STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TIMOTHY L. HESSONG, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 250, Respondent.	Case No. SF-CO-25-M PERB Decision No. 1693-M September 17, 2004

Appearance: Timothy L. Hessong, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Timothy L. Hessong (Hessong) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Service Employees International Union, Local 250 violated the Meyers-Milias-Brown Act (MMBA)[1] by its failure to pursue his grievance to arbitration.

The Board has reviewed the entire record, including the unfair practice charge, the amended charge, the warning and dismissal letters and Hessong's appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

[1]MMBA is codified at Government Code section 3500, et seq.

ORDER

The unfair practice charge in Case No. SF-CO-25-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

June 16, 2003

Timothy L. Hessong

Re: Timothy L. Hessong v. Service Employees International Union, Local 250
Unfair Practice Charge No. SF-CO-25-M; First Amended Charge
DISMISSAL LETTER

Dear Mr. Hessong:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 24, 2003. Timothy L. Hessong alleges that the Service Employees International Union, Local 250 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated May 19, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 27, 2003, the charge would be dismissed. I later extended this deadline to June 2, 2003.

On May 30, 2003, you filed a first amended charge. The first amended charge adds numerous facts to the Chicken Pox grievance and mentions several other class grievances filed by Local 250. To aid in the understanding of each allegation, I will address each grievance and SEIU's actions separately.

I. Chicken Pox Grievance

In November 1998, San Francisco General Hospital adopted a Varicella (Chicken Pox) policy. The policy states in relevant part, as follows:

2. Immunization requirements

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> Except as otherwise stated in this policy, documentation of varicella immunity is mandatory for all employees. . . . Employees not able to provide proof of varicella immunity will have a serum varicella drawn.
>
> * * * * *
>
> 6. Work restrictions for personnel exposed to Varicella
>
> Any non-immune health care worker who is exposed to a varicella infection shall be removed from patient contact and the hospital environment on days 10 through 21 post exposure (with day one being counted as the first day of exposure to rash or two days prior to the appearance of a rash in the source.)

Employees exposed to varicella or other communicable diseases are required to take those quarantine days as sick leave days, pursuant to Article 120.7.2 of the City's Civil Service Rules. Article VII of the parties' collective bargaining agreement also requires employees to use sick leave if they are quarantined.

In October 1999, you informed your supervisor that you had been exposed to Chicken Pox. Your supervisor ordered you to leave the hospital and quarantined you from October 15, 1999 through October 25, 1999. You missed five regular days of work and were charged sick leave for these days pursuant to the contract.

On December 1, 1999, Local 250 filed a grievance on your behalf concerning your quarantine. Facts provided show you alleged that as you were forced to be off of work, you should not be required to use sick leave. Additionally, you alleged you did not meet the "exposure" steps and thus were not really exposed to chicken pox.

On February 2, 2000, a Step II grievance meeting was held. Local 250 Field Representative David Twedell represented you at this meeting. On August 24, 2000, the County issued its Step II response. In denying the grievance at Step II, the County stated that its rules and procedures called for mandatory sick leave if an employee must be quarantined.

On August 28, 2000, you sent an electronic message to Local 250 stating your belief that you did not qualify as "exposed" under the guidelines, and thus the County should be liable for your pay.

On December 20, 2000, Local 250 moved your grievance to Step III, and awaited a response from the County. A response was not forthcoming from the County.

On January 18, and January 19, 2001, you sent several electronic messages to Local 250 representative Ralph Cornejo. These messages inquired as to the status of several grievances, including the chicken pox grievance. In response to these inquiries, Mr. Cornejo stated that he

wished to discuss the chicken pox grievance with you, as he did not believe the County had violated any policy. Although you stated you were available most days before noon, it does not appear any meeting took place.

On July 4, 2001, you sent another electronic message to Mr. Cornejo requesting the date of the next Stewards Council meeting to discuss your chicken pox grievance. Your correspondence also indicated that you were aware Local 250 believe your grievance lacked merit and you further stated your wish to present the matter to the Stewards Council.

Although not indicated by the paperwork you provided, you indicate that a Steward Council was convened to hear your arbitration request, and that your grievance was approved for arbitration.

In January 2002, you corresponded with Local 250 representative Amy Harrington about your grievance. Ms. Harrington indicated that Mr. Cornejo wished to review the information prior to filing a request for binding arbitration. On April 9, 2002, you informed Ms. Harrington that you would provide her with the requested information.

On May 21, 2002, Ms. Harrington sent a letter to the Hospital requesting the grievance be set for binding arbitration. This action was undertaken to preserve relevant timelines.

On November 18, 2002, you inquired as to the status of the grievance with new Local 250 representative Kim Tavaglione. Ms. Tavaglione responded to your inquiry on November 25, 2002 although the facts do not indicate what she said.

On January 13, 2003, you again contacted Ms. Tavaglione regarding the chicken pox grievance. On January 22, 2003, having not heard from Ms. Tavaglione, you contacted her supervisor Dominic Chan about the grievance. On January 23, 2003, Mr. Chan indicated he would look into the matter and get back to you. In early March 2003, Mr. Chan and Mr. Cornejo met to discuss your grievance with Local 250's attorney.

On March 11, 2003, Mr. Chan sent you a letter indicating the grievance would not be elevated to binding arbitration as the attorney and Local 250 staff did not believe the grievance had merit. You were further informed that you could appeal this decision to Local 250's Executive Board.

On March 13, 2003, you sent an electronic message to Mr. Cornejo indicating your wish to appeal the decision to the Executive Board. You also indicated to Mr. Cornejo that you were considering filing an unfair practice charge against the union. On March 14, 2003, Mr. Cornejo indicated that despite the Stewards Council vote, an administrative decision was made to abandon the grievance.

On April 7, 2003, Mr. Cornejo indicated to you that he and Local 250 representative John Borsos would be available to meet with you on April 21, 2003. On April 8, 2003, you stated

your tentative availability and indicated you would contact Mr. Cornejo to confirm. On April 15, 2003, you indicated you would not be available to meet with Local 250.

On April 22, 2003, you sent an electronic message to Mr. Cornejo providing your arguments in favor of arbitration. On that same date, Mr. Cornejo responded, and provided May 5, 2003, as a possible meeting date. On April 22, 2003, you indicated you were not available to meet on that date. Through a number of additional electronic messages, it was determined that you would meet with Local 250 on April 24, 2003, at 10:30 a.m.

On April 24, 2003, you met with Mr. Cornejo and Mr. Borsos regarding your grievance. It was agreed at this meeting that Local 250 would resubmit the grievance to its legal counsel for further review. After this meeting, you sent Mr. Borsos an electronic message reiterating your thoughts on the chicken pox grievance.

II. Other Grievances

It appears that Local 250 is also pursuing a number of class grievances regarding Pharmacy bidding, the use of "as needed" employees, and the use of Pharmacy Registry Technicians. Facts provided regarding these grievances are noted below.

A. Shift Bidding Procedure

With regard to the bidding process, the facts are as follows. With regard to Shift Bidding, Article III of the Agreement provides:

> Shift bidding for all represented classes shall continue by current practice. Upon the written request of the Union, a Department shall negotiate with the Union to establish or to revise a shift bidding procedure. The determination of the shift bidding procedure shall be by mutual agreement. All shift bid postings shall include the following information: the nature of the assignment, days off, work location, and duration of the bid. The shift bidding procedure shall incorporate the principles of seniority.

There are three areas of work for Pharmacy Technicians; Inpatient, Outpatient and Storeroom. Current Pharmacy practice is to rebid each area of work separately.

On September 30, 2002, Ms. Tavaglione sent a request to the Pharmacy Director, Fred Hom, requesting a rebid for the Pharmacy Technicians. Ms. Tavaglione further requested the rebid take place department-wide; that is that all three areas be open for rebidding to all employees.

On October 9, 2002, Local 250 filed a grievance over the bidding procedures, asserting the contract required the Hospital to bid all areas together. On October 21, 2002, Mr. Hom denied the grievance at Step I, asserting the Pharmacy's current practice was to bid for shifts by area,

and that any change in this policy would require the Pharmacy to retrain all those employees whose areas changed.

On October 24, 2002, Ms. Tavaglione elevated the grievance to Step II. On November 25, 2002, the parties met for a Step II meeting, at which you were represented by several Local 250 representatives.

On December 5, 2002, the Hospital issued its Step II response, indicating that the contract did not require the Hospital to negotiate the areas of rebidding but only required them to negotiate the information used in bidding for positions. The Hospital also noted the detrimental effect a department wide bidding process would have on the Pharmacy.

On December 13, 2002, Ms. Tavaglione elevated the grievance to Step III.

On April 30, 2003, you inquired into the status of this, and the following grievances, and were informed by John Borsos that he would look into the matter as Ms. Tavaglione and Mr. Chan were in the middle of bargaining for a new contract. On May 5, 2003, you again inquired as to the status of the grievances. Mr. Borsos responded by indicating that the parties were still negotiating for a new contract and that he would provide information as soon as possible.

B. As-Needed Employees

In September 2002, Local 250 filed a grievance regarding the use of "as-needed" employees in the Pharmacy. With regard to as-needed employees, Civil Service Rule 102.23.6 states:

> 102.23.6 As-Needed
> A temporary or provisional appointment on either a full-time or part-time work schedule against a temporary requisition designated as as-needed to cover peak workloads, emergency extra workloads, necessary relief, and other situations involving a fluctuating staff.

On October 17, 2002, the grievance was elevated to Step II. On October 18, 2002, a Step II grievance meeting was held to discuss the issue. On October 25, 2002, the Hospital issued its Step II response stating the use of as-needed employees was consistent with the Civil Service Rules and the contract.

On December 19, 2002, Ms. Tavaglione elevated the grievance to Step III.

C. Pharmacy Registry Technicians

In February 2002, Local 250 filed a grievance over the use of Pharmacy Registry Technicians to do the work of Pharmacy Technicians. On March 1, 2002, Ms. Harrington elevated the grievance to Step II.

On October 1, 2002, after several postponements, the parties held a Step II grievance meeting. Although not provided with the charge, it appears a Step II response was issued, as on November 26, 2002, Ms. Tavaglione elevated the grievance to Step III.

III. Discussion

Charging Party contends Local 250 has breached its duty of fair representation regarding the above grievances.

MMBA does not expressly impose a statutory duty of fair representation upon employee organizations and an early state appellate court decision reached the same conclusion[2]. However, an appellate court found that when a union voluntarily undertook to represent an employee, it owed the employee a duty equivalent to the duty of fair representation[3].

Most recently in Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213, the court stated that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." The court borrowed this standard from the United States Supreme Court's decision in Vaca v. Sipes (1967) 386 U.S. 171. Thus, based on the appellate court's use of the federal standard, under the MMBA a recognized employee organization breaches its duty of fair representation when its actions are arbitrary, discriminatory or in bad faith. This standard is not breached by the mere negligence of the union.

Most recently, PERB has reiterated its duty of fair representation standard in Coalition of University Employees (Buxton) (2003) PERB Decision 1517-H. With regard to arbitrary conduct, the Board has stated, citing United Teachers of Los Angeles (2001) PERB Decision No. 1453, that in order to state a prima facie case, a charging party:

> . . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rationale (sic) basis or devoid of honest judgment. (Citations omitted.)

Based on the facts provided in both the amended and original charges, Local 250's conduct does not violate the duty of fair representation for the reasons provided below.

With regard to the chicken pox grievance, it is clear that grievance processing has taken over two years. This delay is the result of the Hospital's failure to respond in a timely manner and

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[2] In Andrews v. Board of Supervisors of Contra Cost County (1982) 134 Cal.App.3d 274, the court found that because MMBA section 3502 allows individuals to represent themselves in their employment relations with the employer, exclusive representation was absent and the need for a reciprocal duty of fair representation did not exist.

[3] Lane v. IUOE Stationary Engineers (1989) 212 Cal.App.3d 164.

due in part to the number of representatives who have come and gone from Local 250. However, nothing herein demonstrates Local 250 has acted in bad faith or devoid of honest judgment. Moreover, the extended duration of this grievance process has not precluded the possible ultimate arbitration of this grievance as Local 250 preserved the timelines in 2002.

Although a Stewards Council voted to take the grievance to arbitration, a consultation with Local 250's legal counsel urged the union to reverse this decision, as it appeared to the union that the grievance was without merit. Local 250 communicated this decision to you and met with you to discuss their reasons and their decision. Moreover, the union agreed to have its legal counsel review the matter a second time. While you may not agree with Local 250's decision, the duty of fair representation is not breached by such a disagreement. (United Teachers of Los Angeles (2001) PERB Decision No. 1453.) Additionally, PERB will not judge whether a union's interpretation was "correct," but only whether that judgment was devoid of any rational basis or reached for arbitrary reasons. (Id.)

With regard to the additional three grievances, it is unclear how Local 250's conduct demonstrates bad faith or arbitrary conduct. Each of the grievances has been diligently pursued through Step III, and you have been informed of such conduct, as evidenced by your possession of letters from Local 250 documenting the progress of these grievances. While the Step III responses may be taking longer than you expect, there is no reason to believe the union has "abandoned" the grievances or acted arbitrarily. As explained to you by Mr. Borsos, SEIU is currently negotiating a successor agreement for the thousands of employees in your bargaining unit, and such negotiations have taken up much of the representatives' time. Moreover, as each grievance has been elevated to Step III, the union's timelines have been preserved and are not prejudiced by the delay. As the union has pursued these grievances and has kept you informed of their progress, the charge fails to state a prima facie violation of the MMBA.

Right to Appeal

Pursuant to PERB Regulations,[4] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

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

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON

General Counsel

By _
Kristin L. Rosi
Regional Attorney

Attachment

cc: [***]

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

May 19, 2003

Timothy L. Hessong

Re: Timothy L. Hessong v. Service Employees International Union, Local 250
Unfair Practice Charge No. SF-CO-25-M
WARNING LETTER

Dear Mr. Hessong:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 24, 2003. Timothy L. Hessong alleges that the Service Employees International Union, Local 250 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation.

You are employed by the City and County of San Francisco as a Pharmacy Technician at San Francisco General Hospital. As such, you are exclusively represented by SEIU Local 250. Local 250 and the City are parties to a collective bargaining agreement which expires on June 30, 2003. With regard to Arbitration, the Agreement states in relevant part:

> Step IV Final and Binding Arbitration
>
> 485. Should there be no satisfactory resolution at Step III, the Union has the right to submit and advance the grievance to final and binding arbitration within thirty (30) calendar days of receipt of the Step III response. On an annual basis, the City and the Union shall establish a Standing Arbitration Panel by each submitting a list of seven (7) arbitrators. In any grievance referred to arbitration, the parties shall alternately strike from said List until a single name remains, and said arbitrator shall be designated to hear the matter. Whether the Union or City deletes the first name in the alternating process shall be determined by lot.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> 486. Except when a statement of facts mutually agreeable to the Union and City is submitted to the arbitrator, it shall be the duty of the arbitrator to hear and consider facts submitted by the parties.
>
> 487. The City and the Union must commence selecting the arbitrator and scheduling the arbitration within thirty (30) calendar days of ERD's receipt of the Union's arbitration request. The parties agree to recommend to the selected arbitrator that the hearing be scheduled within ninety (90) calendar days of his/her selection. Should the designated arbitrator be unable to comply with this requirement, the parties shall by mutual agreement commence contacting other arbitrators on the panel, beginning with the last struck, until an arbitrator is selected who will meet such requirement.

In December 1999, Local 250 filed a grievance on your behalf regarding your refusal to receive the varicella or chicken pox vaccine. Because you refused to receive the vaccination, the City ordered you off of work until you complied with this requirement. The grievance alleged you were not required to be vaccinated and thus the City should reimburse you for your sick leave.

During the last four years, the grievance has been handled by a number of grievance representatives, due to turn over at SEIU. In December 2000, the grievance was elevated to Step 3, which requires a response from the Employee Relation Division. Although not specified, it appears the grievance was rejected at Step 3. You do not provide a copy of the Step 3 response, nor do you provide the date upon which it was received. As such, it is unclear whether the City's response was timely.

In mid-2001, you inquired into the status of your grievance. At this time, Local 250 representative Ralph Cornejo stated that he did not believe you had a grievable issue and did not believe the grievance would be meritorious. Mr. Cornejo further suggested that if you disagreed with his analysis, you could appeal the decision to the Shop Steward's Council.

On November 13, 2001, your grievance was heard by the Shop Steward's Council. The Council voted to request arbitration on your grievance. After receiving all of the documentation regarding your grievance, on May 12, 2002, Local 250 representative Amy Harrington requested final and binding arbitration on your grievance to preserve contractual timelines.

On March 13, 2003, Local 250 sent you a letter stating it did not believe your grievance would be meritorious and as such would not take it to arbitration. You were informed you could appeal this request to the Executive Board. You have requested Local 250's Executive Board hear the matter.

Finally, you allege Local 250 has "abandoned" many other grievances you filed. However, the charge fails to provide any specific facts regarding these other grievances.

MMBA does not expressly impose a statutory duty of fair representation upon employee organizations and an early state appellate court decision reached the same conclusion[2]. However, an appellate court found that when a union voluntarily undertook to represent an employee, it owed the employee a duty equivalent to the duty of fair representation[3].

Most recently in Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213, the court stated that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." The court borrowed this standard from the United States Supreme Court's decision in Vaca v. Sipes (1967) 386 U.S. 171. Thus, based on the appellate court's use of the federal standard, under the MMBA a recognized employee organization breaches its duty of fair representation when its actions are arbitrary, discriminatory or in bad faith. This standard is not breached by the mere negligence of the union.

You contend Local 250 has breached its duty of fair representation by failing to take your grievance to arbitration. However, as noted above, the duty of fair representation is breached only if the union acts arbitrarily or in bad faith. Herein, Local 250 has expressed serious doubts about your grievance and has so informed you on at least two occasions. While the union has an obligation to explain why it has chosen not to pursue your grievance, the union has a wide range of reasonableness in rejecting grievances. (United Teachers of Los Angeles (2001) PERB Decision No. 1453.) Despite its belief that the grievance lacks merit, Local 250 has provided you with the right to appeal its decision to the Executive Board. As such, it is unclear why you believe the union has breached its duty of fair representation. While the grievance process may be a long one, there is no evidence demonstrating Local 250 has abandoned your grievance without merit. As such, this charge fails to state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 27, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

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[2] In Andrews v. Board of Supervisors of Contra Cost County (1982) 134 Cal.App.3d 274, the court found that because MMBA section 3502 allows individuals to represent themselves in their employment relations with the employer, exclusive representation was absent and the need for a reciprocal duty of fair representation did not exist.

[3] Lane v. IUOE Stationary Engineers (1989) 212 Cal.App.3d 164.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR