STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MOHAMED HOSNY, Charging Party, v. IFPTE, LOCAL 21, AFL-CIO, Respondent.	Case No. SF-CO-224-M PERB Decision No. 2192-M July 27, 2011

Appearance: Mohamed Hosny, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mohamed Hosny (Hosny) of a Board agent's dismissal of his unfair practice charge. The charge alleged that IFPTE, Local 21, AFL-CIO (Local 21) breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1] by failing to satisfactorily resolve an employment discrimination claim and failing to take a grievance to arbitration. The Board agent found that the charge was untimely filed and failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Hosny's appeal and the relevant law. Based on this review, we affirm the dismissal for the reasons set forth below.

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

BACKGROUND

Settlement of 2006 Civil Service Commission Decision

Hosny is employed by the San Francisco Municipal Transit Agency (MTA) as a Senior Administrative Analyst and is a member of Local 21. In 2003, he filed a complaint with the MTA alleging he was denied a promotion due to discrimination.[2] The MTA denied the complaint in 2004 and Hosny appealed the decision to the San Francisco Civil Service Commission (CSC). Local 21 representative Criss Romero (Romero) represented Hosny before the CSC. On June 21, 2006, the CSC issued a decision stating that the appeal was granted, but provided no further instructions to the parties on how the ruling was to be implemented. Following the issuance of the favorable CSC ruling, Romero attempted to negotiate a settlement with MTA on Hosny's behalf. Romero informed Hosny that he was trying to negotiate a position for Hosny as a Principal Administrative Analyst and to obtain back pay, but that MTA was not responding to him. Eventually, after Romero's attempts to reach an agreement failed, he stopped responding to Hosny's calls and email messages.

On August 8, 2006, Hosny sent an email message to Local 21 representative Bob Britton (Britton) complaining that Romero had not responded to his emails. Britton responded by saying that he had spoken with Romero and that Romero had said he would call Hosny. The email further advised Hosny to let Britton know if he did not get a call from Romero. There is no indication that Romero ever contacted Hosny or that Hosny followed up with Britton until sometime in late 2007.

On October 29, 2007, Britton sent an email message to MTA concerning the 2006 CSC ruling, with a copy to Hosny. The email message mentions prior discussions Britton had had with the CSC and states that Local 21 was considering legal action to enforce the CSC's ruling.

[2] The record does not indicate the alleged basis of discrimination.

Britton suggested a meeting with Local 21, Hosny, the City Attorney's Office and MTA. Hosny alleges that Britton never followed up on this email.

By letter dated March 6, 2008, Jennifer Johnston (Johnston) of the San Francisco Department of Human Resources (DHR) responded to a letter Hosny had sent in February of that same year. That letter acknowledges that the CSC ruling did not provide any direction for an appropriate remedy or resolution in granting his appeal, thus leaving the parties to resolve the matter on their own. The letter further states that the CSC no longer has authority over complaints against MTA, but that Johnston had contacted MTA representatives who indicated that they would be in contact with Hosny's union representative, Pam Covington (Covington), to schedule a meeting to discuss a possible settlement between Hosny and the MTA. The letter concludes with the statement, "You should hear from either party shortly; in the meantime, I thank you for your continued patience." After receiving this letter from Johnston, Hosny received no further communication regarding his CSC ruling and discrimination complaint from either CSC, MTA, or Local 21.[3]

<u>2008 Suspension</u>

In or around May 2008,[4] MTA suspended Hosny for five days for refusing to perform physical inspections of city bus shelters as directed by management. Hosny's refusal was based upon his assertions that he had back problems that prevented him from performing these duties, he lacked the necessary training and education, and that the inspections were not

---

[3] In the meantime, on October 4, 2007, Hosny filed a complaint with the CSC protesting a job announcement.

[4] It is unclear from the record whether the suspension was imposed in March or May 2008. In his charge, Hosny asserts that he was asked to conduct the inspections sometime in May 2008. However, in its July 31, 2008 denial of the grievance, DHR states that the MTA notified Hosny of the suspension on March 7, 2008. This discrepancy is irrelevant to the issues before the Board.

included in his initial job description but rather were added later in subsequent revisions that he was never informed of.

With the help of Local 21 representative Covington, Hosny initiated the grievance procedure and a grievance meeting was held on June 19, 2008 with Hosny's manager, Gail Stern (Stern). During that meeting, an agreement was reached under which Hosny would only need to visit bus shelters to confirm that repairs had been completed, and he would not be required to take pictures or conduct any repairs himself. Hosny agreed to this arrangement. Stern allowed him to conduct the bus shelter inspections at his leisure and said that she would organize a group visit to a bus shelter to further show Hosny what an inspection entailed. Covington advised Hosny that he should request reasonable accommodation for his medical condition if he sought to avoid performing the inspections, but that until such accommodation was granted, he needed to comply with this directive to avoid a charge of insubordination. In his charge, Hosny acknowledges that he was informed that, until he completed the reasonable accommodation paperwork, he still had to carry out his assignments.

In a letter to Covington on July 31, 2008, the DHR Employee Relations Division (ERD) denied Hosny's grievance to set aside his five-day suspension, based on his continued refusal to perform bus shelter inspections as directed.[5] The letter provides that Local 21 has twenty days from the date of receipt of the ERD's response to file a written appeal to arbitration.

On October 8, 2008, Covington sent a letter to Hosny informing him that, in light of his continued refusal to perform the inspections, it was impossible to prevail on the removal of his suspension and, therefore, Local 21 would not take the issue to arbitration. The letter states

[5] Hosny denies that he continued to refuse to perform the inspections after June 19, 2008, and appears to assert that any noncompliance was excused due to his medical condition or was outside the scope of his job duties. The issue of whether Hosny was in fact insubordinate is not relevant to this proceeding.

that, Hosny should continue with the reasonable accommodation process if he sought relief from his inspection duties. After Hosny filed the necessary reasonable accommodation paperwork and medical reports, his reasonable accommodation request was granted in December 2008, relieving him of the obligation to perform bus shelter inspections. MTA refused, however, to remove the initial five-day suspension.

Renewed Efforts to Obtain Union Assistance

In May 2009, Hosny began sending email messages to Local 21 President Dean Coate (Coate) in which he detailed his cases and asked for assistance. In a summary he prepared, Hosny expresses concern that he has not had any communication from Local 21 regarding the CSC ruling since March 2008. Hosny alleges that, during the period mid-2006 through 2008, Local 21 "went through a long reorganization process" and that, during this period, Coate asked him to "wait until the Union gets organized." The amended charge alleges that Hosny spoke with Coate in December 2009 and that Coate asked him for a summary of the case and told him that he was now in a position to help him. This prompted Hosny to re-send his previous email messages from May 2009. However, at some point after that December conversation, Coate informed Hosny that pursuing the matter would be difficult. Hosny then filed his unfair practice charge on April 13, 2010.

Hosny contends that Local 21 breached its duty of fair representation to him by not securing his settlement with MTA over his discrimination claim and for not submitting the grievance regarding his five-day suspension to arbitration.

DISCUSSION

New Evidence on Appeal

In his appeal, Hosny presents new evidence that was not presented in the original charge. The evidence consists of several series of email correspondence dated 2008 and a site visit report dated September 1, 2008.

"Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) On March 8, 2011, the Board agent issued a letter advising Hosny that the charge failed to state a prima facie case and warning him that the charge would be dismissed unless he amended the charge to state a prima facie case. Hosny did file an amended charge on March 28, 2011, as well as a response to Local 21's position statement on May 4, 2010. The Board agent dismissed the charge on April 5, 2011. All of the dates of the events alleged for the first time on appeal predate the dismissal of the charge, and the appeal provides no reason why they could not have been alleged in the original or amended charge. Thus, we find no good cause to consider these new allegations and evidence.

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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

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. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889; *International Union of Operating Engineers, Local 501 (Reich)* (1986) PERB Decision No. 591-H; *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.) In the case of a union's failure to process a grievance in which there is no definitive action upon which to base the limitations period, PERB has upheld the dismissal of a charge alleging violation of the duty of fair representation where the union failed to respond to the employee's letter and telephone messages for several weeks, finding that employee should have known that the union was not processing an employee's grievance prior to the expiration of the statutory limitations period. (*California State Employees Association (Chen)* (2005) PERB Decision No. 1736-S; see also *Oakland Education Association (Freeman)* (1994) PERB Decision No. 1057 [employee knew or should have known that union was failing to process his grievance when it failed to return his telephone calls or reply to his correspondence].)

Once the statute begins to run, the employee cannot cause it to begin anew by making the same request over and over again. (*California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC (Sutton)* (2003) PERB Decision No. 1553-S (*Sutton*); *California State Employees' Association (Calloway)* (1985) PERB Decision No. 497-H (*Calloway*).) Nor does an employee's complaint to higher-level union officials about the handling of the employee's grievance extend the limitations period. (*California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400.)

The charge in this case was filed on April 13, 2010. Therefore, to be timely, the alleged unlawful actions must have occurred on or after October 13, 2009. With respect to the 2006 CSC ruling, the last communication Hosny received from Local 21 was the October 2007 email from Britton to MTA seeking to resolve the settlement, to which no response was received. In March 2008, Hosny received a letter from DHR stating that MTA had been contacted and that he should be hearing from either MTA or Local 21. Although he received no communication from either entity, he then waited over a year to send his email messages in May 2009 to Local 21 President Coate asking for assistance, but received no response. An employee's continued attempts to obtain assistance from the union does not extend the statute of limitations. (*Sutton*; *Calloway*.) Thus, Hosny's repeated efforts to contact the union president did not relieve him of the obligation to file a timely charge. Having received no response to Britton's October 2007 email and Hosny's May 2009 inquiries, Hosny knew or reasonably should have known long before October 13, 2009 that further assistance from Local 21 was unlikely. Accordingly, the charge filed on April 13, 2010 was not timely filed.

Likewise, the charge was not timely filed with respect to Local 21's refusal to request arbitration over the 2008 suspension. Local 21 clearly informed Hosny on October 8, 2008 that it would not take the case to arbitration. Therefore, the charge filed over one and one-half years later was not timely. (*Teamsters Locals 78 & 853 (Hinek)* (2009) PERB Decision No. 2056-M.)[6]

---

[6] Given our determination that the charge was not timely filed, the Board need not and does not address the remaining issues raised on appeal.

On appeal, Hosny asserts that the delay in filing the charge was due to the actions of Coate, who allegedly asked Hosny sometime between 2006 and 2008 to "wait until the Union gets back in order." The charge fails to provide any specifics as to when any reorganization occurred. Thus, even if Hosny may have acted reasonably in waiting until the reorganization was complete, the charge fails to provide sufficient facts to establish when that occurred or that a delay of more than one and one-half years after the last communication he received from Local 21 concerning his CSC appeal was reasonable. Moreover, even after Coate failed to respond to Hosny's May 2009 inquiries, he still took no further action other than to reiterate his request in December 2009. Therefore, even assuming that he was not aware in 2008 that further action by Local 21 was unlikely, he knew or should have known that further assistance was unlikely when Coate failed to respond to his inquiries in May 2009, yet, he still waited nearly a year to file his charge. The fact that Coate finally told him after December 2009 that he would not help him does not excuse the prior failure to file a timely charge.

ORDER

The unfair practice charge in Case No. SF-CO-224-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.