STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1688-M Administrative Appeal PERB Order No. Ad-482-M November 2, 2020

Appearances: Weinberg, Roger & Rosenfeld by Katharine R. McDonagh, Attorney, for Service Employees International Union Local 521; Office of the County Counsel by Nancy J. Clark, Deputy County Counsel, for County of Santa Clara.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on Service Employees International Union Local 521's (SEIU) appeal of an administrative decision by the Board's Appeals Office. The genesis of this appeal is a Notice of Abeyance and Deferral to Arbitration (Abeyance Letter) issued by PERB's Office of the General Counsel (OGC). SEIU appealed the Abeyance Letter directly to the Board. The Appeals Office rejected the appeal as procedurally deficient for failure to comply with PERB Regulation 32200.[1]

[1] PERB Regulation 32200 governs appeals of interlocutory orders and provides, in pertinent part: "The Board itself will not accept the request unless the Board agent

Having reviewed pertinent statutes, regulations, and decisional law, we conclude that a Board agent's decision to defer a charge to arbitration and place it in abeyance pending completion of arbitration proceedings is not an interlocutory order, and therefore PERB Regulation 32200 does not apply in such circumstances. Rather, the abeyance letter is an administrative decision that may be appealed directly to the Board pursuant to PERB Regulation 32360. We therefore reverse the Appeals Office's administrative decision rejecting SEIU's appeal.

BACKGROUND

SEIU filed the unfair practice charge in this matter on May 14, 2019. The charge alleged that the County of Santa Clara violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by: (1) retaliating against a union steward for attending a County Board of Supervisors meeting by rescinding prior approval of paid release time, (2) unilaterally changing the procedure for requesting release time contained in the Memorandum of Agreement (MOA) between SEIU and the County, (3) dealing directly with bargaining unit employees to create a release time policy that requires procedures beyond those specified in the MOA, and (4) by this conduct, interfering with employees' right to request release time.[2]

On June 27, 2019, the County filed a position statement opposing SEIU's charge. The County alleged that the parties' dispute was subject to a negotiated

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joins in the request." PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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

grievance procedure culminating in binding arbitration, and that SEIU had initiated the procedure in March 2019 when it filed a grievance over that dispute. Seeking to defer this dispute to arbitration, the County indicated it would waive any procedural defenses to arbitration of SEIU's grievance.

On June 8, 2020, OGC issued the Abeyance Letter.[3] The Board agent notified the parties that she would: (1) place SEIU's charge in abeyance until the parties' contractual grievance and arbitration process was complete, and (2) dismiss the charge following arbitration unless SEIU sought a repugnancy review of the arbitrator's decision by PERB. In conclusion, the Board agent explained that the Abeyance Letter was an interlocutory order and thus appealable only in accordance with PERB Regulation 32200, which provides that the Board cannot consider an appeal of an interlocutory order unless the Board agent joins the appellant's request for a ruling by the Board.[4]

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[3] Unless otherwise indicated, all further dates are in 2020.

[4] PERB Regulation 32200, Appeal of Rulings on Motions and Interlocutory Matters, states:

> "A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:
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> "(a) The issue involved is one of law;

On June 18, SEIU appealed the Abeyance Letter to the Board itself. SEIU asserted that the Abeyance Letter met the definition of an administrative decision under PERB Regulation 32350, and it was thus entitled to review by the Board without following the interlocutory appeal procedure in PERB Regulation 32200.[5] Alternatively, in case the Board determined that the Abeyance Letter was indeed an interlocutory order, SEIU requested that the Board agent join its appeal and seek a Board ruling addressing SEIU's argument that PERB should decline to defer retaliation allegations to the parties' negotiated arbitration procedure.[6]

On June 30, the Board agent notified the parties that she would review SEIU's filing as an interlocutory appeal and decide whether to join its request for a Board ruling. On July 14, the County filed an opposition to SEIU's appeal.

On July 16, the Board agent declined to join SEIU's appeal. Affirming that her Abeyance Letter was an interlocutory order, the Board agent found that SEIU's appeal was procedurally and substantively deficient because SEIU did not file or serve its

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> "(b) The issue involved is controlling in the case;
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> "(c) An immediate appeal will materially advance the resolution of the case."

[5] Under PERB Regulation 32360, an appeal from an administrative decision may be filed with the Board itself, except as noted in PERB Regulation 32380, *post*.

[6] Board precedent expressly prohibits deferral of allegations that an employee suffered "retaliation for filing PERB charges or otherwise participating in PERB processes." (*Trustees of the California State University (East Bay)* (2014) PERB Decision No. 2391-H, p. 39.) The Board has never addressed whether all retaliation allegations should be categorically exempt from deferral.

appeal in accordance with PERB Regulation 32200, nor did the interlocutory appeal meet the regulatory criteria for her to join it.

On July 24, SEIU filed a second appeal with the Board itself. SEIU asserted the Board agent wrongly concluded that its June 18 appeal was an interlocutory appeal, arguing again that it had properly filed an administrative appeal. On July 28, PERB's Appeals Office rejected SEIU's second appeal as procedurally deficient because the Board agent had declined to join in the appeal.

On August 6, SEIU appealed the Appeals Office's administrative decision, once more asserting that it had "already filed an administrative appeal, which we incorporate by reference."[7] On August 17, the County opposed the administrative appeal, noting that the parties were then conferring over potential arbitration hearing dates.

DISCUSSION

This appeal presents an issue of first impression—whether a Board agent's decision to defer a charge to arbitration and place it in abeyance pending completion of arbitration proceedings is an interlocutory order subject to the appeal procedures in PERB Regulation 32200, or an administrative decision that may be appealed directly to the Board under PERB Regulation 32360. The Appeals Office rejected SEIU's July 24 appeal for failure to comply with PERB Regulation 32200, which prohibits an

[7] Although SEIU did not specify whether it was incorporating its June 18 or July 24 appeal, we presume it intended to incorporate the former because SEIU attached that appeal to its August 6 filing. Nevertheless, we consider both as PERB may take official notice of matters within its own files and records. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.)

appeal from an interlocutory order unless the Board agent "join[s] in the request and certif[ies] the matter to the Board." SEIU contends it was not required to comply with this procedure because OGC's Abeyance Letter was not an interlocutory order.[8] We agree.

SEIU argues that because the Abeyance Letter satisfies the regulatory definition of "administrative decision," it may be appealed directly to the Board. Subject to four specific exceptions that are not relevant here, PERB Regulation 32350, subdivision (a) provides that "[a]n administrative decision is any determination made by a Board agent." Although the Abeyance Letter satisfies this definition, that does not end our inquiry. Under PERB Regulation 32360, subdivision (a), "[a]n appeal may be filed with the Board itself from any administrative decision, except as noted in section 32380." PERB Regulation 32380, in turn, provides in relevant part: "The following administrative decisions shall not be appealable . . . (b) [e]xcept as provided in Section 32200, any interlocutory order or ruling on a motion." By its plain language, Regulation 32380 contemplates that an administrative decision may constitute an

[8] SEIU's appeal does not specifically identify any factual, procedural, or legal errors in the Appeals Office's administrative decision. (See PERB Reg. 32360, subd. (c) [an administrative appeal "must state the specific issue(s) of procedure, fact, law, or rationale that is appealed and state the ground for the appeal"].) Nonetheless, by claiming that it already filed an administrative appeal, SEIU's August 6 appeal adequately provides notice of the primary issue on appeal, viz. whether SEIU was entitled to file its appeal of OGC's Abeyance Letter without OGC's concurrence. (See *Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, pp. 4-5 [finding adequate notice of the issue on appeal, i.e., whether dismissal was supported by the factual record, based on general claim that there was no factual basis for OGC's decision to dismiss a decertification petition].)

interlocutory order.[9] Thus, to determine which appeal procedure applies, we must resolve whether the Abeyance Letter is an interlocutory order.

PERB Regulations do not define "interlocutory order." In *Morgan Hill Unified School District* (2016) PERB Order No. Ad-443 (*Morgan Hill*), upon which the Board agent relied, the Board held that an abeyance letter was an interlocutory order because it "does not 'constitut[e] a final resolution of the whole controversy'" between the parties. (*Id*. at pp. 4-5 & fn. 5, quoting INTERLOCUTORY, Black's Law Dictionary (10th ed. 2014).) There, a group of employees filed a decertification petition. (*Id.* at p. 2.) In response, SEIU simultaneously filed: (1) an unfair practice charge alleging that the petition was tainted because it was circulated by a confidential employee on behalf of management, and (2) a unit modification petition seeking to remove the allegedly confidential classification from the bargaining unit.[10] (*Id.* at p. 2 & p. 4, fn. 4.) OGC placed the unit modification petition in abeyance while an election was held on the decertification petition. (*Id.* at p. 2.) On appeal, the Board held that the abeyance letter constituted an interlocutory order because it "did not decide the merits of [the unit modification] petition, i.e., whether the classification in question or the four employees in that classification were 'confidential.'" (*Id.* at p. 5.) The Board further noted abeyance did not prejudice SEIU because it could still have the issue of the

[9] For this reason, we must reject SEIU's contention, based on *City of Fremont* (2013) PERB Order No. Ad-403-M, that interlocutory orders are limited to "ruling[s] made in the course of a hearing." (*Id*. at p. 12.) Further, SEIU's reliance on *City of Fremont* is misplaced because there the Board explicitly stated, "[W]e do not intend by this decision to fully explicate the scope of interlocutory orders." (*Ibid.*)

[10] The charging party in this case was also the petitioner in *Morgan Hill*.

employees' confidential status resolved by challenging the ballots cast by the alleged confidential employees, filing election objections, and pursuing its unfair practice charge. (*Ibid.*)

We find *Morgan Hill* distinguishable because of the distinctive nature of pre-arbitration deferral. Under MMBA section 3505.8, PERB "*shall* place [an unfair practice charge] in abeyance if the dispute is subject to final and binding arbitration pursuant to [a] memorandum of understanding, and *shall* dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of [the MMBA]." (Italics added.) PERB Regulations also require that the charge be placed in abeyance "if the dispute arises under [the] MMBA . . . and is subject to deferral to final and binding arbitration pursuant to a collective bargaining agreement." (PERB Reg. 32620, subd. (b)(6).) PERB must further "dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of [the] MMBA." (*Ibid.*)

In *Morgan Hill*, placement of SEIU's unit modification petition in abeyance did not in any way lessen the scope of the petition, and SEIU would have been able to pursue it fully once it was removed from abeyance. In contrast, when a Board agent defers a charge to arbitration and places it in abeyance during arbitration proceedings, the charging party can no longer pursue the same claims once the arbitration proceedings are complete. Instead, the charging party is limited to "demonstrat[ing] that the . . . arbitration award is repugnant to the purposes of [the applicable statute]."

(PERB Reg. 32620, subd. (b)(6)).[11] Consequently, once a charge is deferred to arbitration, the charging party is no longer able to fully litigate the charge allegations before PERB. Thus, while a pre-arbitration deferral decision does not completely resolve the entire controversy raised by the charge, its substantial impact on the charging party's subsequent ability to pursue the allegations in the charge leads us to conclude that the Abeyance Letter in this case should not be considered an interlocutory order.

Further supporting this conclusion is the differential treatment of deferred charges under the PERB-administered statutes. Under the Educational Employment Relations Act and the Ralph C. Dills Act, a charge that is deferred to arbitration is dismissed, and the charging party must file a new charge if it seeks repugnancy review. (§§ 3514.5, subd. (a), 3541.5, subd. (a)(2); PERB Reg. 32620, subd. (b)(5).)[12] The dismissal of the charge may be appealed directly to the Board itself under PERB Regulation 32635. (*Claremont Unified School District* (2014) PERB Decision No. 2357,

[11] To prove repugnancy, the charging party must show the arbitration award is "palpably wrong" or "not susceptible to an interpretation consistent with the Act." (*Fremont Unified School District* (1994) PERB Decision No. 1036, pp. 4-5; *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a, p. 7.) Under this standard, the "possibility that this Board may have reached a different conclusion in interpreting the parties' agreement and the evidence does not render the award unreasonable or repugnant." (*Fremont Unified School District*, *supra*, PERB Decision No. 1036, p. 4.) In contrast to the high standard to prove repugnancy, a charging party may prove an unfair practice by a preponderance of the evidence. (PERB Reg. 32178.)

[12] Similarly, the Judicial Council Employer-Employee Relations Act and the Childcare Provider Act require dismissal of a charge that has been deferred to arbitration. (§ 3524.55, subd. (a)(2); Educ. Code, § 8439.5, subd. (b)(1)(B).)

p. 4.) In contrast, under the MMBA and four other statutes under PERB's jurisdiction, a charge that is deferred to arbitration is not dismissed but is instead placed in abeyance, subject to dismissal or repugnancy review only once the arbitration process is complete. (§ 3505.8; PERB Reg. 32620, subd. (b)(6).)[13] Because of this procedural variation, treating deferral and abeyance decisions rendered pursuant to PERB Regulation 32620, subdivision (b)(6) as interlocutory orders would make a charging party's ability to immediately appeal a pre-arbitration deferral decision to the Board itself depend entirely upon the statute under which the charge was filed.

At least with respect to procedural matters, PERB is expected to adopt "a coherent and harmonious system" that avoids arbitrary distinctions between similarly situated parties. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1090.) In accordance with this expectation, we see no reason to treat appeals of pre-arbitration deferrals differently based on the particular statute under which the charge arose, especially when doing so would put parties governed by certain statutes at a disadvantage. Strong policy reasons thus support allowing immediate appeal of all Board agent decisions to defer charges to arbitration.

For the above reasons, we hold that a Board agent's decision to defer a charge to arbitration and place it in abeyance pending completion of arbitration proceedings is

[13] In addition to the MMBA, this process applies to charges filed under the Higher Education Employer-Employee Relations Act (§ 3560 et seq.), the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (Pub. Util. Code, § 99560 et seq.), the Trial Court Employment Protection and Governance Act (§ 71600 et seq.), and the Trial Court Interpreter Employment and Labor Relations Act (§ 71800 et seq.).

not an interlocutory order subject to the appeal procedures in PERB Regulation 32200. Instead, because deferral substantially limits the charging party's subsequent ability to pursue the allegations in the charge, such a decision is an administrative decision that may be appealed directly to the Board under PERB Regulation 32360. (Cf. *Morgan Hill*, *supra*, PERB Order No. Ad-443, pp. 4-5 [holding that a Board agent's decision to place a unit modification petition in abeyance was an interlocutory order, in part because abeyance did not prejudice the union's ability to resolve the disputed issue at PERB].) Accordingly, we reverse the Appeals Office's rejection of SEIU's July 24 appeal.

We nonetheless decline to rule on the merits of SEIU's appeal at this time for two reasons. First, the County's filings so far have not addressed SEIU's argument that PERB should expand the holding in *Trustees of the California State University (East Bay)*, *supra*, PERB Decision No. 2391-H, to preclude deferral of all retaliation allegations. Second, our review of the case file raises additional issues we would like the parties to address. Hence, concurrently with this Order, we will ask the parties to submit supplemental briefs, and we will thereafter render a decision on the merits of SEIU's appeal.

ORDER

Service Employees International Union Local 521's appeal of the Appeals Office's July 28, 2020 administrative decision in Case No. SF-CE-1688-M is GRANTED, and SEIU's July 24, 2020 appeal is hereby accepted for consideration.

Members Banks and Krantz joined in this Decision.