

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ALFRED LAM,

Charging Party,

v.

SEIU LOCAL 1021,

Respondent.

Case No. SF-CO-181-M

PERB Decision No. 2076-M

November 4, 2009

Appearance: Alfred Lam, on his own behalf.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Alfred Lam (Lam) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the exclusive representative of Lam's bargaining unit, SEIU Local 1021 (SEIU), violated the Meyers-Milias-Brown Act (MMBA)¹ by: (1) colluding with Lam's employer, the City and County of San Francisco (City), to close two grievances filed by Lam;² (2) failing to notify Lam or local SEIU officers of the grievance closure; and (3) failing to return Lam's telephone calls. The Board agent dismissed the charge on the grounds that it was untimely filed and failed to state a prima facie case of breach of the duty of fair representation.

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

² The City's role in the closure of Lam's grievances is the subject of the unfair practice charge in Case No. SF-CE-574-M. Lam's appeal of the dismissal of that charge is addressed in a separate Board decision.

The Board has reviewed the dismissal and the record in light of Lam's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

Lam is employed by the City as a counselor in the Juvenile Probation Department. On June 19, 2007, Lam filed a grievance alleging that he had been verbally harassed by his supervisor in retaliation for filing a complaint against the supervisor. The grievance was signed by an SEIU steward. On July 25, 2007, Lam filed a grievance alleging that Asian-American employees were being unfairly targeted for disciplinary action. Again, the grievance was signed by an SEIU steward.

On August 15, 2007, Lam sent two letters to the Chief Probation Officer moving both grievances to Level II. SEIU Local Vice President Kirk Edwards (Edwards) signed both letters. On September 5, 2007, Lam sent letters to the City's Employee Relations Division moving both grievances to Level III because the City had not responded to the grievances at Level II. Edwards again signed the letters.

On July 21, 2008, Lam called the Employee Relations Division to ask about the status of his two grievances. He was informed that both grievances were closed by City Labor Relations Manager Mary Hao and SEIU Worksite Organizer Margot Reed on January 25, 2008.

On July 25, 2008, Lam filed the instant unfair practice charge alleging that SEIU breached its duty of fair representation by colluding with the City to close his grievances and failing to notify him or any local SEIU official of the closure. The charge further alleged that Lam made "numerous attempts" to contact SEIU about his grievances.

The Board agent dismissed the charge on two grounds. First, she found the charge untimely because it was not filed until seven months after SEIU stopped pursuing his

grievances and the charge failed to establish that he could not have learned this through the exercise of reasonable diligence. Second, the Board agent found that Lam failed to allege any facts to show that SEIU acted arbitrarily, discriminatorily, or in bad faith by participating in the closure of Lam's grievances.

On appeal, Lam contends that SEIU "corroborated" with the City to close his grievances because it did not want to "alienate" the City. The appeal also reiterates the allegation that SEIU refused to return Lam's telephone calls.

DISCUSSION

1. Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

(Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd. (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. *(Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)³ In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. *(United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441; *Los Rios College Federation of Teachers, CFT/AFT (Violet, et al.)* (1991) PERB Decision No. 889.) A charging party bears the burden of demonstrating that the charge is timely filed. *(Long Beach Community College District* (2009) PERB Decision No. 2002.)

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. *(Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

The charge alleged that SEIU breached its duty of fair representation by colluding with the City to close Lam's grievances on January 25, 2008, and thereafter failing to notify him or local SEIU officers of the closure. Lam filed the instant unfair practice charge on July 25, 2008, exactly six months to the day after the alleged breach. Thus, these allegations are timely. However, the charge did not state when Lam contacted SEIU about his grievances. Therefore, Lam has not met his burden of demonstrating that the allegation regarding SEIU's failure to return his telephone calls is timely.

2. Breach of Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held 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." (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219, citing *Vaca v. Sipes* (1967) 386 U.S. 171.) In order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified School District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB

Decision No. 258.) The Board has held that an exclusive representative's settlement of a grievance without consulting the grievant does not constitute "arbitrary conduct" that would breach the duty of fair representation. (*Hart District Teachers Association (Mercado and Bloch)* (2001) PERB Decision No. 1456.)

The facts alleged in the charge show that SEIU pursued Lam's grievances up to Level III and then closed them in consultation with the City on January 25, 2008. The charge did not allege any facts establishing that SEIU acted arbitrarily, discriminatorily, or in bad faith by participating in the closure of Lam's grievances. Nor did SEIU's failure to consult with Lam prior to the closure constitute a breach of the duty of fair representation.

As for SEIU's failure to notify Lam of the closure of his grievances, the charge alleged no facts indicating that SEIU intentionally withheld this information from him. Thus, the charge did not establish anything more than negligence on the part of SEIU. "The duty of fair representation is not breached by mere negligence." (*Hussey v. Operating Engineers, supra*, 35 Cal.App.4th at p. 1219.) PERB has held that a union's negligent conduct breaches the duty of fair representation only when it "completely extinguishes the employee's right to pursue his claim." (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274.)

The charge alleged no facts demonstrating that SEIU's failure to notify Lam of the closure of his grievances had any effect on his ability to further pursue those grievances. The charge did not establish that Lam, as an individual employee, could pursue his grievances beyond Level III without SEIU's approval. Thus, even if SEIU had informed Lam of the closure immediately, the charge failed to establish that he had any means to pursue his grievances at that point. Accordingly, SEIU's negligent conduct did not breach its duty of fair representation.

As for the allegation that SEIU breached its duty of fair representation by failing to notify local SEIU officers of the grievance closure, this is an internal union matter which PERB may not review because Lam has not demonstrated that the lack of communication had a substantial impact on his employment relationship with the City. (*Service Employees International Union, Local 221 (Kroopkin)* (2009) PERB Decision No. 2006-M; *Service Employees International Union, Local 99 (Kimmatt)* (1979) PERB Decision No. 106.)

ORDER

The unfair practice charge in Case No. SF-CO-181-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.