STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN LUIS OBISPO POLICE OFFICERS ASSOCIATION, Charging Party, v. CITY OF SAN LUIS OBISPO, Respondent. INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 3523, Intervenor/Applicant for Joinder.	Case No. LA-CE-729-M PERB Order No. Ad-444-M December 13, 2016

Appearances: Hayes & Ortega by Dennis J. Hayes and Brian T. Bloodworth, Attorneys, for International Association of Firefighters Local 3523; Liebert Cassidy Whitmore by Bruce A. Barsook and Che I. Johnson, Attorneys, and Office of the City Attorney by J. Christine Dietrick, City Attorney, for City of San Luis Obispo.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: International Association of Firefighters Local 3523 (IAFF) has filed with the Public Employment Relations Board (PERB or Board) a motion to intervene and application for joinder to participate as a party in the present unfair practice case, which was initiated on October 17, 2011 by the San Luis Obispo Police Officers Association (POA) against the City of San Luis Obispo (City). The unfair practice complaint alleged that, on or about May 17, 2011, the City violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB

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

Regulations,[2] when its governing body decided to place before City voters two ballot measures, one to eliminate from the City Charter a requirement that voters approve any reductions in employee retirement benefits and another to repeal the Charter's interest arbitration provisions for resolving bargaining disputes with the City's police and firefighter units. According to the complaint, the City placed these measures before the voters without first meeting and conferring and/or meeting and consulting with POA, which is the exclusive representative of the City's police department employees.[3]

On January 14, 2013, a PERB administrative law judge (ALJ) convened a formal hearing. The matter was submitted on a stipulated record and 28 joint exhibits. On February 28, 2014, after the parties had filed post-hearing briefs, the ALJ issued a proposed decision which concluded that the City had violated the MMBA and PERB Regulations by submitting to voters the ballot measure to repeal the City Charter's interest arbitration provisions without first meeting and consulting to impasse or agreement with POA.[4] Although the record before the ALJ indicated that the Charter's interest arbitration provisions repealed by the City's voters had applied to bargaining disputes with both the police and firefighter units of City employees, only POA filed a charge against the City and the proposed decision concerned only whether the City had violated its duty to meet and consult with POA. The City

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

[3] Voters approved both measures in a municipal election held in August 2011.

[4] The ALJ dismissed the complaint's allegation regarding the ballot measure to repeal Charter language requiring voter approval to changes in employee retirement benefits. Neither party has excepted to this part of the proposed decision and the issue is therefore not before the Board either in its review of exceptions to the proposed decision or in considering the present motion by IAFF to intervene in the case as a party. (PERB Reg. 32300, subd. (c).)

filed exceptions to the proposed decision, POA filed its response to the City's exceptions, and the matter has been on the Board's docket since June 10, 2014.[5]

On September 29, 2016, IAFF filed with PERB the present motion to intervene and application for joinder pursuant to PERB Regulations. The motion alleges, among other things, that (1) the ballot measures submitted to voters in 2011 affected matters within the scope of representation and/or the scope of consultation, (2) the City never advised, consulted or met and conferred with IAFF before placing these measure on the ballot, and (3) this omission by the City violated the MMBA. IAFF's motion also alleges that POA and the City are currently in negotiations to settle the unfair practice case without reinstating the former Charter provisions for interest arbitration, an outcome which IAFF argues would be disadvantageous to its interests and those of the employees it represents and that it should therefore be permitted to join this action.

On October 18, 2016, the City filed an opposition to IAFF's motion to intervene and application for joinder, arguing, among other things, that they should be rejected as untimely. POA has taken no position on the motion/application.

On November 16, 2016, IAFF filed a reply which addressed arguments raised in the City's opposition and clarified the role it seeks to play in this case.

For the reasons explained below, we deny IAFF's motion and application.

DISCUSSION

Consideration of IAFF's Reply Brief

Before deciding the merits of IAFF's motion, we must decide whether to consider IAFF's reply brief. Because PERB Regulations neither expressly permit nor preclude the submission of

[5] While the matter has been pending before the Board, POA has twice requested that it be placed in abeyance for a period of 90 days each, while it explored settlement possibilities with the City. The most recent abeyance period expired on September 12, 2016.

reply briefs, consideration of such filings is discretionary with the Board. (MMBA, § 3509, subd. (a); EERA,[6] §3541.3, subds. (i), (n); *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14; *Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408 (*Los Angeles*), pp. 4-5.) *Los Angeles* holds that:

> Where the response raises new issues, discusses new case law or formulates new defenses to allegations, the Board might well be persuaded to permit the complainant to submit a reply in order to aid the Board in its review of the underlying dispute.

(*Id.*, at pp. 4-5.)

However, as we explained in *City of Milpitas, supra*, PERB Decision No. 2443-M, the circumstances enumerated in *Los Angeles* serve as illustrations, and not limitations, on the Board's broad discretion to consider a reply. Because the matter is not specifically set forth in or limited by our Regulations, it falls under the Board's broad, *statutory* powers to "investigate unfair practice charges or alleged violations of [the MMBA], and [to] take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of [the MMBA]." (MMBA, § 3509, subd. (a); EERA, § 3541.3, subds. (i), (n); cf. *City of Torrance* (2009) PERB Decision No. 2004-M, p. 11; *UPTE, CWA Local 9119 (Hermanson, et al.)* (2006) PERB Decision No. 1829-H, pp. 3-5.)

In this case, IAFF's reply clarifies its original motion and, significantly, *narrows* the scope of relief requested. Specifically, IAFF's reply explains that it does *not* seek to re-open the record in this case or to re-litigate issues previously considered by the ALJ. Rather, IAFF seeks joinder only to be permitted to engage in any settlement discussions between POA and the City.[7] Because the reply clarifies the original motion and the scope of joinder sought by

[6] The Educational Employment Relations Act (EERA) is codified at section 3540.

[7] We address the practicality of this request below.

IAFF is narrower than indicated in its original motion, consideration of IAFF's reply will aid the Board in its review of the motion and will thereby not prejudice the City. We therefore accept IAFF's reply and next proceed to the merits of IAFF's motion for joinder.

Merits of IAFF's Motion for Joinder

PERB Regulations permit an employee, employee organization or employer who wishes to join an existing unfair practice case to file with the Board itself an application for joinder. The application shall include a written a statement of the extent to which joinder is sought and all the facts upon which the application is based. (PERB Reg. 32164, subds. (a), (b).) After all parties have had notice and opportunity to oppose the application, the Board may allow joinder if it determines that the applicant has a substantial interest in the case or would contribute substantially to a just resolution of the case and if its addition would not unduly impede the proceeding. (*Id.*, subds. (b), (c).)[8] For several reasons, we deny IAFF's motion.

First, the motion does not include facts demonstrating that IAFF has a substantial interest in resolution of the present charge. IAFF's request to participate as a party in any settlement discussions appears to be premised on the mistaken belief that a settlement between POA and the City could lawfully change the status quo or otherwise affect the rights of IAFF and/or IAFF-represented employees. However, it is well-settled that only the designated representative of a unit may bring a charge alleging a unilateral change or other bargaining

[8] The Board may also, either on application by a party or on the Board's own motion, order joinder of an employer, employee organization or individual under certain circumstances. (PERB Reg. 32164, subd. (d); *Bay Area Air Quality Management District* (2007) PERB Decision No. 1927-M, pp. 3-4.) However, neither the City nor POA has requested that IAFF be joined as a party to this action and, for the reasons set forth in the body of this Decision, the Board declines to do so on its own motion. Although IAFF argues that its absence from this case impairs its ability to protect its interests, IAFF's motion provides no facts to suggest that it was previously unaware of the City's conduct, which IAFF now alleges was unlawful, nor explains why IAFF could not have adequately protected its interests by filing its own unfair practice charge within the six-month limitations period.

violation affecting that unit. (*San Francisco Community College District* (1989) PERB Decision No. 688b, pp. 3-4; *Oxnard Union High School District* (2012) PERB Decision No. 2265, adopting dismissal letter at p. 3.) When an employer's conduct is alleged to constitute a unilateral change or other bargaining violation simultaneously affecting more than one bargaining unit, the exclusive representative of each unit must file a charge and litigate on behalf of the employees in its respective unit. (*San Francisco, supra*, PERB Decision No. 668b, pp. 3-4; *Regents of the University of California* (2006) PERB Decision No. 1804-H, adopting warning letter at p. 5.) In such circumstances, the Board's usual practice is to limit the remedy to only the unit or units where the designated representative has successfully litigated the case. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, pp. 17-18; cf. *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 46-48.) This approach is necessary to protect the rights of the respondent to notice of the allegations against it and to protect the rights of other employee organizations who, for whatever reason, may prefer to acquiesce to an employer's conduct rather than file and litigate unfair practice charges.

According to IAFF's motion, the City's decision to submit the ballot measures to the voters and the voters' approval of those measures altered the status quo affecting IAFF-represented employees by, among other things, eliminating the impasse resolution procedures available for bargaining disputes between the City and IAFF. By failing to file an unfair practice charge, IAFF acquiesced to that change. IAFF did not, however, acquiesce to future changes. If the City and POA agree to settle the present unfair practice case, any settlement terms affecting matters within the scope of representation and/or consultation for IAFF-represented employees would trigger the City's duty to meet and confer and/or meet and consult with IAFF. In sum, because POA is not authorized to negotiate on behalf of IAFF or

IAFF-represented employees, IAFF has no cognizable interest in any resolution or this charge, including any settlement between the City and POA, and IAFF's joinder as a party is therefore unwarranted.

Second, even assuming IAFF had demonstrated that it has a substantial interest in this case or that its participation would contribute substantially to a just resolution, we would deny IAFF's motion as untimely and/or as posing an undue impediment to the proceeding. Subject to certain exceptions, which are not at issue here, PERB is precluded by statute from issuing "a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." (MMBA, § 3509, subd. (a), (b); Govt. Code, § 3541.5, subd. (a)(1); *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.) Our Regulations likewise require dismissal of a charge or any part thereof alleging an unfair practice under the MMBA based upon conduct occurring more than six months prior to the filing of the charge. (PERB Reg. 32620, subd. (b)(5).) The limitations period begins to run once the charging party knew or reasonably should have known of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4; *San Dieguito Union High School District* (1982) PERB Decision No. 194, p. 14.)

There is no dispute that IAFF did not file a charge against the City within six months of the City's alleged unfair practices and, although IAFF makes conclusory allegations that the City never met and conferred and/or consulted with IAFF before placing the two measures on the ballot in 2011, IAFF's motion and supporting declarations include no specific facts demonstrating either that IAFF was unaware of the conduct which it now alleges was unlawful, or the circumstances under which IAFF became aware of the City's allegedly unlawful conduct.

Thus, if IAFF were seeking to file its own charge at this late date, there is no question that it would be rejected as untimely.

IAFF argues, however, that it seeks merely to *join* an *existing* charge, rather than *file a new* charge, and that, because the joinder regulation includes no express limitation on the time in which to intervene, it should be allowed to do so to protect its interests. We are not persuaded.

As with statutory construction, the provisions of PERB's Regulations cannot be read in isolation from one another; rather, each word, phrase or clause should be construed with reference to the whole system of which it is a part, so that all may be harmonized and have effect. (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 607–608; *Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 501.) Unless one provision is clearly intended as an exception to a general rule or principle set forth elsewhere in the Regulations, the two should not be read to conflict with one another. (*Los Angeles County v. Craig* (1942) 52 Cal.App.2d 450, 452-453.) While administrative rules or regulations can specify the procedures whereby an agency will carry out its mission, they cannot *expand* the scope of the agency's authority beyond what has been authorized by the enabling statute. (*UPTE, CWA Local 9119 (Hermanson, et al.), supra,* PERB Decision No. 1829-H, p. 4; *Apple Valley Unified School District* (1990) PERB Order No. Ad-209, pp. 10-11.) Because IAFF's construction of the joinder regulation would likely require the Board to act in excess of its authority by recognizing or establishing an exception to the six-month limitations period prescribed by the MMBA, PERB Regulations and judicial authority, we decline this invitation.

IAFF is correct that the joinder regulation includes no definite time limit. However, under the circumstances, the practical effect of IAFF joining this action, even on the limited

terms IAFF requests, is the same. IAFF would have no leverage in settlement discussions without some credible threat of proceeding with litigation. It cannot, however, do so, without PERB amending the existing complaint to include IAFF's allegations against the City. IAFF would then need to prove those allegations either on the basis of the existing record or, more realistically, after remanding the matter to the ALJ and reopening the record to take evidence on the newly-added allegations in the complaint. Even if, as IAFF contends, it does not seek to reopen the record, the City must be afforded an opportunity to do so in order to meet the new allegations against it. After re-opening the record to take additional evidence, the ALJ would need to amend the proposed decision substantially or, more likely, draft a separate proposed decision, to make additional factual findings and resolve the legal issues presented by IAFF's participation in the case.

Each of these steps in the litigation process poses significant problems. For example, while our Regulations permit amendment of an existing complaint before or during a hearing, they do not appear to contemplate amending a complaint *after* the hearing has concluded, the evidentiary record has been closed, briefing has been completed, a proposed decision has issued, and the matter has been appealed to the Board itself. (PERB Regs. 32647, 32648.) Moreover, the joinder regulation expressly states that the addition of a party cannot unduly impede the proceeding. (PERB Reg. 32164, subd. (c).) Even assuming a complaint could be amended at this late stage, granting IAFF's application for joinder under these circumstances would effectively circumvent the limitations period set forth in the MMBA and PERB Regulations, unduly impede the proceedings in this case and thereby undermine the purpose of the joinder regulation, and call into question the fundamental fairness and the due process rights of all parties in PERB's administrative process. For all these reasons, we deny IAFF's motion to intervene and application for joinder.

ORDER

International Association of Firefighters Local 3523's motion to intervene and application for joinder in Case No. LA-CE 729-M are hereby DENIED.

Members Winslow and Gregersen joined in this Decision.