

The Board has reviewed the record, the administrative determination, and the parties' respective appeal and response. Based on this review and as explained below, we conclude that the purposes of the MMBA are best served by dissolving the stay of election issued on May 9, 2014, by the OGC in Case No. SF-CE-1204-M, so that the parties may resolve the pending question concerning representation pursuant to an election agreement in SMCS Case No. 13-1-450.

We turn now to the procedural history, our factual summary, the administrative determination, the City's appeal from the administrative determination and SEIU's response, and our discussion of the factual and legal issues.

PROCEDURAL HISTORY

On January 30, 2014, following submission in November 2013 of a decertification petition by the City of Fremont Employees Association (CFEA), the City, SEIU and CFEA entered into a "Memorandum of Agreement For A Representation Election Through the United States Mail" (Election Agreement) for a representation election.³

On April 30, 2014, SEIU filed with the OGC an unfair practice charge against the City, which was assigned Case No. SF-CE-1204-M, alleging that the City violated the MMBA by:

³ Under the Election Agreement, the election would be conducted among City employees in the general bargaining unit by SMCS pursuant to PERB Regulation 32999(b). The Election Agreement provides for posting the notice of the election ninety (90) days after the execution of the Election Agreement or within thirty (30) days following the issuance of a decision by PERB in Case No. SF-CE-1028-M, whichever occurs earlier. The Election Agreement provides for the voter packet to be mailed to eligible voters fourteen (14) days after the posting of the notice, ballots to be received by SMCS no later than the regular mail delivery on the eighteenth (18th) day following mailing of the voter packet, and ballots to be counted on the twentieth (20th) day following the mailing of the voter packet. Under the Election Agreement, the question to be posed to voters is, "Do you wish to be represented by SEIU Local 1021, the City of Fremont Employees Association or No Organization?"

(1) failing and refusing on December 8, 2013 and January 8, 2014, to respond to SEIU's information requests made, respectively, on December 4, 2013, and January 6, 2014; (2) failing and refusing on December 12, 2013, to meet and confer with SEIU over a grievance; and (3) failing and refusing on January 8, 2014, and again on February 26, 2014, to meet and confer in good faith with SEIU over increases in health care costs and premiums. The charge alleged not only this more recent conduct by the City, but also conduct occurring from November 2012 through June 2013, which is the subject of a prior charge filed by SEIU Case No. SF-CE-1028-M.

Also on April 30, 2014, SEIU filed a Request for Stay of Election (stay request) pursuant to PERB Regulation 33002 seeking to "block" the election which is the subject of the Election Agreement.

On May 1, 2014, the City responded to and opposed SEIU's stay request, arguing that the requested stay was procedurally deficient, made in bad faith and not supported by law. In addition, the City argued that procedures for challenging the election sought to be stayed adequately protected SEIU's interests and that in any event SMCS had a contractual obligation to proceed under the Election Agreement. On May 6, 2014, SEIU replied to and opposed the City's objections to the stay request.

On May 7, 2014, the City filed its response and position statement regarding the unfair practice charge in Case No. SF-CE-1204-M.

On May 9, 2014, following an investigation, the OGC issued an administrative determination, concluding that the stay of election was appropriate under PERB

Regulation 33002,⁴ deeming it substantially identical to PERB Regulation 32752.⁵

On May 27, 2014, the City filed its appeal from the administrative determination, urging that the OGC improperly: (1) considered allegations outside of the six-month statute of limitations period for the charge filed on April 30, 2014; (2) gave undue weight to allegations already the subject of a hearing before, and evidentiary submissions to, a PERB administrative law judge (ALJ); and (3) failed to conduct an adequate investigation.

On May 30, 2014, SEIU responded to and opposed the City's appeal.

⁴ PERB Regulation 33002, Stay of Election, provides:

(a) Any party to an SMCS-conducted election may request that the Board stay the election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.

(b) A request for a stay of an election shall be filed with the appropriate regional office, in accordance with Sections 32075 and 32122. Service and proof of service pursuant to Section 32140 are required.

(c) Any determination to stay an election made by the Board pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 3 of these regulations.

⁵ PERB Regulation 32752, Stay of Election, provides:

The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination to stay an election made by the Board pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 3 of these regulations.

FACTUAL SUMMARY

On November 8, 2013, a group of unit employees calling itself CFEA petitioned to decertify “FACE affiliated with SEIU 1021.”⁶

On December 23, 2013, SEIU filed a competing petition, which the City accepted as an intervention under its Employer-Employee Relations Rules and Regulations.

On January 30, 2014, CFEA, SEIU and the City entered into the Election Agreement, providing that SEIU, CFEA and No Representative would appear on the ballot in a representation election to be conducted by the SMCS on the earlier of thirty (30) days after issuance of the Board’s decision in Case No. SF-CE-1028-M or ninety (90) days after execution of the Election Agreement.

On April 30, 2014, SEIU filed the unfair practice charge in Case No. SF-CE-1204-M and requested a stay of the pending representation election. The charge alleged in substance that:

1. On December 4, 2013, reciting its status as majority representative, SEIU requested information from the City concerning the decertification petition. On December 10, 2013, the City responded, challenging SEIU’s claim of majority status and right to receive the information pursuant to that status, but acknowledged the City’s obligations to respond under the California Public Records Act.⁷

2. On December 6, 2013, the City responded to a grievance previously filed by SEIU regarding an ongoing dispute over payment of the City’s portion of contributions to the CalPERS retirement plan. In its response the City offered to meet and confer with “FACE affiliated with SEIU 1021” over the issue. The City directed its response both to FACE

⁶ “FACE” is the Fremont Association of City Employees.

⁷ Government Code, §§ 6250 et seq.

President Shannan Young and to SEIU Field Representative Terry Meadows. On December 8, 2013, by letter to the City, SEIU objected that inviting a FACE representative to participate in the meet and confer session effectively recognized FACE and displayed unlawful favoritism to FACE. On December 12, 2013, the City responded that it refused to meet and confer with SEIU absent FACE, because it deemed FACE to be the recognized majority representative.

3. On January 6, 2014, SEIU requested information from the City regarding health benefit plans for general bargaining unit employees and requested to meet and confer over such plans. On January 8, 2014, the City informed SEIU that it would consider meeting and conferring over a successor memorandum of understanding, but only if SEIU and FACE could agree on a lead negotiator and structure for bargaining.

4. On February 20, 2014, SEIU requested in writing that the City meet and confer over increases to unit employee health care premiums and costs. On February 26, 2014, the City responded that it recognized "FACE affiliated with SEIU 1021" as the "status quo representational relationship," and that bargaining requests should be processed through FACE.

5. The foregoing conduct constitutes a continuation of conduct commenced in January 2013 and alleged in Case No. SF-CE-1028-M.

On May 9, 2014, the OGC issued an administrative determination to stay the pending election. The City filed an appeal, which SEIU opposed.

ADMINISTRATIVE DETERMINATION

The OGC began its analysis with PERB's recently-adopted PERB Regulation 33002 which applies to elections conducted by SMCS. Noting the similarity to PERB Regulation 32752, the OGC construed PERB Regulation 33002 as articulating the same policy, to wit, the Board's blocking charge rule, which the OGC then reviewed.

As articulated by the OGC, PERB's blocking charge rule operates to stay an election in circumstances in which the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents. When investigating a stay request under the rule, noted the OGC, the ultimate question is whether the conduct alleged is of such a character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election. In making this assessment, the motive of the employees filing a decertification petition is not determinative; rather, the determining factor is whether the alleged unlawful conduct would so affect the election process as to prevent employees from exercising free choice, viz., whether there is a substantial risk that the election outcome will be affected by conduct that is alleged to be an unfair practice when that conduct is the subject of an unfair practice proceeding still pending before the Board.

The OGC next reviewed SEIU's charge allegations, concluding they were inextricably intertwined with allegations in Case No. SF-CE-1028-M, as they focused on the City's continuing refusal to recognize SEIU as exclusive representative, and that for the purpose of the OGC's analysis the charge allegations must be accepted as true.

The OGC next noted that the City did not dispute SEIU's allegation that the City declined to recognize SEIU as exclusive representative, and that when considered in tandem with allegations in Case No. SF-CE-1028-M, it appeared that on and after February 1, 2013, the City had refused to recognize, and to bargain with, SEIU as exclusive representative of the bargaining unit.

The OGC next reasoned, based on the foregoing, that the conduct alleged, withdrawing recognition from SEIU, and refusing to treat with SEIU without involvement of FACE, raised

a substantial risk that the election process would be affected so as to prevent employees from exercising free choice.

Finally, the OGC considered and rejected the City's arguments opposing the stay.

APPEAL AND RESPONSE

The City appeals the administrative determination granting the stay of election, contending: the OGC failed to conduct a sufficient investigation; the OGC acted improperly by considering allegations outside of the limitation period; and the OGC ignored factual findings and legal conclusions made by the ALJ in the proposed decision in Case No. SF-CE-1028-M.

SEIU responds that: the test is whether the OGC abused its discretion; it did not, since the investigation was sufficient; and the facts alleged in the charge in Case No. SF-CE-1204-M reasonably support the OGC's conclusion; PERB Regulation 33002 applies to the election based on the parties' Election Agreement; and the City's reliance on the proposed decision in Case No. SF-CE-1028-M is misplaced as the proposed decision is on appeal and not final, and thus lacks force or effect.

DISCUSSION

We have determined to dissolve the stay. We explain.

The underlying dispute in this matter remains undecided by the Board. In Case No. SF-CE-1028-M, the Board is still considering the dispute among the parties regarding the status of SEIU vis-à-vis City employees in the general bargaining unit. In the interim, SEIU and the City became parties to the Election Agreement which arose out of a valid decertification petition.

SEIU signed off on the Election Agreement on January 30, 2014. At that time, SEIU was aware of the City's refusals in December 2013 and January 2014 to provide SEIU

information, to discuss with SEIU a grievance and to meet and confer with SEIU over employee health care costs and premiums. The City justified these refusals on the ground that SEIU was not the exclusive representative of the City's general bargaining unit.

We conclude on these facts that the determination by the OGC to stay the election called for in the parties' Election Agreement was improvident. We explain.

On January 30, 2014, when it agreed to the election, SEIU had before it fresh evidence from December 2013 and January 2014 that the City still would not recognize it as the exclusive representative of employees in the City's general bargaining unit. Were it concerned on January 30, 2014, that the City's continuing refusals to recognize it as exclusive representative would render impossible a fair representation election, SEIU could have declined to have entered into the Election Agreement. It did not decline. Instead, SEIU entered into the Election Agreement, thereby assuming the risk that the Election Agreement would be enforced according to its terms, to wit, not later than April 30, 2014. The City's conduct forming the basis of SEIU's stay request includes City conduct alleged in Case No. SF-CE-1028-M and the December 2013 and January 2014 allegations made in Case No. SF-CE-1204-M. Only one instance of City conduct cited as the basis for the stay is alleged to have occurred after January 30, 2014.

Moreover, we conclude on these facts⁸ that SEIU is estopped by its agreement to the election to seek a stay based on City conduct known to SEIU at the time it made the Election Agreement. (*Lake Elsinore Union School District* (1984) PERB Decision No. 441; *Santa Ana Unified School District* (2013) PERB Decision No. 2332.) The Election Agreement terms are clear, viz., the election is to be conducted by SMCS within the earlier of ninety (90) days from January 30, 2014, or thirty (30) days from issuance by the Board of a decision in Case No. SF-CE-1028-M. The agreement resolved the issue of the date of the election. We are disinclined to interfere with the date of an election established via the written Election Agreement, absent proof that circumstances that arose subsequent to the agreement's creation and prior to the request for stay require it. The single allegation arising after January 30—that the City insisted on February 26, 2014, that bargaining requests be processed through FACE—does not support an inference that employee dissatisfaction with the incumbent union is attributable to the City's alleged unfair practices.

For these reasons, we dissolve the stay of election issued on May 9, 2014, and direct the parties to proceed to the representation election pursuant to their agreement of January 30, 2014, in SMCS Case No. 13-1-450.

⁸ SEIU also alleged in support of its stay request a single instance of City conduct occurring after January 30, 2014. This allegation that the City declined on February 26, 2014, SEIU's follow-up request to bargain over health care costs and premiums made on February 20, 2014, merely restates the same request and refusal made respectively on January 6, 2014 and January 8, 2014. Thus, as of January 30, 2014, SEIU was aware that the City was refusing to meet and confer over health care costs and premiums and the reasons therefor. SEIU's February 20, 2014, request to bargain and the City's February 26, 2014, refusal are not new matters, but a "second request" and a "second response" on an issue previously known to SEIU as of January 30, 2014, when it voluntarily entered into the Election Agreement.

ORDER

The Stay of Election issued on May 9, 2014, by the Office of the General Counsel of the Public Employment Relations Board is hereby DISSOLVED EFFECTIVE IMMEDIATELY and the parties to State Mediation and Conciliation Service Case No. 13-1-450 are DIRECTED to proceed immediately to the representation election pursuant to their Election Agreement of January 30, 2014.

Chair Martinez and Members Winslow and Banks joined in this Decision.