STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1117, Charging Party, v. CITY OF TORRANCE, Respondent.	Case No. LA-CE-232-M PERB Decision No. 2004-M February 18, 2009

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for American Federation of State, County and Municipal Employees, Local 1117; Ronald T. Pohl, Assistant City Attorney, for City of Torrance.

Before Neuwald, Chair; Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Torrance (City) to the proposed decision of an administrative law judge (ALJ). The unfair practice charge filed by the American Federation of State, County and Municipal Employees, Local 1117 (Local 1117), alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to provide Local 1117 with notice and an opportunity to request negotiations before implementing a change to the vehicle usage policy for employees of the City's water operations division. The ALJ found that the City committed the charged violation.

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

At the hearing, the ALJ allowed telephonic testimony by former Local 1117 president Alan Lee (Lee) over the City's objection. In its exceptions, the City asks the Board to strike Lee's testimony but does not challenge the ALJ's ruling on the merits of the unilateral change allegation.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the ALJ's proposed decision, the City's exceptions and Local 1117's response thereto. Based on this review, the Board affirms the ALJ's denial of the City's motion to strike Lee's testimony for the reasons discussed below.

BACKGROUND

Unilateral Change[2]

From at least 1982 until March 1, 2005, the City allowed Water Service Technician IIIs to take a City truck home when they were scheduled to work weekend or holiday duty. In early 1998, the City and Local 1117 negotiated and adopted the Water Operations Division Rules and Regulations (Rules and Regulations). Section 21 of the Rules and Regulations allowed employees to take City vehicles home "in instances specifically allowed by an employee's supervisor." However, prior to March 1, 2005, the City never required Water Service Technician IIIs to request a supervisor's permission to take a truck home for weekend or holiday duty, nor did the City ever prohibit an employee from doing so.

On March 1, 2005, Senior Water Operations Supervisor, Alan Berndt (Berndt), issued a memorandum that quoted verbatim Section 21 of the Rules and Regulations and added that failure to follow the rules could result in discipline. When Berndt distributed the memorandum

[2]Though the unilateral change issue is not before the Board on appeal, these facts are presented to provide context for Lee's testimony.

to employees, he told them that, per instructions from Deputy Public Works Director, Jack Van Der Linden, they would no longer be allowed to take a truck home for weekend or holiday duty. The City consistently enforced this prohibition after March 1, 2005.

The PERB Hearing

Lee, the former Local 1117 president, was a member of Local 1117's bargaining team during negotiations over the Rules and Regulations in 1998. At the hearing, the City presented testimony that during those negotiations the parties discussed whether Water Service Technician IIIs, and specifically Lee, would be allowed to take a City truck home when they were scheduled to work weekend or holiday duty. City witnesses also testified that Lee had been prohibited from taking a truck home on several occasions when he was scheduled to work weekend or holiday duty.

After the City rested its case at the end of the first day of hearing, counsel for Local 1117, Bernhard Rohrbacher (Rohrbacher), informed the ALJ that he wished to call Lee as a rebuttal witness. At this time, Lee was no longer a City employee but was working for the American Federation of State, County and Municipal Employees International in Las Vegas, Nevada. Because Lee was out of state, Rohrbacher proposed to have Lee testify by phone. The City's counsel, Ronald Pohl (Pohl), objected to telephonic testimony on the grounds that it was not authorized by regulation and that he had no prior warning that a witness would be testifying by phone. Immediately following the City's objection, the ALJ ruled that Lee's testimony by phone would be allowed but the City could make a motion to strike the testimony.

The following morning, the hearing resumed with Lee testifying by telephone. Lee testified that, during the time he was a Water Service Technician III, he was never denied the ability to take home a City truck on the occasions he worked weekend or holiday duty. He also

testified that the parties never discussed employees taking a City truck home for weekend or holiday duty during negotiations over the Rules and Regulations in 1998.

During his examination of Lee, Rohrbacher said that he faxed Lee two exhibits. Lee testified that he did not receive the documents. Nonetheless, Rohrbacher questioned Lee about the two documents after reading their contents to Lee. Pohl then questioned Lee about the documents and about being told not to take a City truck home when he worked weekend or holiday duty. Following Pohl's questioning, Rohrbacher offered to fax the documents to Lee again. Pohl declined the offer. Pohl then made a formal motion to strike Lee's testimony. The ALJ asked both sides to address the motion in their post-hearing briefs.

ALJ's Proposed Decision

In his proposed decision, the ALJ denied the City's motion to strike Lee's testimony. The ALJ rejected the City's argument that PERB is bound by the telephonic testimony provision of the Administrative Procedure Act (APA),[3] which prohibits testimony by telephone if a party objects to it. The ALJ instead found that PERB has granted its ALJs broad authority to obtain a complete evidentiary record on which to make a decision. The ALJ went on to note that there was no question as to Lee's identity during his testimony, that the City had the opportunity to hear Lee's testimony and to cross-examine him, and that no credibility determinations were based on Lee's demeanor.

DISCUSSION

1. Motion to Strike Lee's Testimony

The City's exception to the admission of Lee's testimony is based exclusively on APA section 11440.30, which states in full:

[3]The APA is codified at Government Code section 11340 et seq.

> (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.
>
> (b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.

The City argues that PERB unfair practice hearings are subject to Chapter 4.5 of the APA, in which section 11440.30 is found, and therefore the ALJ erred in admitting Lee's testimony over the City's objection. Local 1117 agrees that PERB unfair practice hearings are subject to APA Chapter 4.5, but argues that section 11440.30 is an optional provision. Because PERB has not adopted section 11440.30, Local 1117 contends, its prohibition on allowing telephonic testimony over the objection of a party does not apply in unfair practice hearings.

Before turning to the relevant APA provisions, it is necessary to examine the statutory language governing the application of the APA to PERB proceedings. Prior to July 1, 1997, the APA provisions governing agency adjudication did not apply to PERB. As part of its 1995 overhaul of the APA, the Legislature amended section 3541.3 of the Educational Employment Relations Act (EERA)[4] to make the new general adjudication provisions found in APA Chapter 4.5 applicable to PERB. Section 3541.3(h) currently provides, in relevant part:

> Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.

Under this section, APA section 11425.10, the Administrative Adjudication Bill of Rights, applies to all PERB hearings. The remainder of APA Chapter 4.5 applies to PERB

[4]EERA is codified at Government Code section 3540 et seq.

unfair practice hearings but not to other types of PERB hearings, such as those on representation matters. Further, MMBA section 3509(a) provides that the "powers and duties of the board described in Section 3541.3" apply to proceedings under the MMBA. Thus, because the hearing in this case involved an alleged unfair practice under the MMBA, it was governed by the provisions of APA Chapter 4.5.

APA Chapter 4.5 contains both mandatory and optional provisions. APA section 11415.10(b) provides: "This chapter supplements the governing procedure by which an agency conducts an adjudicative proceeding." The California Law Revision Commission comment[5] to subsection (b) states that some provisions of the Chapter are optional, such as the informal hearing procedure, the emergency decision procedure and the declaratory decision procedure. According to the comment:

> The agency determines whether to use any of the optional provisions. The optional provisions do not replace any other agency procedures that serve the same purpose.

The comment also states that other provisions of Chapter 4.5 are mandatory and gives the Administrative Adjudication Bill of Rights, section 11425.10, as an example. The comment then says:

> The mandatory provisions govern any adjudicative proceeding to which this chapter is applicable, and supplement the governing procedure by which an agency conducts an adjudicative proceeding, subject to a contrary statute applicable to the particular agency or proceeding.

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[5]The California Law Revision Commission is an independent state agency charged with recommending reforms of state law to the Legislature. (Gov. Code sec. 8289.) "Because the official comments of the California Law Revision Commission 'are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it' [cit.], the comments are persuasive, albeit not conclusive, evidence of that intent." (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, 12, fn. 9 [50 Cal.Rptr.3d 585] (Alcoholic Beverage Control).)

Further, section 11415.20 provides: "A state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a conflicting or inconsistent provision of this chapter." Thus, a mandatory APA provision is binding on an agency unless an exemption is provided by state or federal statute or by federal regulation. An agency cannot exempt itself from a mandatory APA provision by its own regulations. Here, neither a state or federal statute nor a federal regulation exempts PERB from the operation of APA section 11440.30. Accordingly, that section is binding on PERB unless the section is optional.

Unfortunately, the Law Revision Commission comment to section 11415.10(b) does not categorize section 11440.30, or any of the other general procedural provisions contained in Article 9 of Chapter 4.5, as either mandatory or optional. Nor does the language of section 11440.30 itself indicate into which category it falls. In the face of this statutory silence, it is necessary to examine the legislative history of the 1995 APA revisions to determine the apparent intent of the Legislature regarding section 11440.30. (See Mays v. City of Los Angeles (2008) 43 Cal.4th 313, 321 [74 Cal.Rptr.3d 891] [if statutory language is ambiguous, the court "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history"].)

"In 1987, the Legislature directed the California Law Revision Commission to study administrative adjudication and propose reforms to the APA." (Alcoholic Beverage Control, at pp. 8-9.) The Law Revision Commission originally proposed a system that would apply across the board to all state agencies. (Michael Asimow, The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act (1996) 32 Tulsa L.J. 297, 302.)[6] Under this system, the new APA provisions would function as defaults and "agencies

[6]Professor Asimow was the principal adviser to the Law Revision Commission on the 1995 APA revisions. The California Supreme Court has found his prior "work on

would be invited to adopt regulations to change or delete the default provisions." (Ibid.) This approach was strongly criticized by the attorney general and most state agencies. (Id. at p. 303.) "[A]gencies complained that they would have to go through a complex and costly rulemaking proceeding – for which they lacked the personnel and budget – to get back to where they were in the first place." (Ibid.)

This criticism led to the more limited approach set forth in the Law Revision Commission's 1995 recommendation and report. (Id. at p. 303.) As adopted by the Legislature in S.B. 523, the 1995 APA revisions would: (1) set out an administrative adjudication bill of rights applicable to all agencies; (2) revise the APA's formal hearing procedures;[7] and (3) provide "a set of flexibility enhancing provisions" applicable to all agencies. (Ibid.) Regarding this third group of provisions, the Law Revision Commission Report stated: "In addition to the mandatory provisions of the administrative adjudication bill of rights, the proposed law includes a number of optional provisions that will add flexibility to and help modernize and expedite state agency hearing procedures, whether conducted under the 1945 California APA or under an agency's other hearing procedures. The major optional provisions are described below." (Recommendation on Administrative Adjudication by State Agencies (January 1995) 25 Cal. Law Revision Com. Rep. (1995) p. 106.) The very first optional provision discussed is "Telephonic Hearings." (Id. at p. 107.) The description of the content of that provision matches section 11440.30 (Ibid.) Thus, it appears that the Law Revision

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administrative law for the Commission highly persuasive." (Alcoholic Beverage Control, at p. 9, fn. 5.)

[7]"Although Section 3541.3 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter." (Cal. Law Revision Com. com., 32A West's Ann. Gov. Code (1995 ed. & 2008 supp.) foll. sec. 3541.3, supp. p. 204.)

Commission intended for section 11440.30 to be optional. There is no indication in the statute itself or in the legislative history that the Legislature intended differently.

The optional nature of section 11440.30 is further supported by the actual practice of state agencies regarding the section. Several agencies have adopted regulations explicitly stating that their hearing officers may not conduct all or part of a hearing by telephone or other electronic means if a party objects. (E.g., Fair Employment and Housing Commission, Cal. Code Regs., tit. 2, sec. 7429(c)(3) ["The hearing shall ordinarily be conducted with the parties present before the Hearing Officer, unless the Hearing Officer, with the approval of the parties, permits the hearing to be conducted by telephone, television, or other electronic means."]; Department of Motor Vehicles, Cal. Code Regs., tit. 13, sec. 115.07(b) ["The hearing officer shall not conduct all or part of a hearing by telephone, television, or other electronic means, if a party objects."]; Air Resources Board, Cal. Code Regs., tit. 17, sec. 60075.30(e) ["Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone or other electronic means."].) Adoption of these regulations is consistent with the "opt in" scheme contemplated by the Law Revision Commission and embodied in the 1995 APA revisions.

On the other hand, some agencies have adopted regulations that exempt their hearings from the requirements of section 11440.30. For example, the regulations governing special education hearings by the Department of Education provide that: "Notwithstanding Government Code section 11440.30 of the Administrative Procedure Act, the hearing officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits." (Cal. Code Regs., tit. 5, sec. 3082(g).) Similarly, the Department

of Insurance has adopted a regulation providing that: "The hearing officer may conduct all or part of the proceeding by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits, which shall have been previously received by all parties and by the hearing officer." (Cal. Code Regs., tit. 10, sec. 2509.58(b).) Both of these regulations exempt their adopting agencies from the prohibition in section 11440.30(b) against conducting a hearing by telephone if a party objects. If section 11440.30 was mandatory, the Office of Administrative Law could not have approved the regulations because they would be in conflict with existing law. (Gov. Code sec. 11349(d).)[8] This compels the conclusion that section 11440.30 is optional.

Nonetheless, this conclusion does not fully resolve whether section 11440.30 applies to agencies like PERB that have not adopted regulations regarding use of telephonic testimony in their hearings. As noted, the Law Revision Commission rejected a scheme in which the new 1995 APA provisions would serve as defaults in favor of a system whereby agencies could "opt in" to the APA's optional provisions. Under this system, if an agency has adopted a regulation specifically applying section 11440.30 to its proceedings, that section applies to all of the agency's hearings. Conversely, if the agency has adopted a regulation exempting its hearings from section 11440.30, that section does not apply to any of the agency's hearings.[9] But the

[8]Government Code section 11349(d) requires the Office of Administrative Law to determine if a proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

[9]In 1997, the Unemployment Insurance Appeals Board (UIAB) successfully sought a statutory exemption from section 11440.30. (Unemp. Ins. Code sec. 1953.5.) However, this does not necessarily mean that the UIAB could not have established an exemption by regulation. It merely shows that, for whatever reason, the UIAB preferred an exemption granted by the Legislature to one established by the agency's own regulations.

APA does not limit an agency to one of these two "all or nothing" options. Rather, consistent with the Legislature's intent that the optional provisions enhance agency flexibility, the APA also allows an agency to forego adopting a specific regulation on the subject and instead determine on a case-by-case basis whether to apply section 11440.30 to a particular hearing. Thus, because the Board has not adopted regulations regarding telephonic testimony in unfair practice hearings, PERB ALJs are free to apply section 11440.30 on a case-by-case basis.

For the reasons above, we find that APA section 11440.30 is optional and therefore PERB is not required to follow it in unfair practice hearings. As a result, the ALJ did not err in admitting Lee's telephonic testimony over the City's objection. Accordingly, we affirm the ALJ's denial of the City's motion to strike Lee's testimony.

2. Unilateral Change

Local 1117 urges the Board to uphold the ALJ's ruling that the City committed an unlawful unilateral change on the ground that the City did not properly except to that portion of the ALJ's proposed decision. PERB Regulation 32300(a)[10] states, in relevant part:

> The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

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

"Compliance with [PERB Reg. 32300(a)] is required in order to afford the respondent and the Board an adequate opportunity to address the issues raised." (Temecula Valley Unified School District (1990) PERB Decision No. 836.)

The City's exceptions do not address the merits of the unilateral change issue. In fact, the exceptions do not mention the substantive issue in this case at all. Rather, the City asserts that "the testimony of Mr. Lee must be stricken from the record and disregarded when the board weighs the evidence in this matter." The City then states in its Conclusion: "Upon the exclusion of this testimony, the state of the evidence leaves the Charging Party substantially short of meeting their burden of proof."

Even were the Board to rule in the City's favor regarding Lee's testimony, these two statements would not be sufficient to trigger review of the ALJ's ruling on the unilateral change allegation. Neither statement identifies any "specific issues of procedure, fact, law or rationale" to which the City takes exception, nor does either state any grounds for exception. Because the City failed to specifically urge an exception to the ALJ's ruling on the unilateral change issue, any exception on that issue has been waived. (PERB Reg. 32300(c).)[11] Accordingly, the ALJ's decision on the unilateral change issue remains binding upon the parties, but shall have no precedential effect with respect to other cases. (PERB Regs. 32215 and 32300(c); City of Porterville (2007) PERB Decision No. 1905-M; Palos Verdes Peninsula Unified School District (1979) PERB Decision No. 96.)

ORDER

The administrative law judge's denial of the City of Torrance's (City) motion to strike the testimony of Alan Lee is hereby AFFIRMED.

[11]PERB Regulation 32300(c) provides in full: "An exception not specifically urged shall be waived."

Further, upon the findings of fact and conclusions of law contained in the administrative law judge's proposed decision, it is found that the City violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by failing to provide the American Federation of State, County and Municipal Employees, Local 1117 (Local 1117), with notice and an opportunity to request negotiations before the City changed the vehicle usage policy for employees of the City's water operations division. By this same conduct, the City denied employees the right to be represented by Local 1117 and interfered with the right of Local 1117 to represent bargaining unit members.

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that the City, its governing council, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Changing the vehicle usage policy for water operations division employees without providing Local 1117 with notice and an opportunity to request negotiations over the policy change.

2. Denying employees the right to be represented by Local 1117.

3. Interfering with the right of Local 1117 to represent bargaining unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind the absolute prohibition on water operations division employees taking home a City truck for weekend or holiday duty announced March 1, 2005 and reinstate

the policy contained in section 21 of the 1998 Water Operations Division Rules and Regulations, unless the parties have subsequently negotiated a new work rule on the subject.

2. Reimburse employees for losses they incurred during the period they were unable to take home a City truck for weekend or holiday duty. They shall be reimbursed at the rate per mile that the City reimburses employees for the use of personal vehicles for City business. If no such rate exists, they shall be reimbursed at the rate the Internal Revenue Service has established as non-taxable. Additionally, affected employees shall be paid back pay for the uncompensated time added to their weekend/holiday duty workday and emergency repairs that resulted from the unilateral change of policy. The amount determined shall be augmented by the interest rate of 7 percent per year.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the City, indicating the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the PERB, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 1117.

Chair Neuwald and Member Wesley joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-232-M, American Federation of State, County, and Municipal Employees, Local 1117 v. City of Torrance, in which all parties had the right to participate, it has been found that the City of Torrance (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, and Public Employment Relations Board Regulation 32603(a), (b) and (c), by changing the vehicle usage policy for water operations division employees without providing the American Federation of State, County and Municipal Employees, Local 1117 (Local 1117) with notice and an opportunity to request negotiations over the policy change.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Changing the vehicle usage policy for water operations division employees without providing Local 1117 with notice and an opportunity to request negotiations over the policy change.

2. Denying employees the right to be represented by Local 1117.

3. Interfering with the right of Local 1117 to represent bargaining unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind the absolute prohibition on water operations division employees taking home a City truck for weekend or holiday duty announced March 1, 2005 and reinstate the policy contained in section 21 of the 1998 Water Operations Division Rules and Regulations, unless the parties have subsequently negotiated a new work rule on the subject.

2. Reimburse employees for losses they incurred during the period they were unable to take home a City truck for weekend or holiday duty. They shall be reimbursed at the rate per mile that the City reimburses employees for the use of personal vehicles for City business. If no such rate exists, they shall be reimbursed at the rate the Internal Revenue Service has established as non-taxable. Additionally, affected employees shall be paid back pay for the uncompensated time added to their weekend/holiday duty workday and emergency repairs that resulted from the unilateral change of policy. The amount determined shall be augmented by the interest rate of 7 percent per year.

Dated: _____ CITY OF TORRANCE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.