

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OPERATING ENGINEERS LOCAL 3,

Charging Party,

v.

COUNTY OF SIERRA,

Respondent.

Case No. SA-CE-292-M

PERB Decision No. 1915-M

June 27, 2007

Appearance: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for Operating Engineers Local 3.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Operating Engineers Local 3 (Local 3) of a Board agent's dismissal (attached) of the unfair practice charge. The charge alleged that the County of Sierra (County) violated section 3505 of the Meyers-Milias-Brown Act (MMBA)¹ by failing to provide information, unilaterally imposing a new memorandum of understanding, and refusing to meet and confer in good faith.

The Board has reviewed the entire record in this matter, including but not limited to the charge, the correspondence and all exhibits and attachments thereto, the warning and dismissal letters and Local 3's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below regarding the charge that the County failed to provide the requested information.

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

DISCUSSION

The record in this case includes correspondence between the Board agent and Local 3 following the issuance of the Board agent's dismissal. In particular, Local 3 filed additional documentation in support of its charge, but the Board agent ruled it was not timely filed. The following is a brief discussion regarding the disposition of this additional documentation.

In May of 2005, following a series of telephone conversations, the Board agent informed Local 3 that unless they provided additional information no later than 4:00 p.m. on May 25, 2005, she would dismiss the charge. In her dismissal letter, the Board agent indicated that Local 3 failed to provide any additional information by the May 25, 2005 deadline and, consequently, dismissed the charge.

In its appeal, Local 3 argues that the Board agent erred when she dismissed the case for failure to timely file additional information in support of the charge. According to Local 3, they met the filing deadline when they timely filed additional documents via facsimile and mail on May 25, 2005. In support of this argument, Local 3 provided a facsimile confirmation page that indicates the information was faxed to the Sacramento Regional Office on May 25, 2005, at 3:53 p.m. Based on this evidence, we find that Local 3 timely filed the additional documentation with the Board.

On June 6, 2005, the Board agent issued a letter in which she acknowledged receipt of Local 3's additional documentation. The letter further indicated that the documentation was not responsive to the defects identified in the warning letter. On appeal, Local 3 argues that there is sufficient evidence to establish a prima facie case for failure to provide information.

The documentation provided by Local 3 addressed the necessity and relevance of the request. However, the record reflects that the County provided some of the requested

documents and sought clarification regarding the balance of the request. The additional documentation failed to establish that Local 3 provided such clarification. Accordingly, we conclude Local 3 failed to establish a prima facie case for failure to provide information. For this reason, we find the Board agent properly dismissed this aspect of the charge.

ORDER

The unfair practice charge in Case No. SA-CE-292-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone:
Fax:(916)327-6377



May 25, 2005

Matthew Gauger, Attorney
Weinberg, Roger & Rosenfeld
428 J Street, Suite 520
Sacramento, CA 95814-2341

Re: Operating Engineers Local 3 v. County of Sierra
Unfair Practice Charge No. SA-CE-292-M
DISMISSAL LETTER

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2004. The Operating Engineers Local 3 (Union) alleges that the County of Sierra (County) violated section 3505 of the Meyers-Milias-Brown Act (MMBA)¹ by failing to provide information, unilaterally imposing a new memorandum of understanding, and refusing to meet and confer in good faith.

I indicated to you in my attached letter dated April 20, 2005, 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 4, 2005, the charge would be dismissed.

You and I spoke on May 13, 17, and 23 about the above referenced Charge. On May 23, we agreed that without either an amended charge or a request for withdrawal received by me on or before May 25, I would dismiss the matter. To date, I have not received any documents in reference to the above Charge. Therefore, I am dismissing the charge based on the facts and reasons contained in my April 20 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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

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 ww.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulations 32135(a) and 32130.) 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.)

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May 25, 2005

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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

Erin R. Koch-Goodman

Regional Attorney

Attachment

cc: James Curtis

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: 3278386
Fax: (916) 327-6377



April 20, 2005

Matthew J. Gauger, Attorneys for Operating Engineers Local 3
Operating Engineers Local 3
428 J Street, Suite 520
Sacramento, CA 95814

Re: Operating Engineers Local 3 v. County of Sierra
Unfair Practice Charge No. SA-CE-292-M
WARNING LETTER

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2004. The Operating Engineers Local 3 (Union) alleges that the County of Sierra (County) violated section 3505 of the Meyers-Milias-Brown Act (MMBA)¹ by failing to provide information, unilaterally imposing a new memorandum of understanding, and refusing to meet and confer in good faith.

Failure to Provide Information

In May 2004, the Union and the County began negotiations for a successor collective bargaining agreement. On May 4, 2004, the Union's business representative, Tina Marie Love, sent an email to County Counsel, James Curtis, requesting information in preparation for the upcoming negotiations.

On May 5, 2004, Mr. Curtis sent an e-mail to Ms. Love both responding to the Union's information request and attempting to clarify the Union's request. Mr. Curtis wrote that the County Auditor was in the process of gathering further information and would give Ms. Love most of what the Union had requested. In regards to the Union's request for copies of all County job descriptions, Mr. Curtis wrote that the information was kept by the County Clerks' Office. Because of the lengthy nature of Ms. Love's information request, Mr. Curtis wrote that the information would take some time to copy and that it would entail substantial copying costs. Therefore, the documents could be reviewed at the Clerks' Office and selected documents would be provided at her request. With regard to the Union's request for copies of all independent service and employment contracts, Mr. Curtis wrote that he was unsure of

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 ww.perb.ca.gov.

exactly what the Union was seeking and that the request was very broad. Mr. Curtis attached copies of an index provided by the County Clerk for Ms. Love's review and wrote that individual copies of the contracts could be provided at her request. The Union has not responded to Mr. Curtis to clarify the information sought or requested more specific information, nor obtained documents from the County Clerks' Office.

On April 7, 2005, this case was transferred from Leena Kwon, Board Agent, to me. Ms. Kwon's file notes indicate that she contacted Ms. Love and discussed the Charge. Ms. Love indicated that she was still not in receipt of all of the documents originally requested. Ms. Kwon requested Ms. Love fax over a list of information the Union had not yet received from the County. The file does not contain such a fax. On April 18, 2005, I spoke to Ms. Love regarding the Charge. At my request, Ms. Love forwarded to me, via email, a copy of the Unfair Labor Charge, Exhibit B and highlighted the questions that have yet to be answered by the County.

The Union asserts that the County has violated the MMBA by only providing part of the information requested. The Meyers-Milias-Brown Act provides in section 3500(a), "(I)t is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.,² Thus the exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Decision No. 143).³ PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (California State University (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

The County has provided some information, sought clarification as to additional information requested, and offered to make copies of items specifically requested by Ms. Love. In addition, the County has made some of the requested information available via the County Clerks' Office, but the Union has not availed themselves of this information. The Union now has the burden to respond to the County and clarify and identify the information requested, and further, request copies of specific documents necessary for representation. At this time, the facts fail to make a prima facie case for failure to provide information because the Union does not respond to the County and identify why the initial information provided is insufficient to meet the Union's needs.

² In addition, during bargaining the parties have "the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (Government Code section 3505.)

³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Unilateral Change

On October 18, 2004, the County notified the Union that it had prepared three draft MOUs to reflect the agreement for the year and wanted to submit them to the Board of Supervisors for their adoption. The County asked the Union to look over the MOUs for any misstatements, omissions or other errors. The Union replied that it wanted to return to negotiations to discuss salaries, work related benefits and the personnel code. The County responded that it was surprised by the Union's request to return to bargaining because the Union had only ever introduced one proposal during bargaining - health care costs.

On October 27, 2004, Ms. Love received a copy of the Board of Supervisors agenda for November 2, 2004. Mr. Curtis had placed on the agenda, "Approval and Adoption of MOU Between the County and the County Employees." On November 4, 2004, Mr. Curtis notified Ms. Love by e-mail, that the proposed MOUs had been pulled from the Board's agenda and that no action had been taken on them.

The Union argues that this is a unilaterally imposed MOU that has not been negotiated and is not the subject of tentative agreements. In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),⁴ PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.i Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 (165 Cal.Rptr. 908); Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The Union has failed to make a prima facie case for unilateral change because the proposed MOUs were never implemented by the Board of Supervisors. Nor does the Charge include facts indicating the County has otherwise implemented the MOUs.

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

⁵ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal13d 608.)

Failure To Meet and Confer In Good Faith - Surface Bargaining

At the outset of negotiations, the County presented the Union with a list of proposals that it wanted to discuss. The Union said that it would negotiate the County's proposals, but wanted to discuss the time sensitive issue of health and welfare first. The parties focused their negotiations on the health and welfare issues and resolved them in September 2004.

The Union states that it wants to continue with negotiations because health and welfare was the only issue discussed during negotiations. The County alleges that other proposals had been discussed and that the Union only submitted one proposal for the new MOU, which concerned the health and welfare issue.

The Union alleges that the County has refused to negotiate the new MOUs. The County states that they have offered to return to negotiations regarding the personnel code and other issues. . Subsequent to the filing of this Unfair Practice Charge, the parties have returned to negotiations. However, the Union believes that the County is unwilling to discuss economic issues such as wage increases because the County has conditioned the negotiation of economic matters on the resolution of non-economic matters.

Applying the totality of conduct test to other cases, PERB has concluded that conditional bargaining may demonstrate evidence of bad faith. In State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S (DPA), the employer linked pay raises with the union's agreement to support civil service reform legislation and the approval of an income tax cut. The Board found evidence of bad faith in the DPA case because the employer's pay raise proposal was conditioned on a matter over which the union had no control, approval of an income tax cut. However, the Board concluded that linking the pay raise to the support of the civil service reform legislation did not demonstrate bad faith because the union could decide whether to support the legislation. (See also State of California (Department of Personnel Administration) (1999) PERB Decision No. 1330-S; State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

The Union allegation that the County has conditioned the negotiation of economic matters on the resolution of non-economic matters is insufficient to establish a prima facie case of surface bargaining. The economic and non-economic issues referenced by the parties are all within the scope of bargaining. And unlike the above cited authority, in this case, the Union has the authority and control over both the economic and non-economic issues to be negotiated.

For these reasons the allegation that the County failed to provide information, unilaterally imposed a new MOU, and refused to meet and confer in good faith, 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

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April 20, 2005

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PERB. If I do not receive an amended charge or withdrawal from you before May 4, 2005, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Erin Koch-Goodman
Regional Attorney