STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 221, Charging Party, v. COUNTY OF SAN DIEGO, Respondent.	Case No. LA-CE-1360-M PERB Decision No. 2721-M May 22, 2020

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Xochitl A. Lopez, Attorneys, for Service Employees International Union, Local 221; Kenneth Weidmann, Jr., Senior Labor Relations Officer, for County of San Diego.

Before Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union, Local 221 (SEIU), from the Office of the General Counsel's dismissal of SEIU's unfair practice charge against the County of San Diego (County). SEIU alleged that a County policy violates the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by requiring that members of the County Board of Supervisors "shall not meet and discuss or have audience with" any union representative or union-represented employee on any topic within the scope of representation during a period in which the topic is or may be

subject to negotiation or consultation.[1] The Office of the General Counsel (OGC) found SEIU's charge untimely, and this appeal ensued.

In resolving an appeal of a dismissal, we review OGC's decision de novo. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 6, fn. 5 (*Lake Elsinore*); *City of San Jose* (2013) PERB Decision No. 2341-M, p. 47.) At this stage of the case, "the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8.) Accordingly, we assume the charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 8 (*Cabrillo I*); *Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 4 (*Cabrillo II*).) We do not rely on the respondent's responses if they explicitly or implicitly create a factual conflict with charging party's factual allegations, even if the respondent's contrary responses are stated more persuasively or appear as though they may be backed up by more supporting evidence, when compared to charging party's allegations. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 13.)[2]

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] However, a charging party cannot state a prima facie case merely by making legal allegations. (*Lake Elsinore*, *supra*, PERB Decision No. 2548, p. 18.)

Thus, in this procedural posture we generally do not resolve conflicting allegations, make conclusive factual findings, or judge the merits of the dispute. (*Cabrillo II*, *supra*, PERB Decision No. 2622, pp. 4-5; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 12.) Nonetheless, it is appropriate to dismiss an alleged violation without issuing a complaint if the parties' filings disclose undisputed facts sufficient to defeat the claim. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 9.)

When the sufficiency of a charge turns on interpreting a statute, contract, or employer rule or policy, the Board must accept the plain meaning of the language at issue if it is "clear and unambiguous on its face." (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 8.) If the language is ambiguous, "the parties must be afforded the opportunity to offer evidence in support of their respective interpretations at a formal hearing." (*Ibid.*) At the charge investigation stage, "the appropriate question is not which of two competing interpretations . . . is the more plausible, but whether the language in dispute is reasonably susceptible to the charging party's interpretation and whether that interpretation supports a viable, i.e., non-frivolous, theory of liability under the applicable PERB-administered statute." (*Ibid.*)

The Board has reviewed the entire record, including the initial unfair practice charge, the first amended charge, the second amended charge, the County's position statements responding to each charge, OGC's warning and dismissal letters, SEIU's appeal, and the County's response. Based on this review, we grant SEIU's appeal in part, and we remand to OGC to issue a complaint consistent with this decision. We first recount the facts we must assume are true at this stage, and we then apply relevant law to those assumed facts.

BACKGROUND

The County is a public agency within the meaning of MMBA section 3501, subdivision (c). SEIU, a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), exclusively represents County employees in ten bargaining units. SEIU and the County are parties to four Memoranda of Agreement (MOAs) establishing terms and conditions of employment for the ten SEIU-represented bargaining units. Each of the MOAs is effective from October 13, 2017 to June 23, 2022.

In 1977, the County's Board of Supervisors adopted a "Policy on Matters Subject to Meet and Confer," referring to it at that time as Policy 13. In 1982, the Board of Supervisors reviewed and reapproved the policy with several non-substantive wording changes, resulting in the following updated policy:

> "It is the policy of the Board of Supervisors that: Members of this Board outside of meetings of this Board shall not meet and discuss or have audience with any employee or any employee organization or representative thereof on any matter within the scope of representation or consultation during the period when such matters are, should be, or may be, the subject of consultations, or meeting and conferring between the County negotiator and an employee or an employee organization. It is appropriate in such circumstances for the person seeking such audience to be referred to the County negotiator."

As part of reapproving the policy in 1982, the Board of Supervisors renumbered it as Policy A-93. Thereafter, the Board of Supervisors reviewed and reapproved

Policy A-93, without change, in 1988, 1994, 2006, 2008, and 2011, as well as most recently in the fall of 2018.[3]

The Board of Supervisors engaged in its fall 2018 review as part of the County's Sunset Review Process, which requires that most County policies, codes, and ordinances sunset after seven years, and that the Board of Supervisors must determine in advance of such sunset date what action it should take relative to the expiring policy.[4] When the Board of Supervisors reapproved Policy A-93 in 2011, it set a sunset date of December 31, 2018. Absent reapproval prior to this sunset date, Policy A-93 would have no longer been in effect. Pursuant to the Sunset Review Process, the Board of Supervisors reviewed Policy A-93 in the fall of 2018, in order to decide what action it should take relative to the expiring policy. The Board chose to reapprove it without change and established a new sunset date in 2025.

DISCUSSION

SEIU's allegations presented four different claims: interference, discrimination, maintenance of an unreasonable local rule, and unilateral change. However, on appeal of OGC's dismissal, SEIU chose not to pursue its unilateral change theory.

[3] Based on available information at this stage, it appears that the Board of Supervisors reviewed Policy A-93 on October 30, 2018 and took final action to reapprove the policy on November 13, 2018. We use the term "reapprove" because the County used that term in its position statements and its opposition to SEIU's appeal, and because the term appears to describe accurately what occurred.

[4] We take administrative notice of the County's current Sunset Review Process (Board of Supervisors Policy A-76), which was last reapproved in 2016 and is itself set to sunset in 2023.

We therefore do not consider it, and we leave undisturbed OGC's dismissal of SEIU's unilateral change allegation.

I. The Continuing Violation Doctrine and the New Wrongful Act Doctrine

PERB generally may not issue a complaint based upon an alleged unfair practice that occurred more than six months before the charge was filed. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1091.) The six-month statute of limitations period begins to run when the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.) However, in *San Dieguito Union High School District* (1982) PERB Decision No. 194 (*San Dieguito*), the Board "articulated three distinct exceptions to the six-month rule: 'the charge may still be considered to be timely filed if the alleged violation is a continuing one, if the violation has been revived by subsequent unlawful conduct within the six-month period, or if the limitation period was tolled.'" (*City & County of San Francisco* (2017) PERB Decision No. 2536, p. 15, fn. 14, quoting *San Dieguito*, *supra*, PERB Decision No. 194, p. 5.)

In *San Dieguito*, a union alleged that a school district made an unlawful unilateral change when it implemented a new policy requiring teachers to sign out when leaving campus during their preparation period. (*San Dieguito*, *supra*, PERB Decision No. 194, pp. 2-3.) Although the union did not file a charge until two years after the district first implemented the sign out policy, the union claimed that its charge was timely because the district continued to enforce the policy after implementing it, including in the six months before the union filed its charge. (*Id.* at pp. 2, 5-6.) The

Board, relying on decisions of the National Labor Relations Board, held that in a unilateral change case, continuing enforcement of a unilaterally implemented policy is insufficient to create an exception to the statute of limitations. (*Id.* at pp. 5-10.) The Board next addressed the new wrongful act exception and found no conduct occurring within the limitations period (such as reimplementation, a further change, or a failure to bargain) that would revive the unilateral change claim for statute of limitations purposes. (*Id.* at p. 10.) In unilateral change charges, then, the new wrongful act doctrine can apply if there are sufficient facts to support the exception, but the continuing violation doctrine does not apply. (See, e.g., *City of Livermore* (2014) PERB Decision No. 2396-M, p. 6 ["Under the applicable legal standard in unilateral change cases, the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent."].)

In decisions such as *San Dieguito*, *supra*, PERB Decision No. 194, p. 5, and *City & County of San Francisco*, *supra*, PERB Decision No. 2536, p. 15, fn. 14, the Board was clear that the continuing violation doctrine and the new wrongful act doctrine are separate exceptions to the statute of limitations. In other decisions, however, the Board seemingly merged the continuing violation doctrine and the new wrongful act doctrine, declaring that the Board may find a continuing violation only if the respondent engaged in a new wrongful act within the limitations period. For instance, in *El Dorado Union High School District* (1984) PERB Decision No. 382 (*El Dorado*), the Board stated:

> "a continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. [Citation.] However, a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense. [Citation.] Where the underlying theory of the charge is an alleged unilateral change occurring outside the limitations period, the employer must engage in conduct during the limitations period 'such as reimplementation or subsequent refusals to negotiate . . . [which] revive[s] the viability of the unfair practice.' [Citation.]"

(*Id.* at pp. 4-5.) Because *El Dorado* involved an alleged unilateral change, the Board should have focused, and in practice did focus, on the new wrongful act doctrine. The Board properly found that the district implemented the policy in question more than six months before the union filed its charge, and the district's conduct within the limitations period—defending its policy in response to the union's protest—did not have sufficient independent significance to constitute a new wrongful act. (*Id.* at pp. 5-6.) Accordingly, the Board's improper blurring of distinct exceptions did not prevent the Board from reaching the correct result in a unilateral change case.

In analyzing other types of charges, either the continuing violation doctrine or the new wrongful act doctrine may apply, and blurring the line between the two doctrines may lead to incorrect results. For instance, in *Fresno County Office of Education* (1993) PERB Decision No. 978 (*Fresno*), a union asserted that an employer interfered with protected rights by refusing to recognize the union's designated site representative. Although the union filed its charge more than six months after the employer refused to recognize the site representative, the union correctly noted that the interference was continuing. (*Id.*, adopting partial dismissal letter at pp. 1-2.)

Nonetheless, the Board adopted a board agent's decision to dismiss the charge, relying on *El Dorado*'s mistaken statement that a charging party cannot establish a continuing violation without showing a new wrongful act within the limitations period. (*Id.*, adopting partial dismissal letter at p. 2.) However, to fall within the continuing violation exception, the charging party did not need to allege that the employer restated its position during the limitations period, nor that such a restatement had sufficient independent significance to constitute a new wrongful act, as no such new act is necessary for the continuing violation doctrine to apply. The critical point was that the employer allegedly continued to interfere with the union's rights on an ongoing basis by refusing to recognize its authorized site representative. Because the Board failed to recognize that the continuing violation exception applied, we overrule *Fresno*'s treatment of the union's interference allegation.

We turn now to how these doctrines apply in the broad category of cases into which the instant matter falls: interference or discrimination charges challenging an employer policy or rule.[5]

[5] Section I of our discussion, *ante*, applies to any type of unfair practice charge, as the continuing violation doctrine and new wrongful act doctrine are always distinct exceptions requiring separate analysis. In contrast, Sections II and III, *post*, pertain only to interference or discrimination charges challenging an employer policy or rule. In those sections, we do not consider the exceptions' application to other types of charges. (See, e.g., *San Mateo County Community College District* (1993) PERB Decision No. 1030, p. 12, fn. 7 [bad faith bargaining allegations found to constitute continuing violation]; cf. *Anaheim Union High School District* (2015) PERB Decision No. 2434, adopting proposed decision at p. 58 [considering bargaining conduct outside the statute of limitations because "[a]rtificially removing from consideration any bargaining conduct older than six months for any purpose is antithetical to the 'totality of the bargaining conduct' analysis and would, in this dispute, exclude almost half of the parties' bargaining conduct"].)

II The Board's Application of the Continuing Violation Doctrine and New Wrongful Act Doctrine to Employer Rules or Policies That Allegedly Interfere with or Discriminate Against Protected Rights

In analyzing employer policies and rules, the Board has long recognized that interference with protected rights may continue indefinitely after an employer first adopts a policy, in which case the statute of limitations for an interference claim does not lapse even though the limitations period for a unilateral change claim lapses six months after policy adoption. For instance, *Long Beach Unified School District* (1987) PERB Decision No. 608 (*Long Beach*) addressed an employer policy limiting the times and locations that union representatives were permitted to meet with employees. (*Id.* at pp. 9-10.) The Board held that the specific date the employer adopted or revised the rule or policy "has no legal significance" because the rule's continued existence qualifies as a continuing violation. (*Id.* at p. 12.) In so holding, the Board noted that the union need not show that it attempted to violate the policy within the limitations period for its charge to be timely under the continuing violation doctrine. (*Ibid.*)

The Board has followed the same principles in resolving allegations that an employer policy discriminates against protected activities. For instance, in *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources, and Board of Equalization)* (1998) PERB Decision No. 1279-S (*State of California*), the Board held that a union timely challenged a policy prohibiting use of state equipment for union purposes, even though the employer had implemented the policy years earlier, because "the challenged discriminatory application of the State policy remained in effect during the period six months prior to the filing of the charge." (*Id.*, adopting proposed decision at p. 32.) The Board also correctly declined to apply

the continuing violation doctrine to the union's separate unilateral change allegation. (*Id.*, adopting proposed decision at p. 33.)[6] And in *State of California (Department of Corrections)* (1999) PERB Decision No. 1339-S, the Board found timely an allegation that the employer discriminatorily refused to allow the union to use meeting rooms because "the charge clearly alleges unlawful conduct occurring within six months prior to the date of the charge." (*Id.* at pp. 8-9 & fn. 5.)

This area of law became more confusing, however, when the Legislature vested PERB with jurisdiction over the MMBA in 2000 and the Board began to address challenges to local agencies' employer-employee relations rules. In *County of Orange* (2006) PERB Decision No. 1868-M (*Orange*), the Board declined to extend *Long Beach* to facial challenges to local employer-employee relations rules, holding that for such an allegation to be timely, an employer must actually have applied a local rule to the charging party within the limitations period. (*Id.* at pp. 5-7.) In *County of Riverside* (2011) PERB Decision No. 2176-M, the Board found no continuing violation where the employer had applied the challenged local rule to deny the union's request for registration more than six months before the charge was filed. (*Id.* at pp. 6-10.)

The Board then corrected its course by overruling *Orange* in part, and holding that the continuing violation doctrine applies to challenges to local rules other than those challenges premised on an employer's alleged failure to meet and confer or meet and consult. (*City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, 14-15 & fn. 12.) This principle makes "particular sense in the realm of labor

[6] As in *El Dorado*, the Board's description of the legal standard conflated the continuing violation and new wrongful act exceptions (*State of California*, *supra*, PERB Decision No. 1279, p. 2), but the Board reached the correct result under each.

relations, because, as a matter of labor policy, it is reasonable to allow bargaining parties the opportunity to operate under a rule and attempt to work out adjustments or accommodations if possible, rather than requiring a charge at the earliest possible stage in response to every rule change." (*City & County of San Francisco* (2020) PERB Decision No. 2691-M, p. 54 [judicial appeal pending on other grounds].)[7]

The Board left one remnant of *Orange* intact, however, indicating that a facial challenge to a local rule is not appropriate if the charging party can test the rule and bring an as applied challenge without risking an adverse consequence. (*City & County of San Francisco*, *supra*, PERB Decision No. 2536, pp. 14-15 & fn. 12.) Today, we overrule this final aspect of *Orange*, which is out of step with *Long Beach* and federal precedent we find to be persuasive. (See, e.g., *Cellular Sales of Missouri, LLC* (2015) 362 NLRB 241, 242 ["The [National Labor Relations] Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated."]) Moreover, in practice it has been

[7] In *Orange*, *supra*, PERB Decision No. 1868-M, the majority relied, in part, on the incorrect notion that the continuing violation doctrine applies only if the employer commits a new wrongful act within the limitations period. (*Id.* at p. 4.) Member Shek, dissenting in *Orange*, relied upon *San Dieguito*, *Long Beach*, and other precedent to explain that the two doctrines are independent of one another. (*Orange*, *supra*, PERB Decision No. 1868-M, pp. 9 & 15-22.) Member Shek had the more reasonable construction of precedent, as the Board eventually clarified in *City & County of San Francisco*, *supra*, PERB Decision No. 2536, noting that there are "three distinct exceptions to the six-month rule," and that the continuing violation doctrine and new wrongful act doctrine are separate exceptions. (*Id.* at p. 15, fn. 14.)

difficult to interpret the remaining fragment of *Orange* in order to determine whether a facial challenge is permitted.[8]

To resolve any ambiguity in our decisional law regarding challenges to employer rules or policies, we clarify the continuing violation exception and new wrongful act exception, as follows. The continuing violation doctrine applies if a charging party alleges that a respondent's rule or policy on its face interferes with protected rights or discriminates against protected activity, and the policy was in effect during the six months prior to the filing of the charge. In such cases, "it is not the 'act' of adopting the policy, but its 'existence' continuing to the time of the hearing that constitutes the offending conduct." (*City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, p. 8.) Thus, for the charge to be timely, the employer need not

[8] The instant case provides a good example of this difficulty. A County employee who contacts an elected County Supervisor but does not hear back (or who hears back in only a perfunctory manner or otherwise is not afforded an opportunity to meet with the Supervisor) may never learn whether the Supervisor acted based on Policy A-93, was too busy with other County business, or had still other reasons for not meeting. And even when a County Supervisor meets or otherwise communicates with a County employee, the Supervisor may or may not disclose the extent to which Policy A-93 impacted which topics the Supervisor was willing or able to address, or how these communications could have gone differently in the absence of the policy. There is no reason to require an employee to engage in the theater required to obtain an admission that the policy has caused the Supervisor to refrain from meeting or from hearing one or more concerns. Moreover, to impose such a requirement when an employer's rule or policy is also alleged to interfere with protected rights would render largely inoperative the principle that a charging party states a prima facie case of interference by proving that a policy *tends* to harm protected rights, irrespective of whether it actually has caused such harm. (See, e.g., *San Diego Unified School District* (2019) PERB Decision No. 2634-M, p. 17 [employer's broad directive tended to cause harm to protected rights].)

have applied the rule or policy to the charging party during the limitations period. (*Long Beach*, *supra*, PERB Decision No. 608, p. 12.)

The new wrongful act doctrine is a separate exception. It applies if the charging party alleges that within the limitations period the respondent committed a new wrongful act that goes beyond merely reiterating a prior policy. (*City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, p. 15.) Normally, a charging party need not rely on the new wrongful act exception when it challenges a rule or policy based on an interference or discrimination theory, as the continuing violation doctrine usually applies in such cases. For claims based upon a unilateral change theory, in contrast, the new wrongful act doctrine tends to have more salience.

III. Analysis of the Instant Allegations

SEIU argues both the continuing violation exception and the new wrongful act exception apply here. We agree. First, SEIU has alleged that Policy A-93, on its face, is discriminatory, interferes with protected rights, and remained in effect when SEIU filed its charge. Those allegations are sufficient for the continuing violation doctrine to apply.

SEIU's charge is also timely under the new wrongful act doctrine. OGC reasoned that because the Board of Supervisors made no language changes to Policy A-93 as part of reapproving it, this reapproval had no significance independent of the Board of Supervisors' original decision to adopt the policy decades earlier. OGC therefore concluded there was no new wrongful act within the limitations period. We disagree.

As noted above, Policy A-93 was set to expire on December 31, 2018 absent reapproval. The County's Sunset Review Process required the Board of Supervisors to decide what action it should take relative to the expiring policy. We do not consider the policy's impending expiration and the Board's decision to reapprove the policy to be pro forma tasks that lack legal import. Rather, reapproving an expiring policy constitutes reimplementation to the same degree as if the Board of Supervisors had first allowed the policy to expire before reapproving it—a similar set of circumstances that few would doubt qualifies as reimplementation. We therefore find that the Board of Supervisors' reapproval had sufficient independent significance to constitute a new wrongful act, which is a second, independent reason why the statute of limitations does not bar SEIU's charge.

Noting that OGC's dismissal addressed only the timeliness of SEIU's charge, the County asserts that if we find the charge timely, we should remand the case to OGC to determine whether the charge states a prima facie case on the merits. Although that is one option available to the Board, we see no need to remand for that purpose because County Policy A-93 is reasonably susceptible to SEIU's broad interpretation and that interpretation supports viable theories of liability under the MMBA. Employees and employee organizations have a right to petition elected officials, though they may not make bargaining proposals that have not previously been made to the employer's authorized representatives. (*County of Tulare* (2020) PERB Decision No. 2697, p. 8.) Under SEIU's interpretation, Policy A-93 on its face tends to interfere with those rights. Further, under SEIU's interpretation Policy A-93 is facially or inherently discriminatory in that it openly directs and requires County

Supervisors to treat represented employees, union representatives, and unions differently from all other employees, organizations, and constituents, who are not banned from meeting with their elected officials regarding issues of concern. (*Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, pp. 74-81.) Lastly, by alleging a prima facie case of interference and discrimination, SEIU has also asserted a prima facie case that Policy A-93 is an unreasonable local rule. Consequently, a complaint must issue to afford the parties the opportunity to offer evidence and argument as to the scope and potential impact of Policy A-93. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 8.)

ORDER

We REVERSE IN PART the dismissal in Case No. LA-CE-1360-M and REMAND this matter to the Office of the General Counsel to issue a complaint alleging that Board of Supervisors Policy A-93 interferes with protected employee and union rights, discriminates against represented employees, and constitutes an unreasonable local rule.

Members Shiners and Paulson joined in this Decision.