STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU-UNITED HEALTHCARE WORKERS WEST LOCAL 2005, Charging Party, v. WEST CONTRA COSTA COUNTY HEALTHCARE DISTRICT, Respondent.	Case No. SF-CE-691-M PERB Decision No. 2164-M February 24, 2011

Appearances: Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for SEIU- United Healthcare Workers West Local 2005; Foley & Lardner by Gregory W. McClune and Kristy Kunisaki Marino, Attorneys, for West Contra Costa County Healthcare District.

Before Dowdin Calvillo, Chair; McKeag and Miner, Members.

DECISION

MINER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by SEIU United Healthcare Workers West Local 2005 (SEIU), from a Board agent's dismissal of an unfair practice charge. The charge alleged that the West Contra Costa County Healthcare District (District) violated sections 3502, 3503 and 3506 of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulation 32603(a), (b) and (d)[2] when, during a decertification election period, a lead employee circulated and solicited employee signatures on a petition criticizing SEIU's activities and requested that the District

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

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

restrict SEIU's access to bargaining unit employees. The Board agent determined that the charge failed to state a prima facie violation of the MMBA and therefore dismissed the charge.

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

BACKGROUND

At all relevant times, SEIU was the exclusive representative of a unit of employees, including housekeepers, employed by the District at the Doctors Medical Center San Pablo/Pinole. SEIU and the District were parties to a memorandum of understanding (MOU) governing wages, hours and terms and conditions of employment of bargaining unit employees. Section 19 of the MOU provides that SEIU representatives shall have reasonable access to the District's facilities, both in public areas and in designated non-work areas, for the purpose of communicating with employees.

On March 2, 2009, the National Union of Healthcare Workers (NUHW) filed a petition with PERB seeking to decertify SEIU as the exclusive representative of employees in the unit represented by SEIU.

Roger Allen (Allen) is employed by the District in the classification of EVS lead housekeeper.[3] The position of lead housekeeper is included in the bargaining unit covered by the MOU. In addition to his regular housekeeper duties, Allen is in charge of the EVS department when the managers are away. In that capacity, Allen has the authority to assign and reassign employees, direct their work, adjust schedules and call in replacement employees to cover staff vacancies, authorize overtime if necessary to cover vacancies, and report

[3] "EVS" stands for the Environmental Services Department.

employees for insubordination. As the lead housekeeper, Allen receives $1.10 more per hour than other employees.

According to testimony provided by Allen in a related hearing on August 25, 2009, in PERB Case Nos. SF-CE-641-M, SF-CE-648-M, SF-CO-201-M, and SF-DP-281-M, Allen performs a variety of duties when he is in charge of the EVS during the absence of the manager.[4] In the mornings, before his supervisors arrive, he sometimes has to decide where to assign an employee. He also answers phone calls in the office and orders supplies. In addition, he has the authority to adjust the schedule and call in replacements when people call in sick. To do so, Allen either goes down the seniority list and calls people in or, depending upon the census in the hospital, moves workers around by reassigning them during their shift. If a department calls in with a request, such as to have a bed made, Allen has the authority to direct a particular housekeeper to perform the work. Allen has the authority to offer overtime to housekeepers on the basis of seniority if he is unable to get someone else to come in without incurring overtime. Allen has the authority to report a housekeeper for insubordination in the event the employee refuses to perform work directed by him. Allen testified, however, that he does not report to managers whether an employee is doing a good job or a poor job, because "I'm a union member too."

On April 8, 2009, Allen prepared and circulated a petition among EVS employees and employees in other departments who are also in the bargaining unit represented by SEIU. The petition is addressed to Charm Patton (Patton), human resources department manager, and states:

> We, the undersigned, and others are fed up with the harrassment [sic] of SEIU staff whom you have allowed into our break rooms

[4] PERB has the authority to take official notice of its own records. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.)

throughout the hospital. In doing so, you have infringed on our rights to take our breaks and lunches in peace.

Last week the Radiology/Ultrasound Dept. called the security guards on the SEIU staff who came to their break room. Also, yesterday afternoon I was paging one of our EVS employees overhead and by her pager for 15-20 minutes. When the EVS employee finally responded to my page, she told me that she was putting toilet tissue in a bathroom. While she was still there, a SEIU staff member approached her and started talking rather rudely to her.

SEIU staff are NOT to approach employees while they are working! They are not to approach employees at all. SEIU staff should wait for the employee to come to them if they have any questions.

We, the undersigned, request that you inform SEIU staff to stay out of the break rooms in all shifts, so we can take our breaks and lunches in peace. We also request that you inform SEIU staff to stay in the cafeteria and not wander around the hospital harrassing [sic] the employees.

Thank you.

Roger Allen, EVS Lead housekeeper

The petition was signed by twenty employees, including Allen. Six of these employees were from EVS, with the remainder from other departments.

Subsequently, Allen[5] delivered the petition to Patton's office and demanded that the District enforce the demands set forth therein by prohibiting any contact between SEIU staff and employees of the unit, requiring SEIU staff to stay out of the break rooms on all shifts, and restricting SEIU staff to the cafeteria. According to the District, human resources manager

[5] The original charge alleged that the petition was presented by Allen and a group of bargaining unit employees. The amended charge alleges that the petition was presented by Allen alone.

Lydia Chan informed Allen that the District could not go along with the demands and would allow the SEIU representatives into the employee break room as required by the MOU.[6]

BOARD AGENT'S DISMISSAL

The Board agent determined that the facts as alleged failed to establish that Allen's actions in soliciting signatures and presenting the petition to the District may be imputed to the District. Accordingly, the Board agent dismissed the charge for failure to state a prima facie case of unlawful domination or interference with protected activities.

CHARGING PARTY'S APPEAL

On appeal, SEIU contends that it has made a prima facie showing that: (1) Allen had supervisory authority over bargaining unit employees; (2) Allen's duties made it reasonable for bargaining unit employees to believe that he had apparent authority from the District to circulate a petition to employees at the worksite and on work time on the issue of whether SEIU's access rights should be restricted during a decertification election; (3) the District either knew of, consented to, or approved the petition; (4) the District did so for the purpose of interfering with the bargaining unit members' right to be represented by SEIU; and (5) this conduct interfered with SEIU's rights to represent its members and access their place of employment, as well as encouraged employees to join and support the decertification petition.

DISCUSSION

MMBA section 3502 guarantees to covered public employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on matters of employer-employee relations. Section 3503 affords

[6] In determining whether to issue a complaint, the Board may consider uncontroverted facts provided by a respondent. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M.)

recognized employee organizations the right to represent their members in their employment relations with public agencies. PERB Regulation 32603(d) makes it an unfair practice for a public agency to dominate or interfere with the formation or administration of any employee organization, to contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of the rights guaranteed by MMBA section 3502.[7] To state a prima facie case of unlawful domination or interference, the charging party must allege facts that demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103 (*Santa Monica*); *Redwoods Community College District* (1987) PERB Decision No. 650.)[8] Proof that an employer intended to unlawfully dominate, assist or influence employees' free choice is not required, nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (*Santa Monica.*) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Ibid.*)

The central issue in this case is whether the charge alleges sufficient facts that, if proven at hearing, would establish that, in circulating and presenting the petition seeking to

[7] PERB Regulation 32603 also makes it an unfair practice for a public agency to: "(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507" and "(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507."

[8] 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.)

restrict SEIU's access to employees, Allen acted with the apparent authority of the District so as to state a prima facie case of unlawful domination or interference.

Apparent Authority[9]

Both PERB and the courts have held that apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question. (*Compton Joint Unified School District* (2003) PERB Decision No. 1518 (*Compton*); *Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (*Chula Vista*); *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 781 (*Inglewood*).) Thus, apparent authority may be found when the employer has knowledge of its employee's activities and fails to repudiate or disavow them (*Compton*; *Chula Vista*; *Antelope Valley Community College District* (1979) PERB Decision No. 97) or where the employer engages in additional acts in furtherance of the agent's conduct that signify that it has ratified the employee's conduct (*Compton* [in addition to having knowledge of threats made by bargaining unit employee and failing to repudiate them, school principal questioned an employee about a meeting where the alleged threats occurred and removed her from the school leadership team].) "[T]he burden of proving agency, as well as the scope of the agent's authority, rests upon the party asserting the existence of the agency and seeking to charge the principal with the representation of the agent." (*Inglewood*, at p. 780.)

SEIU contends that, because Allen's duties as lead housekeeper included a variety of supervisory duties, he was acting with the apparent authority of the District when he circulated and presented the petition seeking to restrict SEIU's access to bargaining unit employees. Because the only sworn testimony on this issue is that provided by SEIU to the Board agent,

[9] SEIU does not contend that Allen had actual authority to act on behalf of the District.

SEIU contends, only an administrative law judge can determine whether Allen's "laundry list of duties as a 'lead' worker are sufficient manifestations to create a reasonable basis for employees to believe that he had apparent authority to act" on behalf of the District.

To state a prima facie case, however, the charging party must allege sufficient facts that, if proven true at a subsequent hearing, would establish a violation of the Act. (*Oakland Unified School District* (2009) PERB Decision No. 2061.) PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Apart from the allegations regarding Allen's supervisory duties, the charge fails to allege any facts that would establish that the District created a reasonable basis for employees to believe that Allen was authorized to engage in the conduct of circulating a petition seeking to restrict SEIU's access to bargaining unit employees. The charge also fails to allege facts that would establish knowledge or ratification of Allen's conduct by the District. Nonetheless, SEIU asserts that the fact that Allen was authorized to perform some duties that could be considered supervisory vested him with apparent authority to act on behalf of the District in all areas. The charge is devoid of any facts that would establish that the performance of these duties would reasonably lead employees to believe that Allen was authorized to circulate petitions on behalf of the employer requesting the exclusion of union representatives. To the contrary, the facts as alleged would tend to lead a reasonable person to believe that Allen was

not acting on behalf of the employer but rather on behalf of bargaining unit employees when he presented the petition to the District. The mere fact that Allen had the authority to perform some supervisory duties in the absence of his own supervisors is insufficient to establish that he had apparent authority to act on behalf of the District in circulating a petition seeking to limit SEIU's access to bargaining unit employees.

Moreover, the charge fails to allege facts that would establish knowledge or ratification of Allen's conduct by the District. There is no showing that the District knew of, consented to or authorized Allen's actions. Rather, the facts indicate that the District had no knowledge of Allen's conduct and rejected his request when presented with it. Therefore, the charge fails to state facts sufficient to establish that Allen had apparent authority to circulate the petition.

District's Knowledge

SEIU contends that its theory of liability does not require that additional facts be alleged to establish that the District had independent knowledge of Allen's conduct, and that Allen's own knowledge and approval of the petition is sufficient to impute knowledge to the District. As discussed above, however, for apparent authority to exist, there must be a showing of facts to indicate that the actions of the District created a reasonable belief that the District authorized Allen to act on its behalf in circulating the petition. No such facts are alleged here.

SEIU also asserts that it disputes the District's assertion that it rejected the petition. While SEIU contends that it presented evidence at a consolidated hearing in the related case that the District "engaged in deliberate conduct to do exactly what Mr. Allen's petition demanded, that is, restrict SEIU-UHW's access rights," it has provided no facts to support this assertion in this matter. Accordingly, SEIU's argument is rejected.

CONCLUSION

SEIU has failed to establish a prima facie case of unlawful domination or interference based upon Allen's circulation and presentation of a petition seeking to restrict SEIU's access to bargaining unit employees. Accordingly, the charge is dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-691-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.