STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. WESTLANDS WATER DISTRICT, Respondent.	Case No. SA-CE-65-M PERB Decision No. 1622-M April 22, 2004

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Alan G. Crowley and Matthew A. Gauger, Attorneys, for Operating Engineers Local 3; Sagaser, Franson & Jones by Howard A. Sagaser, Attorney, for Westlands Water District.

Before Duncan, Chairman; Neima and Whitehead, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Operating Engineers Local 3 (Operating Engineers) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Westlands Water District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by accepting a unit modification petition, approving the petitioned unit, and scheduling an election on the unit modification petition. The Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the entire record in this matter, including the original and amended charge, the warning and dismissal letters, the Operating Engineers' appeal and the District's response. Based on the discussion below, the Board reverses the dismissal and remands this matter to the Office of the General Counsel for issuance of a complaint.

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

BACKGROUND

Recognition of Operating Engineers

The jurisdiction of the Board is not in dispute. On August 29, 1996, the District recognized Operating Engineers as the representative of a miscellaneous unit of approximately 80 employees of the District. On February 7, 2002, the District accepted a petition seeking to decertify the Operating Engineers as the exclusive representative of the miscellaneous unit of employees. An election was held on March 14, 2002, which was won by the Operating Engineers. Also on March 14, 2002, the Operating Engineers won an agency fee election.

In April 2002, the District received a petition from a group of employees seeking to modify the miscellaneous unit by creating a separate office clerical unit (clerical unit) to be represented by the Westlands Office and Clerical Employee Association (WOCEA). This petition sought to create the new unit by removing twenty-six clerical workers from a unit of approximately eighty employees represented by the Operating Engineers.

On May 17, 2002, District Assistant General Manager, Dave Ciapponi (Ciapponi) informed the Operating Engineers that:

> After having received the input of Operating Engineers Local Union No. 3 and applying the criteria set forth in Article 12.11, Modification of Established Appropriate Unit, of the District's Rules & Regulations, I have determined that the modified unit is a more appropriate unit which will assure employees the fullest freedom in the exercise of rights and the continued efficiency and effectiveness of the District's operation.
>
> An election of the proposed modified unit will be scheduled for June 19, 2002. Pursuant to the District's Rules & Regulations, Section12.11(B), should Operating Engineers Local No. 3 disagree with this determination, you have the right to refer the matter to the Board of Directors for final determination. The Board of Directors will meet on June 13, 2002, prior to the election, and any requests to be placed on the agenda will need to be filed timely.

On June 10, 2002, the Water District's Supervisor of Human Resources and Administration, Gary Lundin sent the Operating Engineers a letter which stated:

> Per Article 12.11(B) of the District's Rules and Regulations, your challenge to the General Manager/General Counsel's determination with respect to the modification of the established appropriate unit has been included on the Board of Director's agenda for final determination on June 13, 2002, beginning at 10:00 am at Westlands Water District...

On June 14, 2002, Ciapponi sent the Operating Engineers a letter that stated in full:

> Operating Engineers Local 3's objection and challenge of the General Manager/General Counsel's determination with respect to the modification of the established appropriate unit was agendized and acted upon at the June 13, 2002, Board of Directors meeting pursuant to Article 12.11.B of the District's Rules and Regulations. The Board of Directors affirmed the General Manager/General Counsel's determination with respect to the Westlands Office and Clerical Employee Association.

On June 19, 2002, an election was held on the unit modification issue where only the clerical employees were allowed to vote. They voted to modify the unit.

Relevant Local Rules

Pursuant to MMBA section 3507, the District has adopted local Employer-Employee Rules (EER) governing employer-employee relations. The relevant portions of the EER are as follows:

> 12.7 APPROPRIATE UNIT
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> A. The Manager may, and after review of a petition filed by an employee organization seeking recognition pursuant to Section 12.8 shall, determine the appropriate unit or units. Prior to making such determination, he shall consult with any employee organization which has filed such petition relevant to the determination and any affected employee organization. The consultation shall be for the purpose of the obtaining of employee and organization views on any proposed determination, including effect and operation of criteria stated in this section. The consultation shall be informal and shall occur after reasonable notice has been given to such employees and organizations.

B. The principle criterion in determining an appropriate unit shall be that the unit established shall be the broadest feasible group of employees having an identifiable community of interest. The following factors, among others, are to be considered in making a determination of an appropriate unit:

(1) which unit will assure employees the fullest freedom in the exercise of rights set forth under this article;

(2) the history of employee relations
(i) in the proposed unit,
(ii) among other employees of the District, and
(iii) in similar public employment;

(3) the effect of the unit on the efficient operation of the District and sound employer-employee relations; and

(4) the extent to which employees have common skills, supervision, working conditions, and job duties, and that the positions have similar training or educational requirements.

C. In determination of the appropriate unit, the Manager shall apply the following rules:

(1) except in the case of confidential employee, a single class of employees shall not be divided among two or more appropriate units;

(2) no unit shall be deemed appropriate solely on the basis of the extent to which employees in the proposed unit have organized;

(3) professional employees shall not be denied the right to be represented separately from nonprofessional employees;

(4) confidential employees shall not be included in the same unit as nonconfidential employees;

(5) management employees shall not be included in the same unit with nonmanagement employees;

(6) supervisory employees shall not be included in the same unit as nonsupervisory employees; and

(7) guard employees shall not be included in the same unit as nonguard employees.

12.9 ELECTIONS: FORMAL RECOGNITION

G. The recognition rights of a recognized employee organization designated in accordance with this section shall not be subject to challenge by election for a period of at least twelve months following the date of such recognition. [Emphasis added.]

12.10 REVOCATION OF REPRESENTATION

A. A petition for revocation of [sic] alleging that an employee organization granted formal recognition is no longer the representative of a majority of the employees in an appropriate unit may be filed with the Manager only during the last two months of any twelve-month period following the month in which formal recognition was granted. The petition for revocation may be filed by an employee, a group of employees or their representative, or an employee organization. The petition, including all accompanying documents, shall be verified under penalty of perjury by the person signing it that its contents are true. The petition for revocation shall be filed with the Manager and shall contain the following . . . [Emphasis added.]

12.11 MODIFICATION OF ESTABLISHED APPROPRIATE UNIT

A. A petition for modification of an established appropriate unit may be filed by an employee organization with the Manager during the two-month period for filing a petition for revocation . . . [Emphasis added.]

B. If the Manager determines that a modified unit is a more appropriate unit, then he shall follow the process set forth in Section 12.9 for determining formal recognition rights in such unit. If the Manager's determination with respect to the modification of the established appropriate unit is challenged by an employee organization, the matter shall be referred to the Board of Directors for final determination. The Board shall not be required to set forth findings in its order. [Emphasis added.]

DISCUSSION

Acceptance of Unit Modification Petition

The first issue on appeal involves the District's acceptance of WOCEA's unit modification petition under the specific provision of EER 12.11. Operating Engineers alleges that, under the application of EER 12.10, a unit modification petition may only be filed "during the last two months of any twelve-month period following the month in which formal recognition was granted." Since Operating Engineers was formally recognized on August 29,

1996, they argue that a unit modification petition can only be filed in July or August of each year. By accepting a petition in April, the District violated its own local rules, according to Operating Engineers.

The District claims that EER 12.10 allows the filing of a representational petition during the two-month period before expiration of the memorandum of understanding (MOU) or anytime thereafter. Since the contract with Operating Engineers had expired by April 2002, there was no bar to the District's acceptance of WOCEA's petition. The District claims that in applying EER 12.10, it followed federal precedent under the National Labor Relations Act (NLRA)[2]. Specifically, the District argues that its application of EER 12.10 is consistent with the contract bar rule[3] under the NLRA. The District argues that relying on NLRA precedent is proper since California courts have turned to NLRA precedent to interpret analogous provisions of the MMBA.

The District's argument fails because nothing in EER 12.10 resembles that of a contract bar provision. EER 12.10 does not reference a contract nor is its function dependent upon the existence of a contract. (Cf., e.g., PERB Reg. 61380(c)(1).) Instead, EER 12.10 appears to be a 12-month bar triggered by the formal recognition of an employee organization. (See, e.g., Ralph C. Dills Act sec. 3520.5(c) (Dills Act)[4]; PERB Reg. 61380(c)(3)[5].) Such a rule is intended to provide an insulating period of 12 months to permit the employee organization to

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[2]The NLRA is codified at 29 U.S.C. section 141, et seq.

[3]Simply stated, the contract bar rule under the NLRA holds that an existing collective bargaining agreement not exceeding three years will bar a petition for redetermination of representation in most instances. (See NLRB v. Circle A&W Products Cto. (9th Cir. 1981) 647 F.2d 924, 926 [107 LRRM 2923, 2924].)

[4]The Dills Act is codified at Government Code section 3512 et seq.

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

represent its unit and negotiate with the employer without interference with its representational rights.

Operating Engineers argues that under EER 12.10, revocation and unit modification petitions may only be filed in July or August of any year (since it was formally recognized on August 29, 1996). In other words, they read the phrase "any twelve-month period" as "the one-year period". Under Operating Engineers' interpretation, EER 12.10 would read:

> [A] petition for revocation . . . may be filed with the Manager "only during the last two months of [the one-year period] period following the month in which formal recognition was granted."

However, that is not what the rule states. EER 12.10 uses the phrase "any twelve-month period." By its plain meaning, the twelve-month period can be any twelve-month period. Thus, it could be the twelve-month period ending August, or September, or October, and so forth. The end result of such a rule is that it provides protection for the incumbent union only for the first twelve months after formal recognition. After that, the specific provisions of EER 12.10 do not constitute a bar to representational petitions.

It is well-settled that in evaluating a charge, the plain language of the contract or rule will be accepted where it is clear and unambiguous. (Glendora Unified School District (1991) PERB Decision No. 876; Butte Community College District (1985) PERB Decision No. 555.) Here, adhering to the plain language of EER 12.10 leads to the conclusion that an election bar exists for the first twelve-months after formal recognition. Accordingly, Operating Engineers' allegation that the District violated EER 12.10 when it accepted the filing of WOCEA's unit modification petition fails to state a prima facie case.

Determination of Appropriate Unit

Operating Engineers' second contention is that the District violated EER 12.7 when it determined that the proposed clerical unit was an appropriate unit. Specifically, it argues that

the relevant factors and criteria contained in EER 12.7 do not support the District's conclusion that a clerical unit is appropriate. However, these allegations fail to state facts constituting an unfair practice. With respect to a unit determination decision under the MMBA, an unfair practice occurs only where it is alleged that the local rule itself is invalid or where there has been unlawful interference or denial of rights. (PERB Reg. 32603.) As Operating Engineers has not made such allegations, that portion of the unfair practice charge must also be dismissed.[6]

Scheduling of Election

Lastly, Operating Engineers argues that the District violated its own local rules by conducting an election on WOCEA's unit modification petition within twelve months of the decertification election. In essence, it argues that it should not have had to face two challenges to its representational rights within one year. In support, Operating Engineers cites to EER 12.9(g) which states:

> G. The recognition rights of a recognized employee organization designated in accordance with this section shall not be subject to challenge by election for a period of at least twelve months following the date of such recognition. [Emphasis added.]

Operating Engineers interprets the phrase "recognition rights" to include more than just an employee organization's initial formal recognition. It asserts that an employee organization's "recognition rights" are established any time there is a representational election, including any decertification and unit modification election. Thus, under Operating Engineers' interpretation, its "recognition rights" were established not only in August 1996, when it was initially formally recognized, but renewed again in March 2002, when employees voted to

[6]Where a party instead seeks review of the unit determination decision itself, a petition for Board review should be filed. (PERB Reg. 60000 et seq.) As no such petition was filed in this matter, the Board declines to address Operating Engineers' arguments regarding the appropriateness of the District's unit determination decision.

maintain representation. According to Operating Engineers, WOCEA's unit modification petition constitutes a challenge to its "recognition rights." Under EER 12.9(g), Operating Engineers argues that an election on WOCEA's unit modification petition was barred for at least one year from March 2002. By conducting an election in June 2002, the District violated EER 12.9(g), according to Operating Engineers.

The District does not directly address the import of EER 12.9. Rather, the District argues generally that since no contract was in effect, there was no contract bar to holding another election. The District asserts that consistent with public policy, "the District deemed that the Petition was timely and that there was not any bar to the processing of the Petition."

For the purpose of issuing a complaint, the Board agrees with Operating Engineers' argument regarding the rights conferred to the bargaining unit by EER 12.9(g). Examining the District's local rules as a whole, it seems clear that the meaning of "recognition rights" in EER 12.9 includes more than the initial formal recognition of an employee organization. This is because EER 12.9 is expressly incorporated into other provisions of the District's local rules. Importantly, EER 12.9 is incorporated into the District's local rule governing unit modifications. EER 12.11 states, in pertinent part:

> If the Manager determines that a modified unit is a more appropriate unit, then he shall follow the procedures set forth in Section 12.9 for determining formal recognition rights in such unit. . . . [Emphasis added.]

Thus, by its plain language, an election under EER 12.11 must comply with EER 12.9. As discussed, EER 12.9 states that only one challenge to the recognition rights of an recognized employee organization may be made in a twelve month period. Since the recognition rights of Operating Engineers were designated pursuant to EER 12.9 in March 2002, when it prevailed in the decertification election, challenges to those rights were barred for a 12-month period

from that election. By conducting an election on the unit modification petition in June 2002, the District violated its own local rules. Accordingly, a complaint should be issued.

The Board notes that its interpretation of EER 12.9 is consistent with its understanding of the plain language of the District's local rules. At hearing, the District is not prohibited from asserting a contrary interpretation or prevented from attempting to introduce extrinsic evidence. (Long Beach Community College District (2000) PERB Decision No. 1378.) However, the Board further notes that even if the District's local rules permitted the instant unit modification election, the District may be in violation of MMBA section 3507(b), which states:

> Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

Since the applicability of MMBA section 3507(b) has not been raised on appeal, the Board makes no finding on this issue at this time. Instead, the Board will defer this issue to the administrative law judge.

ORDER

The Board REVERSES the dismissal of the unfair practice charge in Case No. SA-CE-65-M and REMANDS the case to the Office of the General Counsel for issuance of a COMPLAINT consistent with this Decision.

Chairman Duncan and Member Whitehead joined in this Decision.