

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



SPENCER TACKE,

Charging Party,

v.

MODESTO IRRIGATION DISTRICT,

Respondent.

June

Case No. SA-CE-267-M

PERB Decision No. 1768-M

10, 2005

Appearances: Spencer Tacke, on his own behalf; Scott T. Steffen, Assistant General Counsel, for Modesto Irrigation District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Spencer Tacke (Tacke) of a Board agent's dismissal of his unfair practice charge. The unfair practice charge alleged that the Modesto Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by placing senior engineers in a bargaining unit with nonprofessional employees. Tacke alleged that this conduct constituted a violation of MMBA section 3507.3.

The Board has reviewed the entire record in this matter, including the District's response to the unfair practice charge, Tacke's position statement, the amended unfair practice charge, the District's response to the amended unfair practice charge, the Board agent's warning and dismissal letters, Tacke's appeal and the District's response to Tacke's appeal. In light of our review, the Board affirms the dismissal consistent with the discussion below.

<sup>1</sup>MMBA is codified at Government Code section 3500, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

## BACKGROUND

On August 10, 2004, the District's Board of Directors amended the District's Employer Employee Relations Resolution (EERR), placing District job classifications into three bargaining units. Senior engineers were placed into the Professional and Supervisory unit. In the original charge, Tacke asked that senior engineers be placed into the Management and Confidential unit or alternatively, a fourth unit consisting solely of professional employees.

In its response to the charge, the District agrees that professional employees are entitled to a separate unit under MMBA section 3507.3 and EERR section 8.2.f.<sup>2</sup> but asserts that requests for such a unit must be made pursuant to EERR section 8D.<sup>3</sup> Neither Tacke nor any other employee has made such a request. Under EERR Section 8D, one employee cannot require the District to put him in a separate bargaining unit. The District also argues that professionals should not be included in the Managerial and Confidential unit. The District states that it would acknowledge a separate unit of professional employees if there was sufficient numerical support for such a unit.

Tacke filed a position statement disputing some of the District's points. Tacke was unable to locate EERR section 8.2.f. He asserts that EERR section 8D applies to formation of

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<sup>2</sup>The appropriate citation for this section is EERR section 13A.2.f, which states:

Professional employees shall not be denied the right to be represented separately from non-professional employees.

<sup>3</sup>EERR section 8D provides:

When an employee organization found to be appropriate submits to the Employee Relations Officer a statement that it represents at least 30% but not more than 50% of the employees in the bargaining unit, the Employee Relations Officer shall arrange for a secret ballot election through the neutral third party, or division of Conciliation . . . the Employee Relations Officer may exercise discretion not to have an election, but may designate the employee organization as the Exclusively Recognized Employee Organization for the bargaining unit.

employee organizations, not bargaining units. He further believes that under MMBA section 3507.1, the District has discretion to include professionals in the managerial unit but has chosen not to.

In the warning letter, the Board agent indicated that MMBA section 3507.3 protects the right of professional employees to be represented separately from nonprofessional employees. However, he concluded that Tacke had not provided evidence that professional employees had sought separate representation from a labor organization other than the two unions now representing the District employees or that the District had denied professional employees that right. Further, Section 3507.3 does not prohibit professional employees from being represented in a unit including nonprofessionals nor does it provide a right for employees to opt out of union representation when there is no separate professional employees' units.

Tacke filed an amended charge, disagreeing with the Board agent's conclusion that he provided no facts showing that professional employees have sought to be separately represented. He indicated that on September 10, 2004, fourteen professional employees signed and submitted a petition to the District asking that it "honor our right, as defined by Section 3507.3, not to be placed in the same bargaining unit with non-professional employees" and that the professional employees be placed instead in the "Management/Confidential group, and further request that the undersigned be treated identical (sic) to those already placed in the Management/Confidential group." The petition, which is attached to the amended charge, also noted, that "This Petition should in no way be interpreted to single out the undersigned individuals as a separate bargaining unit." On September 14, 2004, John Gronholt (Gronholt), District assistant general manager for human resources, responded by memo that the petition to be placed in the Management/Confidential group was not appropriate however the request fell within the EERR and met the requirements for separating professional employees from the

Professional and Supervisory bargaining unit. Gronholt stated that he "was tasked" to provide written notice to the affected employee organizations, hold a hearing, and then make a determination on the composition of the unit consistent with the EERR and the MMBA. On December 6, 2004, eight professional employees submitted a second petition. That petition requests that the employees be placed in a separate bargaining unit.

The District counters that MMBA does not authorize transferring professional employees from one nonprofessional unit to another, as opposed to a separate unit. Tacke and other professional employees had petitioned on September 14, 2004 to be placed in the Management/Confidential Group. The District agrees with the Board agent that there is no evidence that Tacke or other professional employees have sought to be represented in a separate professional unit. Tacke and other employees did petition to be represented in a separate professional unit on December 6, 2004; however, that petition was untimely under the EERR because it was not filed between 120 days and 90 days before the expiration of the effective Memorandum of Understanding (MOU). The Board agent did not address this petition in the warning letter dated December 31, 2004.<sup>4</sup>

The Board agent determined that neither petition met the requirements of Section 3507.3. The September petition requested that the employees be treated the same as management/confidential employees and that the petitioners did not wish to be in a separate unit. The December petition requested that the employees be placed in a separate unit but did

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<sup>4</sup>On January 19, 2005, after the dismissal was issued on January 13, Tacke responded to the District noting that Gronholt never followed through with his statement that he would notify employee organizations and hold a hearing. Although Gronholt stated that the December petition was untimely, the only reason that petition was filed was because Gronholt did not timely process the September petition for a professional unit as stated in his September 14 memo. When the December petition was filed, there was no MOU between the District and International Brotherhood of Electrical Workers, the employee organization, and thus the "open period" defined in the District EERR may not be applicable.

not request that employees be "represented separately from nonprofessional employees by a professional employee organization" as required by Section 3507.3. The Board agent concluded that there was no evidence that either petition indicated that professional employees wished to be represented by a professional employee organization.

### DISCUSSION

MMBA section 3507.3 provides:

Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

'Professional employees,' for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

The right to separate representation for professional employees has been confirmed by the courts. (Alameda County Assistant Public Defenders Assn. v. County of Alameda (1973) 33 Cal. App. 3d 825, 828 [109 Cal.Rptr. 392].)

Section 14 of the District's EERR sets forth the procedure for modification of established appropriate units and provides, in pertinent part:

A. Requests by employee organizations for modifications of established appropriate units may be considered by the Employee Relations Officer only during an 'open period'<sup>5</sup>. Such requests shall be submitted in the form of a Recognition Petition and, in

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<sup>5</sup>EERR section 8C defines the open period as: "Any petition filed pursuant to this Section 8 must be filed, if at all, during the period that is not more than 120 days, nor less than 90 days, prior to the expiration of an MOU (the 'open period')."

addition to the requirements set forth in Section 8 of this Article, shall contain a complete statement of all relevant facts and citations in support of the proposed modified unit in terms of the policies and standards set forth in Section 13 hereof. The Employee Relations Officer shall process such petitions as other Recognition Petitions under this Article II.

B. The Employee Relations Officer may on his/her own motion proposed during the period specified in Section 12 of this Article that an established unit be modified.

1. The Employee Relations Officer shall give written notice of the proposed modification(s) to any affected employee organization and shall hold a meeting concerning the proposed modification(s), at which time all affected employee organizations shall be heard.

2. Thereafter the Employee Relations Officer shall determine the composition of the appropriate unit or units in accordance with Section 13 of this Article II, and shall give written notice of such determination to the affected employee organizations.

These procedures authorize an employee organization, not an individual employee or group of employees, to file a unit modification petition to create a separate unit of professional employees.

Tacke and other professional employees filed two petitions to separate its unit from the Professional and Supervisory unit. The September 10 petition indeed improperly sought to place the unit with the Management/Confidential group, which would also comprise a mixed unit of professional and non-professional employees. The petition also stated that it "should in no way be interpreted to single out the undersigned individuals as a separate bargaining unit." We agree with the Board agent that MMBA section 3507.3 does not require placement from one mixed unit to another. However, in his September 14 response to the petition, Gronholt committed to notifying the affected employee organizations and holding a hearing, after which he would "determine the composition of the professional bargaining unit apart from the Professional and Supervisory bargaining unit consistent with the provisions of the EERR and

MMBA." Gronholt never followed through with his written commitment and Tacke and other professional employees filed a second petition in December. In this petition, the employees asked to be placed in a separate bargaining unit from non-professional employees. The petition did not specifically request "to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees." (MMBA section 3507.3, emphasis added.) That the petition did not seek representation by a professional employee organization is the basis for the Board agent's dismissal.

PERB regulations<sup>6</sup> and the EERR section 14 only provide that an employee organization may petition for unit modification. Tacke and other professional employees, not employee organizations, filed the two unit modification petitions with the District. Despite Gronholt's acknowledgement of the professional employees' September petition, the charge should be dismissed because the petitions were not filed by employee organizations.<sup>7</sup> In light of the above discussion, the dismissal is affirmed.

#### ORDER

The unfair practice charge in Case No. SA-CE-267-M is hereby **DISMISSED WITHOUT LEAVE TO AMEND.**

Chairman Duncan and Member Shek joined in this Decision.

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<sup>6</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. See for example, PERB Regulations 61450, 32781, 81450, and 91450.

<sup>7</sup>We reject the District's argument that the December petition was not filed during the open period because, according to Tacke's undisputed allegation, there was no MOU in existence for Professional and Supervisory unit at the time both petitions were filed.