

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ERIC E. MAXEY,

Charging Party,

v.

IFPTE, LOCAL 21, AFL-CIO,

Respondent.

Case No. SF-CO-179-M

PERB Decision No. 2077-M

November 4, 2009

Appearances: Eric E. Maxey, on his own behalf; Subha Varadarajan, Representative/Organizer, on behalf of Professional & Technical Engineers, Local 21, AFL-CIO.

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Eric E. Maxey (Maxey) of a dismissal of his unfair practice charge by a Board agent. The charge alleged that the IFPTE, Local 21, AFL-CIO (Local 21) violated the Meyers-Milias-Brown Act (MMBA)¹ when it failed to adequately represent him in connection with a grievance filed in response to his termination. Maxey alleged that the failure of Local 21 to provide adequate representation constituted a breach of Local 21's duty of fair representation in violation of MMBA section 3500.

We have reviewed the entire record in this matter and find the warning and dismissal letters (attached) well-reasoned, adequately supported by the record and in accordance with

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

applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as a decision of the Board itself.²

ORDER

The unfair practice charge in Case No. SF-CO-179-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.

² The dismissal letter indicates that Maxey did not file an amended charge. Maxey, however, filed an unfair practice charge on July 20, 2008, and an amended charge on July 24, 2008. The warning letter was issued on August 8, 2008, and Maxey did not file an amended charge in response. Since Maxey failed to cure the deficiencies set forth in the warning letter, the charge was properly dismissed.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



August 22, 2008

Eric Maxey

Re: Eric Maxey v. IFPTE, Local 21, AFL-CIO
Unfair Practice Charge No. SF-CO-179-M
DISMISSAL LETTER

Dear Mr. Maxey:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 20, 2008. Mr. Eric Maxey alleges that the IFPTE, Local 21, AFL-CIO (Local 21) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to adequately represent him during the processing of a grievance.

You were informed in the attached Warning Letter, dated August 8, 2008, 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 August 15, 2008, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons contained in the August 8, 2008 Warning 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 name and number, and the original and five (5) copies of all documents must be provided to the Board.

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.

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

A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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 95811-4124
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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,

TAMI R. BOGERT
General Counsel

By 
Laura Davis
Regional Attorney

Attachment

cc: Subha Varadarajan

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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August 8, 2008

Eric Maxey

Re: Eric Maxey v. IFPTE, Local 21, AFL-CIO
Unfair Practice Charge No. SF-CO-179-M
WARNING LETTER

Dear Mr. Maxey:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 20, 2008. Mr. Eric Maxey alleges that the IFPTE, Local 21, AFL-CIO (Local 21) violated the Meyers-Miliias-Brown Act (MMBA)¹ by failing to adequately represent him during the processing of a grievance.

Summary of Facts

Mr. Maxey alleges as follows. On April 4, 2008, Mr. Maxey contacted Local 21 because he had been released from employment with the City of Oakland without just cause in violation of the Memorandum of Understanding (MOU). The applicable MOU contained a formal grievance procedure and he asked Local 21 to pursue a grievance. He received no response from Local 21 for several days and so went to Local 21's office in person. There, he met with a representative, Ms. Varadarajan. On April 8, 2008, Local 21 filed a Step Three grievance. Mr. Maxey did not hear again from Local 21 until April 24, 2008 when Ms. Varadarajan advised him via an e-mail message that a meeting was scheduled with management to discuss the grievance and that she wanted to meet with Mr. Maxey prior to the management meeting. On May 1, 2008, she sent Mr. Maxey an e-mail message asking him to meet at a coffee shop on May 5, 2008 to discuss the case. Mr. Maxey alleges that at the May 5, 2008 meeting Ms. Varadarajan was unprepared and had no details regarding how she would present his grievance.

On May 7, 2008, Mr. Maxey and Ms. Varadarajan met with City of Oakland management as planned. Mr. Maxey recorded the meeting with his digital recorder. Ms. Varadarajan read the grievance aloud and then told Mr. Maxey to present his case. Mr. Maxey was upset because he expected Ms. Varadarajan to present his case, nonetheless, he went ahead. Mr. Maxey cited to the MOU, employee handbook and civil service rules in presenting his case and also stated that he had no prior disciplinary or performance issues during his tenure with the City.

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.

Pursuant to the MOU, the City of Oakland had ten days following the meeting to submit a response, or by May 21, 2008. Starting on May 20, 2008, Mr. Maxey contacted Local 21 four times to find out the City's response. The City requested an extension to June 5, 2008 and then to June 15, 2008, and then the City's determination had to be approved by a supervisor, causing further delays. Finally, on June 30, 2008, the City sent its response denying the Level Three grievance on the grounds that the just cause provisions of the MOU do not apply to Mr. Maxey because he is an exempt employee.

Applicable Law

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 (1995) 35 Cal.App.4th 1213.) The duty of fair representation is not breached by mere negligence or ineptitude and a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power." (Ibid.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517 that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, the Charging Party must allege facts demonstrating that 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.) In analyzing whether an honest judgment has been made, PERB does not decide whether the union's assessment was correct, but only whether its judgment had a rational basis and was not reached for reasons that were arbitrary or based upon invidious discrimination. (International Union of Operating Engineers, Local 39 (Siroky) (2004) PERB Decision No. 1618.)

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 (Wylter) (1993) PERB Decision No. 970.) For purposes of establishing a prima facie case at this stage of case processing, all facts alleged by the charging party are accepted as true. (San Juan Unified School District (1977) EERB² Decision No. 12.)

²Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

Discussion

In general, Mr. Maxey alleges that Local 21 did not communicate well with him in processing his grievance and he had to repeatedly call or e-mail Local 21 in order to get a response. He also alleges that the Local 21 representative assigned to his case was not prepared for her meeting with him or with City management and he wound up presenting his case mostly by himself. Further, he alleges that the City delayed responding to the grievance meeting for over a month, and Local 21 allowed that to happen. Despite these shortcomings, however, Mr. Maxey does not allege that he lost the right to pursue his claim or suffered other irreparable harm because of the union's allegedly dilatory and inept conduct.

A situation similar to the one here was presented in Coalition of University Employees (Buxton), supra, PERB Decision No. 1517. In that case, a grievant accused her union of failing to represent her when it failed to inform her of the progress of her grievance, failed to respond to the employer's request for clarification, did not notify the grievant of the employer's decision on the grievance, and instructed the grievant not to contact the union representative. The Board found that the union's conduct was not sufficiently egregious to constitute arbitrary conduct and a violation of the duty of fair representation. Although the union's conduct in Buxton may have been negligent, it did not violate the duty of fair representation. The Board further noted in Buxton that the failure to pursue a grievance in the way requested by the employee does not necessarily constitute a breach.


Likewise, Mr. Maxey does not demonstrate that Local 21 abused its power by acting in an arbitrary, irrational or dishonest way. His allegations may demonstrate conduct tantamount to "mere negligence," but he does not allege facts sufficient to show that Local 21 breached its duty of fair representation.

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

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amended charge or withdrawal from you before August 15, 2008, I shall dismiss your charge.
If you have any questions, please call me at the above telephone number.

Sincerely,

 Laura Davis
Regional Attorney

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