STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JAIME AVILA, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No. LA-CE-1603-M PERB Order No. Ad-496-M October 6, 2022

Appearances: Jaime Avila, on his own behalf; Orange County Office of County Counsel by Cynthia Inda, Deputy County Counsel, for County of Orange.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on Jaime Avila's appeal of an administrative decision by an administrative law judge (ALJ). The complaint in this matter alleges that the County of Orange discharged Avila because he engaged in conduct protected by the Meyers-Milias-Brown Act (MMBA).[1] The ALJ deferred the dispute to binding arbitration under a memorandum of understanding (MOU) between the County and the union that represents Avila's bargaining unit, Orange County Employees Association (OCEA). Avila asks us to reverse the ALJ's deferral order and find that the arbitration process,

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

including the arbitration decision that ultimately issued, was repugnant to the MMBA.

We have reviewed the ALJ's decision, the record, and the parties' arguments. We affirm the ALJ's deferral order and find no basis to sustain Avila's repugnancy claim. We therefore dismiss the complaint and underlying unfair practice charge.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2020, the County discharged Avila, a Senior Correctional Services Technician in the County Sheriff's Department. At all relevant times prior to his discharge, Avila served as an OCEA steward.

Avila filed a grievance claiming that the County violated MOU Articles IX and XVII because it lacked reasonable cause to discharge him and did so in retaliation for protected activity. Avila also filed this unfair practice charge, which he later amended. PERB's Office of the General Counsel issued a complaint alleging that the County discharged Avila because he served as a union steward.

In answering the complaint in January 2021, the County denied all liability and affirmatively asserted that PERB should defer the complaint to arbitration. Specifically, the County averred that: (1) "The grievance terms of the parties' labor agreement cover the matter at issue and culminates in binding arbitration"; (2) "the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties"; (3) "the parties are ready and willing to proceed to arbitration"; and (4) "the County waives procedural defenses to arbitration."

In November 2021, 10 months after answering the complaint, the County filed a deferral motion under MMBA section 3508.8 and PERB Regulation 32620, subdivision (b)(6). After receiving the County's motion to defer the matter to arbitration, the ALJ

vacated all scheduled hearing dates pending her decision on the motion.

Meanwhile, Avila and the County jointly selected Louis Zigman as their neutral arbitrator, and they scheduled the arbitration hearing for February 1-4, 2022.[2] When the arbitration hearing began on February 1, the County's deferral motion was still pending before the ALJ. The parties notified Zigman about the related PERB proceedings, and the parties do not dispute Zigman's recitation that they jointly authorized him to make findings "consistent with the MOU, the MMBA and PERB protocols." Zigman informed the parties that because the MOU prohibited adverse action for union activity—the same conduct alleged in the PERB complaint—it was proper for him to resolve both matters.

Avila represented himself at the arbitration hearing, just as he has done throughout this case.

Neither party disputes Zigman's recitation of the issues before him, as follows:

> "1. Was Jaime Avila terminated for reasonable cause?
>
> "2. Was Mr. Avila terminated for protected union activity, including serving as a union steward or union representative, in violation of the [MMBA] and Article XVI, Section 1 of the [MOU], which requires that the MOU provisions be applied to employees without discrimination as required by state law?
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> "3. If Avila was not terminated for reasonable cause, or if he was terminated in violation of the MMBA, and Article XVII, Section 1 of the MOU, to what remedy is he entitled under the provisions of Article X, Section 8(B) (2) of the MOU?"

On February 1, the County presented its case-in-chief to Zigman. Avila began

[2] All further dates refer to 2022.

presenting his case that day, and he continued doing so on February 2. But on February 3, Avila left the hearing mid-morning and never returned. As discussed further below, Avila did not believe the hearing was a fair one. After Avila did not return to the hearing, the County moved to proceed with the hearing without him. Zigman granted this motion, and the County presented rebuttal evidence. The County filed a post-hearing arbitration brief, but Avila declined to do so.

On July 15, before Zigman rendered an arbitration decision, the ALJ issued the deferral order from which Avila appeals.

On July 20, Zigman issued a final arbitration decision finding no violation of the MOU, the MMBA, or PERB regulations. Zigman concluded that the County had shown reasonable cause for discharging Avila. The arbitration decision also addressed Avila's retaliation claims. After recounting Avila's evidence of retaliation, Zigman found that Avila "made many vague and general allegations of unlawful motives against many individuals" but that Avila presented no persuasive evidence of unlawful animus. Zigman therefore dismissed Avila's argument that the County discharged him for his union activities, noting that "speculation without preponderant proof is not a basis to conclude that his termination was unlawful."

DISCUSSION

A Board agent's decision to defer a charge to arbitration and place it in abeyance pending completion of such proceedings is an administrative decision appealable under PERB Regulation 32360. (*County of Santa Clara* (2020) PERB Order No. Ad-482-M, pp. 10-11.) In an appeal from an administrative decision, the appellant has the burden to show that the challenged decision is contrary to law.

(*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 6.)

Under MMBA section 3505.8 and PERB Regulation 32620, subdivision (b)(6), PERB is authorized to: (1) grant a deferral motion and place an unfair practice charge in abeyance if the parties' dispute is subject to final and binding arbitration pursuant to an MOU; and (2) dismiss the charge at the conclusion of the arbitration process, unless the charging party demonstrates that the ultimate settlement or arbitration award is repugnant to the MMBA.

I. Pre-Arbitration Deferral

"PERB may defer an unfair practice charge to arbitration if the respondent carries its burden to establish that: (1) the dispute arises within a stable collective bargaining relationship; (2) the respondent is willing to waive procedural defenses and to arbitrate the merits of the dispute; (3) the contract and its meaning lie at the center of the dispute; and (4) no recognized exception to deferral applies." (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 53 (*Oxnard*).) Moreover, if the charging party is an individual employee and the applicable MOU does not allow an employee to advance a grievance to arbitration, PERB also must determine whether the exclusive representative is willing to proceed to arbitration on the employee's grievance. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 18.)

Here, while the ALJ's deferral order predated the arbitration decision by only five days, the order nonetheless qualifies as a pre-arbitration deferral order.[3]

In challenging the ALJ's deferral order, Avila concedes that OCEA and the

[3] The record does not reveal why the ALJ waited until July 2022 before ruling on the County's deferral motion.

County have a stable bargaining relationship and that the MOU allows individual employees to file and arbitrate grievances. It is similarly undisputed that the County waived procedural defenses, guaranteeing that the parties could arbitrate the merits of the dispute.

The most critical prong of the deferral test is often whether the contract and its meaning lie at the center of the dispute. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 55.) To meet this prong, the respondent must show, first, that the parties' agreement prohibits the alleged unfair practice. (*Ibid*.) It is not sufficient for the agreement to "merely cover or discuss the matter." (*Ibid*.) Rather, "the conduct alleged to be an unfair practice must be prohibited." (*Ibid*.) Second, "resolution of the contractual issue must necessarily resolve the merits of the unfair practice allegation." (*Ibid*.) This condition exists "if the contract incorporates the statutory legal standard, or if the parties ask the arbitrator to resolve the statutory unfair practice issue." (*Ibid*.) "If resolution of the alleged unfair practice requires application of statutory legal standards, and 'there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles,' deferral is not appropriate." (*Ibid*., quoting *Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 8.)

In initially objecting to deferral, Avila argued that MOU Article XVII, entitled "Nondiscrimination," is too vague to ensure that any arbitrator will apply the proper standard. Avila has abandoned that argument on appeal. In any event, the ALJ correctly found that Article XVII, which requires the County to apply the MOU without discrimination under state and federal law, prohibits discrimination for union activity and therefore may supply a basis for deferral of a retaliation allegation. (*Fremont*

Unified School District (2003) PERB Decision No. 1571, p. 4.)

Avila's appeal shifts to a new argument. Specifically, he claims the County did not prove that Zigman would necessarily apply the statutory standard. The ALJ found that the County satisfied this condition by assuring PERB and Avila that it would stipulate to ask Zigman to consider and resolve the MMBA retaliation claim. And, indeed, that is exactly what occurred. Moreover, Avila admits that "to remedy the vagueness of the collective bargaining agreement," he "stipulated to Arbitrator Zigman to please consider and resolve [the] unfair MMBA labor practice charge as well as the arbitrary and wrongful termination grievance." The arbitration decision itself further shows that the parties submitted the MMBA retaliation question as one of the issues for Zigman to resolve, and that he did so, applying the statutory standard.

Avila raises no other challenge related to the ALJ's deferral order, and we therefore affirm it.

II. Post-Arbitration Deferral

We exercise our discretion to resolve Avila's repugnancy claim rather than remanding it to the ALJ, because doing so promotes administrative efficiency. (*Alliance Judy Ivie Burton Technology Academy High School, et al* (2022) PERB Decision No. 2809, pp. 23-24, judicial appeal pending [Board may exercise discretion to promote efficiency by resolving issues at Board level in the first instance]; PERB Reg. 32661, subd. (d) [where charging party files repugnancy claim, the Board itself "may, at any time, direct that the record be submitted to the Board itself for decision"].)

In *Trustees of the California State University (East Bay)* (2014) PERB Decision No. 2391-H (*Trustees*), the Board noted that deciding if an arbitration decision or

settlement is repugnant to a PERB-administered statute is equivalent to deciding whether to defer to such a decision or settlement after it is final. (*Id*. at pp. 21-22.) Indeed, in *Trustees*, the Board listed four "repugnancy elements" that correspond to the Board's post-arbitration deferral standard, as follows: "[T]he Board will . . . dismiss and defer a complaint to the arbitrator's award if: (1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the parties agreed to be bound; and (4) the decision of the arbitrator was not 'clearly repugnant to the purposes and policies of the Act.'" (*Id.* at p. 22, citing *Santa Ana Unified School District* (2008) PERB Decision No. 1951, p. 6 (*Santa Ana*).) Thus, "repugnancy" is a term of art, because the Board may decline to defer to an arbitration award if the unfair practice issues were not presented to and considered by the arbitrator, a circumstance that does not necessarily fall within the normal English definition of the word "repugnant."

An arbitration decision or settlement is repugnant to the governing act if it is "palpably wrong" or "not susceptible to an interpretation consistent with the Act." (*County of Santa Clara*, *supra*, PERB Order No. Ad-482-M, p. 9, fn. 11.) The mere possibility that the Board may have reached a different conclusion does not render the award repugnant. (*Ibid*.) As noted, however, a repugnancy claim can also focus, in whole or in part, on allegedly unfair procedures or simply on the fact that the arbitrator did not consider the unfair practice issues. Irrespective of whether the party alleging repugnancy focuses on the ultimate result, the process, or a combination, that party "has the burden of affirmatively demonstrating the defects in the arbitral process or award." (*Santa Ana*, *supra*, PERB Decision No. 1951, p. 6, citing *Olin Corp.* (1984)

268 NLRB 573, 574.)

Here, Avila asked Zigman to resolve his MMBA charge, but Avila changed his mind on the third day of the arbitration hearing when he left, never to return. Avila asks us to reject the eventual arbitration decision because, he alleges, Zigman: (1) improperly limited Avila's time to present evidence; (2) did not consider all evidence in the record; and (3) refused Avila's request for an extension of time to file a closing brief.

On the first day of the hearing, both parties presented their opening statements. Thereafter, the County presented its case-in-chief, and Avila cross-examined the County's witnesses. Avila avers that on the second hearing day, he presented more than half his testimony and evidence, including two witnesses.

Avila's contentions center on the third day of hearing. Avila alleges that Zigman, annoyed by Avila's repetitiveness, began to "badger" him and ordered him to finish his testimony "in twenty minutes." Zigman addressed Avila's presentation of evidence in the arbitration decision, noting that, as he does with other pro per advocates, he allowed Avila to testify in narrative form, and that both parties had the opportunity to present testimony, cross-examine witnesses, and present other evidence. The decision recounts that on the third hearing date, Avila began reading from prepared text until the morning break. Zigman, citing to the hearing transcript, described what occurred before and after the break. In short, the transcript reflects that Zigman told Avila that he understood the points Avila was making, and rather than continue to repeat them, Avila would be better off moving to new topics. Zigman also suggested that Avila place his written statement in the record, something that Zigman had

suggested—and Avila had agreed to—the day before. The transcript further shows that although Zigman initially told Avila to take 20 minutes to finish reading from the prepared document, Zigman subsequently agreed that Avila could have the greater amount of time Avila sought. Zigman even offered extra time if needed. Avila did not object. Zigman called a 10-minute morning break. Avila did not return after the recess. Zigman summarized these events as follows: "[T]he grievant persuaded me to allow him more time to present evidence but the grievant left instead."[4]

After a several-hour recess during which Avila did not return, Zigman allowed the County to present its rebuttal case and thereafter closed the hearing. That afternoon, Avila e-mailed the County that he was placing the arbitration hearing in "abeyance" because Zigman had placed a time limitation on his presentation of evidence.

The next day, February 4, at 8:20 a.m., Zigman e-mailed Avila to inform him what occurred after he left the hearing, and asked Avila if there were any exigent reasons for his absence. Zigman also informed Avila that he could file a written closing brief and that the parties' closing briefs would be due 45 days from receipt of the hearing transcripts. At 10:40 a.m., Avila responded that he left "to stop the hearing and place my arbitration hearing in abeyance." Avila also asked Zigman to recuse himself. At 11:56 a.m., Zigman responded to Avila, denying his motions to place the hearing in abeyance and to recuse himself. Zigman closed by noting that "foremost" among his

[4] Avila asserts that when he "decided to stop" the hearing and told Zigman he was leaving, Zigman responded by telling him, "don't leave." The arbitration decision recounts these events a bit differently, stating that Avila informed the court reporter—not Zigman—that he was leaving. In any event, there is no dispute that Avila left of his own accord and did not return to the hearing after the morning break.

multiple responsibilities as an arbitrator "is providing due process along with ensuring that irrelevant issues and irrelevant evidence are excluded from the hearing."

On March 11, the County e-mailed Avila to inform him that it had received the arbitration transcripts, and accordingly closing briefs would be due by April 25, 2022. Later that day, Avila responded by moving for a continuance of the arbitration. Several hours later, Zigman denied the continuance, but offered Avila a "reasonable" extension on the closing brief, if needed.

On April 25, the County sent its brief to Zigman and e-mailed a courtesy copy to Avila. Avila did not file a closing brief, but rather e-mailed Zigman, declaring the arbitration hearing to be "in continuance." Zigman responded, again denying the motion, explaining: "[I]n my 46 years as a labor/management arbitrator I have never had any party self-declare an arbitration hearing to be continued." Zigman stated that he would review and consider the evidence and argument Avila presented during the hearing. On July 15, Avila requested an extension to file a closing written statement by August 29. On July 19, Zigman denied this request, which Avila filed nearly three months after the due date.

In *Trustees*, *supra*, PERB Decision No. 2391-H, we held that a party may not "avoid deferral by abandoning the process by walking out of the arbitration hearing." (*Id*. at p. 42.) In that case, the charging party's conduct prevented the arbitrator from reaching a decision on the merits of his claims. (*Ibid*.) The Board found that by his conduct, the charging party waived his right to claim the award against him was repugnant. (*Ibid*.)

So too, here, the arbitration process and resulting decision were not repugnant

to the MMBA. As in *Trustees*, *supra*, PERB Decision No. 2391-H, Avila walked out of the arbitration hearing without any valid reason for doing so. The hearing transcript shows that Zigman afforded Avila great latitude in the presentation of his case, and agreed to give Avila the extra time that Avila said he needed. Avila may not defeat deferral by improperly refusing to take part in the arbitration. (*Trustees*, *supra*, PERB Decision No. 2391-H, p. 42.)

While the arbitrator in *Trustees*, *supra*, PERB Decision No. 2391-H, dismissed the grievant's appeal due to his failure to prosecute it, Zigman considered the full record, including considerable evidence and argument Avila introduced on the first three days of the hearing, and issued a ruling on the merits. Given that Avila did not avail himself of Zigman's offer of an extension of time to file a closing brief, Zigman's later denial of Avila's extremely tardy extension request does not supply sufficient grounds for Avila to claim repugnancy. Nor has Avila alleged facts suggesting that the arbitration decision was "palpably wrong" or inconsistent with the MMBA. (*County of Santa Clara*, *supra*, PERB Order No. Ad-482-M, p. 9, fn. 11.)

In sum, we deny Avila's appeal, find that the arbitration process and decision were not repugnant to the MMBA, and dismiss the complaint and underlying charge.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-1603-M are DISMISSED.

Chair Banks and Member Paulson joined in this Decision.