STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED STEELWORKERS TEMSA LOCAL 12911, Charging Party, v. OAK VALLEY HOSPITAL DISTRICT, Respondent.	Case No. SA-CE-1008-M PERB Decision No. 2583-M September 10, 2018

Appearances: Gilbert & Sackman by Pamela Chandran and Benjamin M. O'Donnell, Attorneys, for United Steel Workers TEMSA Local 12911; Lozano Smith by Sloan R. Simmons and Gabriela D. Flowers, Attorneys, for Oak Valley Hospital District.

Before Banks, Winslow, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: The prevailing party below, United Steelworkers TEMSA Local 12911 (USW or Union), filed exceptions challenging the conclusion of an administrative law judge (ALJ) that the Meyer-Milias-Brown Act (MMBA or Act)[1] permits a local public agency employer to withdraw recognition from an exclusive representative when the conditions for withdrawal under federal labor law are satisfied.[2] Although the Board has previously declined

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

[2] In the proposed decision, the ALJ also concluded that: (1) the District failed to follow its local rule requiring independent verification of signatures on a representation petition; (2) the District failed to follow its local rule allowing 15 days to appeal a determination by its Employee Relations Officer; (3) the District made an unlawful unilateral change and interfered with employee free choice by refusing to allow employees to retract their signatures on a decertification petition; and (4) the decertification petition was not tainted by District misconduct. Neither party filed exceptions to these conclusions. Accordingly, these issues are not before the Board and the ALJ's conclusions regarding them are binding on the parties. (PERB Regs. 32215, 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.]; *City of Torrance* (2009) PERB Decision No. 2004, p. 12.)

to consider initial exceptions filed by a prevailing party, we do so in this case to prevent the parties from being bound by an erroneous legal standard should similar facts arise in the future. Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that under the MMBA decertification may be accomplished only by employee vote, and therefore the Oak Valley Hospital District's (District) local rule allowing the District to withdraw recognition from an exclusive representative without an employee vote violates the Act.

BACKGROUND[3]

The District has adopted an Employee Relations Ordinance (Local Rules) to address representation matters. The Local Rules are administered by the District's Employee Relations Officer (ERO). At all relevant times, District Vice President of Human Resources Brian Beck (Beck) served as the ERO.

Section 12 of the Local Rules states, in its entirety:

> Section 12. Provision for Decertification
>
> (a) A Petition for Decertification alleging that an employee organization granted recognition is no longer the majority representative of the employees in an appropriate unit may be filed with the District Employee Relations Officer at any time following the first full one (1) year of formal recognition pursuant to Sections 7(6)(a) or (b) above. However, if a Memorandum of Understanding with a term of up to three years is in effect, then a Petition for Decertification may not be filed except during a sixty (60) day window period commencing one hundred and fifty (150) days prior to the termination date of a Memorandum of Understanding. If a Memorandum of Understanding with a term in excess of three years is in effect, then a petition for decertification may be filed at any time commencing one hundred and fifty (150) days prior to the expiration of the third year of the Memorandum of

[3] Because it is the only issue before the Board on appeal, we relate only the facts relevant to the issue of the lawfulness of the District's local rule allowing withdrawal of recognition.

> Understanding. The Petition for Decertification may be filed by an employee, a group of employees or their representative, or an Employee Organization. The Petition, including all accompanying documents, shall be verified, under oath, by the person signing it. It may be accompanied by a Petition for Recognition by a challenging organization. The Petition for Decertification shall contain the following information.
>
> (1) The name, address and telephone number of the petitioner and a designated representative authorized to receive notices or requests for other information.
>
> (2) The name of the formally recognized employee organization.
>
> (3) An allegation that the recognized employee organization no longer represents a majority in the appropriate unit, and any other relevant and material facts.
>
> (4) Written proof that at least thirty percent (30%) of the employees in the unit do not desire to be represented by the recognized Employee Organization. Such written proof shall be dated within six (6) months of the date upon which the petition is filed and shall be submitted for confirmation to the Service in the same manner as the Petition for Recognition.
>
> (b) Upon verification by the [State Mediation and Conciliation] Service that at least thirty percent (30%) of the employees in the bargaining unit do not desire to be represented by the recognized employee organization, the Service shall conduct a secret ballot election pursuant to the provisions of Section 11 of this Resolution. The recognized employee organization shall be decertified if a majority of the eligible voters who cast votes fail to cast valid ballots for the employee organization. The formally recognized employee organization shall be decertified if a majority of those casting valid ballots vote for decertification.
>
> (c) Nothing herein shall preclude the District from unilaterally withdrawing recognition when it is in possession of objective criteria that demonstrates the employee organization no longer represents a majority of employees in the applicable bargaining unit.

On April 13 or 14, 2017,[4] Beck received from a group of employees (Petitioners) a six page single-spaced letter with the heading, "Employee Request for Removal of Representation by the United Steelworkers 12-911 [*sic*] (full bargaining name below) via proof of support,

[4] All dates are in 2017 unless otherwise indicated.

signature pages and decertification." The first page of the petition specifically requested that the District immediately withdraw recognition from the Union under Local Rule 12(c). Included in the text of the letter were the typed names of all the employees who signed the proof of support. A few days later, the Petitioners asked the District to replace the original petition with a "revised" petition dated April 18. The revised petition redacted the names of those who signed the proof of support.

On April 20, Beck notified the Petitioners in writing that the revised April 18 petition failed to comply with Local Rule 12(a) because it did not contain verification by the petitioning parties, signed under oath, that the petition was true and correct. Later that day, the Petitioners submitted a corrected petition. After determining that the earlier procedural defects had been corrected, Beck began to process the petition.

After comparing employees' signatures on the petition to their signatures on recent personnel documents, Beck determined that a majority of employees in the bargaining unit had signed the petition. Because Local Rule 12(c) permits withdrawal of recognition from an exclusive representative when "objective criteria" demonstrate that it has lost the support of a majority of the bargaining unit members, and the petition appeared to provide the necessary objective criteria, Beck concluded that Local Rule 12(c) was applicable and no election would be necessary.

Beck then consulted with the District's Chief Executive Officer, John McCormick (McCormick), who agreed that Local Rule 12(c) could be applied based on the signatures on the petition. Despite their agreement, Beck and McCormick decided to get the approval of the District's Board of Directors before actually withdrawing recognition from USW. At a public meeting on May 3, the Board voted unanimously to adopt McCormick's recommendation that recognition be withdrawn from USW pursuant to Local Rule 12(c). After the meeting,

McCormick sent an e-mail to USW representative Steven Sullivan informing him that the Board had withdrawn recognition from the Union and cancelling the next day's bargaining session.

DISCUSSION

In its exceptions, USW—the prevailing party below—does not challenge the outcome of the proposed decision, which ordered the District to rescind its withdrawal of recognition, but merely several of the ALJ's legal conclusions supporting that outcome. Before discussing the merits of USW's exceptions, we explain why the particular circumstances of this case warrant consideration of the prevailing party's initial exceptions.

1. Reasons for Considering USW's Exceptions

In *Fremont Unified School District* (2003) PERB Decision No. 1528 (*Fremont*), the Board declined to consider initial exceptions filed by the prevailing party, stating: "Absent good cause, the Board will dismiss as without merit any initial exceptions filed by a prevailing party unless the Board's ruling on the exceptions would change the outcome of the ALJ decision." (*Id*. at p. 3.) The rationale for this policy is that "[t]he Board should not be forced to expend its limited resources correcting harmless errors in the record." (*Ibid*.)

If we were to agree that the ALJ's legal conclusions were wrong in the manner urged by USW, the outcome of the case would not change, i.e., the District's local rule allowing withdrawal of recognition would still be unlawful. Under these circumstances, *Fremont* typically would dictate dismissal of the exceptions. But this case presents good cause for the Board to consider USW's exceptions. If we were to dismiss the exceptions and declare the proposed decision final, as the Board did in *Fremont*, the ALJ's legal conclusions would be binding on the parties. (PERB Reg. 32215; *Fremont*, *supra*, PERB Decision No. 1528, p. 2.) Consequently, the ALJ's conclusion that an employer may withdraw recognition when the

conditions for withdrawal under federal labor law are satisfied would apply to these parties going forward. Because a similar situation may arise between the parties in the future, it is appropriate for the Board to address the merits of USW's exception that the MMBA does not permit withdrawal of recognition.

2. The MMBA Does Not Permit Withdrawal of Recognition without an Employee Vote

USW excepts to the ALJ's conclusion that federal law regarding withdrawal of recognition, specifically *Levitz Furniture Co. of the Pacific, Inc.* (2001) 333 NLRB 717 (*Levitz*), applies under the MMBA. *Levitz* allows an employer to withdraw recognition from an incumbent union based upon objective evidence of a loss of majority support within the bargaining unit. The ALJ invalidated Local Rule 12(c) because it conflicts with *Levitz* by eliminating the presumption that an exclusive representative has majority support within the unit.

We agree with USW that *Levitz* is inapplicable under the MMBA because the language of the Act precludes withdrawal of recognition. MMBA section 3507, subdivision (b) provides:

> Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

In construing statutory language, we must "ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Orange County Water District* (2015) PERB Decision No. 2454-M, p. 13.) MMBA section 3507, subdivision (b)—the only MMBA provision that addresses revocation of exclusive representation—says that exclusive representation "may be revoked by a majority vote of the employees." This language indicates the Legislature intended to prohibit revocation of exclusive

representation by any means other than an employee vote. (See, e.g., *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, pp. 19-20 [applying the maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) to conclude that a statute's repeated references to meeting and conferring over the impact of court closures indicated that the Legislature did not intend to impose a meet and confer obligation over a decision to close the court].)

In contrast, federal law does not require that withdrawal of recognition be supported by an employee vote, but only by objective evidence of actual loss of majority support. (*Levitz*, *supra*, 333 NLRB at p. 725.) Under the *Levitz* standard, lawful withdrawal was found where a majority of employees in the bargaining unit signed a petition that said, "We the employee's [sic] of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199." (*Wurtland Nursing & Rehabilitation Center* (2007) 351 NLRB 817, 818.) *Levitz* also allows withdrawal based on statements by individual employees that they no longer desire to be represented by the incumbent union. (*Anderson Lumber Co.* (2014) 360 NLRB 538, 543.) However, neither a petition seeking an election nor a statement that an employee no longer wishes to be represented constitutes a "vote."[5] *Levitz* therefore is incompatible with MMBA section 3507, subdivision (b)'s employee vote requirement.

The District points out that although the National Labor Relations Act (NLRA) permits an employer to file a decertification petition, the National Labor Relations Board (NLRB) nevertheless continues to recognize an employer's ability to withdraw recognition under *Levitz, supra*, 333 NLRB 717. Yet the NLRA contains no statutory language comparable to that in

[5] Webster's dictionary defines "vote" as a "formal expression of opinion or will," while the act of voting is defined as an expression of one's view in response to a poll. (See https://www.merriam-webster.com/dictionary/vote.) Black's Law Dictionary defines a "vote" as "the expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." (VOTE, Black's Law Dictionary (10th ed. 2014).)

MMBA section 3507, subdivision (b). Accordingly, federal law provides no meaningful guidance in this case. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15.) Rather, we must follow the Legislature's command that an employee vote is necessary to decertify an exclusive representative, which precludes the Board from creating or adopting a non-statutory withdrawal doctrine as the federal board has done.

The District also argues that *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 (*Gridley*) recognizes the possibility of withdrawal of recognition under the MMBA. Specifically, the District relies on the Court's statement that "[t]his is not to say, of course, that under the MMBA revocation of recognition would necessarily be inappropriate in all situations." (*Id.* at p. 206.) When viewed in context, the Court's statement cannot bear the heavy burden the District places on it.

In *Gridley*, the city invoked a local rule allowing it to revoke an exclusive representative's recognition for engaging in an illegal strike. The Court determined that "the sanction of revocation is clearly inconsistent with [the MMBA's] provisions guaranteeing public employees the right to be represented by organizations of their own choosing and with the stated purposes of the MMBA." (*Id.* at p. 197.) Relying in part on section 3507, subdivision (b), the Court held that "recognition must be based on employee choice." (*Id.* at p. 201.)

The Court went on to address the city's reliance on *Union Nacional de Trabajadores (Carborundum Co. of Puerto Rico)* (1975) 219 NLRB 862, where the NLRB revoked a union's certification for engaging in brutal and unprovoked violence that made collective bargaining impossible. After addressing the extraordinary circumstances of that case (and other authority cited by the city), the Court concluded "[t]his is not to say, of course, that under the MMBA revocation of recognition would necessarily be inappropriate in all situations." (*Gridley*,

supra, 34 Cal.3d at p. 206.) The Court immediately went on to note that because the case before it did not involve "facts at all comparable to [*Union Nacional de Trabajadores*, it had] no occasion to determine whether revocation would be permissible in such a case." (*Ibid*.) Thus, although it left open the possibility of revocation where a union engaged in egregious misconduct that nullified the statutory collective bargaining framework, the *Gridley* Court did not determine whether MMBA section 3507, subdivision (b) permits withdrawal of recognition based on an asserted loss of majority support. Because cases are not authority for propositions not considered (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 58), *Gridley* does not assist the District here.

Ultimately, we agree with the ALJ that Local Rule 12(c) is unreasonable, but our conclusion is based on the language of the MMBA itself. A local public agency employer may not adopt or enforce a local rule that is contrary to or frustrates the declared policies and purposes of the MMBA. (*County of Calaveras* (2012) PERB Decision No. 2252-M, p. 2, citing *Huntington Beach Police Officers Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502.) MMBA section 3507, subdivision (b) provides that exclusive representation "may be revoked by a majority vote of the employees."

As this case demonstrates, Local Rule 12(c) allows the District to withdraw recognition without a vote of the employees based solely on undefined "objective criteria" purportedly showing the exclusive representative no longer enjoys majority support among employees in the bargaining unit. Because this outcome is contrary to the policy declared by MMBA section 3507, subdivision (b), Local Rule 12(c) is unreasonable and therefore violates the MMBA.

Since our ruling on this exception fully resolves the complaint's allegation concerning Local Rule 12(c), it is unnecessary for us to address USW's remaining exceptions. (*United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, pp. 54-55.)

REMEDY

Because we find Local Rule 12(c) unreasonable, it is necessary to declare Local Rule 12(c), and the May 3, 2017 order withdrawing recognition from USW pursuant to that Rule, to be void and unenforceable. (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, pp. 42-43.) The Order also will incorporate the remedies the ALJ ordered for the remaining violations that were not the subject of exceptions.

ORDER

Upon the findings of fact and conclusions of law in this Decision and those contained in the proposed decision in this case, it is found that the Oak Valley Hospital District (District) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3507 and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), (f), and (g) by applying an unreasonable local rule, unreasonably failing to apply local rules, and amending its local rules without providing notice or an opportunity for United Steelworkers TEMSA Local 12911 to demand consultation over the amendment.

Pursuant to Government Code section 3509, subdivision (a), it hereby is ORDERED that Local Rule 12(c) and the District Board of Directors' May 3, 2017 order withdrawing recognition from United Steelworkers TEMSA Local 12911 are void and unenforceable. The District, its governing board, and its representatives also are ORDERED to:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with United Steelworkers TEMSA Local 12911 as the recognized majority representative of the Hospital Unit.

2. Unilaterally creating new local rules without first giving notice to recognized employee organizations and an opportunity for such organizations to demand consultation.

3. Interfering with the right of bargaining unit employees to be represented by an employee organization.

4. Denying United Steelworkers TEMSA Local 12911 its right to represent employees in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Upon demand by United Steelworkers TEMSA Local 12911, and continuing for a period of no less than six months from commencement, meet and confer in good faith with United Steelworkers TEMSA Local 12911 as the recognized majority representative of the Hospital Unit

2. Process any and all future decertification petitions in the manner dictated by the local rules, which, absent a lawful modification includes:

a. submitting the proof of support accompanying any such petition to the State Mediation and Conciliation Service for verification in accordance with section 12(a)(4) of the Employee Relations Ordinance (ERO); and

b. permitting employees to retract signatures on a proof of support for a decertification petition in accordance with ERO section 7(a)(6).

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Hospital Unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable

steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

In addition to the physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the Hospital Unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on United Steelworkers TEMSA Local 12911.

Members Banks, Winslow, and Krantz joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-1008-M, *United Steelworkers TEMSA Local 12911 v. Oak Valley Hospital District*, in which all parties had the right to participate, it has been found that the Oak Valley Hospital District violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by applying an unreasonable local rule, unreasonably failing to apply local rules, and amending its local rules without providing notice or an opportunity for United Steelworkers TEMSA Local 12911 to demand consultation over the amendment.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with United Steelworkers TEMSA Local 12911 as the recognized majority representative of the Hospital Unit.

2. Unilaterally creating new local rules without first giving notice to recognized employee organizations and an opportunity for such organizations to demand consultation.

3. Interfering with the right of bargaining unit employees to be represented by an employee organization.

4. Denying United Steelworkers TEMSA Local 12911 its right to represent employees in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Upon demand by United Steelworkers TEMSA Local 12911, and continuing for a period of no less than six months from commencement, meet and confer in good faith with United Steelworkers TEMSA Local 12911 as the recognized majority representative of the Hospital Unit;

2. Process any and all future decertification petitions in the manner dictated by the local rules, which, absent a lawful modification includes:

a. submitting the proof of support accompanying any such petition to the California State Mediation and Conciliation Service for verification in accordance with section 12(a)(4) of the Employee Relations Ordinance (ERO); and

b. permitting employees to retract signatures on a proof of support for a decertification petition in accordance with ERO section 7(a)(6).

Oak Valley Hospital District

Dated: _____ By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.