

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CITY OF PARLIER,

Employer,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39,

Petitioner.

Case No. SA-RR-1148-M

Administrative Appeal

PERB Order No. Ad-421-M

June 4, 2015

Appearances: Lozano Smith by Dale E. Bacigalupi, Attorney, for City of Parlier; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for International Union of Operating Engineers, Stationary Engineers, Local 39.

Before Winslow, Banks and Gregersen, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the International Union of Operating Engineers, Stationary Engineers, Local 39 (Local 39) from an administrative determination (attached) by PERB's Office of the General Counsel dismissing a representation petition. The appeal alleges that the City of Parlier (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by adopting and applying rules for processing representation petitions that are repugnant to the MMBA, specifically those that purport to exclude confidential employees from units that include non-confidential employees. Local 39 alleges that this conduct constituted a violation of MMBA section 3507.5.

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

For the reasons discussed herein, we affirm PERB's Office of the General Counsel's finding that PERB lacks jurisdiction to consider the petition.

FACTUAL SUMMARY

On or about June 3, 2014, Local 39 filed with the City a "Petition for Recognition," seeking to represent a unit of administrative, miscellaneous, general and public works employees.

The classifications attached to the letter included "Accounting Technician I, II, III" and "Executive Assistant/City Clerk."

On June 6, 2014, the City's Interim City Manager, Israel Lara (Lara), notified Local 39 that the petition for recognition was deficient in several ways, including that it lacked a proof of employee support and included the position of "Executive Assistant/City Clerk," a position the City had designated as "confidential." Lara offered to consult with Local 39 to discuss the defects in the petition for recognition.

On June 10, 2014, Local 39 filed an "MMBA REPRESENTATION PETITION" with PERB marked as a "Request for Recognition" from the City. The MMBA representation petition included "all City rank and file employees" and excluded "Supervisory and management."

On June 13, 2013, the Office of the General Counsel sent a letter to Local 39 and the City acknowledging receipt of the recognition petition, and requesting the City to confirm whether it has adopted local rules concerning request for recognition petitions in accordance with MMBA section 3507.

On June 17, 2014, the City attorney forwarded various documents to the Office of the General Counsel, including the chapter of the Parlier Municipal Code that contains the City's

rules adopted in accordance with MMBA section 3507, (hereafter “Employer-Employee Relations Rules,” or “EERR”.)

On February 9, 2015, the Office of the General Counsel sent an “ORDER TO SHOW CAUSE” to the parties that stated, in relevant part:

The City’s EERR section 4.05.050 provides for petitions to request representation of employees in an appropriate unit. The City has asserted that it is processing the representation petition consistent with this section. Accordingly, it appears that the local rules referenced above are applicable to Local 39’s request for recognition, and that the matter should proceed under the local rules. If so, PERB would lack jurisdiction over any further proceedings, and the instant proceeding would be dismissed.

In light of the above, Local 39 is afforded this opportunity to SHOW CAUSE as to why the petition should not be dismissed.

Local 39 responded on February 11, 2015, acknowledging that the City has adopted rules regarding MMBA representation petitions for representation, but asserting: (1) that the City wrongly classified the accounting technician III as confidential,² and (2) the City’s rules prohibiting confidential employees from being in the same bargaining units as non-confidential employees is inconsistent with and repugnant to the MMBA.

On February 23, 2015, the City responded to both the February 9, 2015, letter from the Office of the General Counsel and Local 39’s February 11, 2015, letter asserting the City’s discretion and authority under MMBA section 3507.5 to designate certain positions as confidential and requesting PERB to dismiss Local 39’s petition.

² Prior to February 11, 2015, none of the City’s letters challenged the inclusion of the accounting technician III in the petitioned-for unit. The only position to which the City objected on the basis of alleged confidential status was the executive assistant/city clerk position.

Relevant Municipal Codes

Section 4.05.100 of the Municipal Code, "Policy and standards for determination of appropriate units," states in Subsection C:

Notwithstanding the foregoing provisions of this section, managerial, supervisory and confidential responsibilities, as defined in Section 4.05.020 of this chapter,³ are determining factors in establishing appropriate units under this article, and therefore such managerial, supervisory and confidential employees may only be included in units that do not include nonmanagerial, nonsupervisory and nonconfidential employees. Managerial, supervisory and confidential employees may not represent any employee organization which represents other employees.

Section 4.05.120 of the Municipal Code, "Appeals," states, in relevant part:

- A. An employee organization aggrieved by an appropriate unit determination of the employee relations officer under this article may, within ten days of notice thereof, request the intervention of the State Conciliation Service pursuant to Government Code §§ 3507.1 and 3507.3, or may, in lieu thereof or thereafter, appeal such determination to the city council for final decision within fifteen days of notice of the employee relations officer's determination or the termination of proceedings pursuant to Government Code §§ 3507.1 and 3507.3, whichever is later.
- B. An employee organization aggrieved by a determination of the employee relations officer that a recognition petition . . . has not been filed in compliance with the applicable provisions of this chapter may, within fifteen days of notice of such determination, appeal the determination to [*sic*] city council for final decision.

ADMINISTRATIVE DETERMINATION

On or about March 20, 2015, the Office of the General Counsel issued an administrative determination dismissing Local 39's Petition for Recognition on the grounds

³ Section 4.05.020 defines as "Confidential" an employee "who, in the course of his or her usual duties, has regular access to information relating to the city's administration of employer-employee relations."

that the City's local rules provide for "petitions to request representation of employees."

Local 39 had failed to demonstrate that PERB has authority over this matter pursuant to PERB Regulation 61000, "Application of Regulations" (applicable specifically to MMBA jurisdictions) which states, in relevant part:

Except as otherwise ordered pursuant to Chapter 1 . . . the Board will conduct representation proceedings . . . under MMBA in accordance with the applicable provisions of this Chapter only where a public agency has not adopted local rules in accordance with MMBA section 3507.

APPEAL BY LOCAL 39

Local 39 filed a timely appeal of the administrative determination with the Board on March 24, 2015. Local 39 asserts in its appeal that the City's rule excluding confidential employees from bargaining units comprised of non-confidential employees is repugnant to the MMBA, which does not require that confidential employees be "excluded from bargaining units." (Appeal, p. 2.) Although the City has a right to adopt a procedure for certifying an exclusive representative, it does not have the authority to adopt a rule that is inconsistent with the MMBA. According to Local 39, the MMBA only restricts confidential employees from representing non-confidential employees; the statute does not permit excluding confidential employees from bargaining units comprised of non-confidential employees.

CITY'S RESPONSE

The City responded to Local 39's appeal on April 2, 2015, urging that it should be dismissed because the City has adopted local rules of procedure under the MMBA, i.e., its EERR. The City notes that Local 39 has filed an unfair practice charge against the City in

which it makes the same allegations as are made in this case.⁴ The City also argues that Local 39 has failed to avail itself of the appeal procedures contained in Section 4.05.120 A and B (“Appeals”) of the City rules, which provide that an aggrieved employee organization must appeal an adverse determination to a “recognition petition” to the City council or with the state conciliation service “within 10 days of notice thereof.” The City alleges that Local 39 did neither, and therefore has failed to exhaust its remedies as provided in the City rules. Local 39 is consequently barred from seeking relief at PERB, according to the City, having elected to forego the local appeal remedy that was provided for this type of complaint.

DISCUSSION

It is well-settled that PERB does not have the authority to conduct representation proceedings under the MMBA unless a public agency has not adopted local rules in accordance with MMBA section 3507.⁵ (PERB Reg. 61000.) As the Board held in *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M:

⁴ The Board takes administrative notice of unfair practice charge Case No. SA-CE-887-M, which is currently pending before the Office of the General Counsel on an expedited basis.

⁵ MMBA section 3507 states in, relevant part:

(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

[¶]

(3) Recognition of employee organizations.

Based on both the plain language of MMBA section 3509, subdivision (a), and the legislative intent behind the 2003 amendment to that subdivision, it is clear that PERB regulations serve to “fill in the gap” when a local agency has not adopted a local rule on a particular representation issue.

In this case, the City has adopted local rules that address petitions by employee organizations for recognition as exclusive representatives. The City has specifically adopted a rule that permits the employee relations officer to designate which positions are confidential and establishes a definition of “confidential employee,” as it is specifically authorized to do by MMBA section 3507.5.⁶

Because the City has adopted such regulations, there is no “gap” for PERB to fill with its own representation rules. The local rules provide the means by which Local 39 can accomplish what it seeks, including an appeal to the City council of the determination that

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

[¶ . . . ¶]

(9) Any other matters that are necessary to carry out the purposes of this chapter.

⁶ MMBA section 3507.5 states:

In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

accounting technicians III are confidential. (*County of Orange* (2010) PERB Order No. Ad-386-M.)

Local 39 contends that the City's rule prohibiting confidential employees from being placed in non-confidential bargaining units is unreasonable because it is allegedly not consistent with, or does not effectuate the purposes of the express provisions of, the MMBA. We need not reach this issue in this case, because the appropriate avenue for such a challenge is an unfair practice charge pursuant to MMBA section 3509(b),⁷ not a representation petition before PERB. (See also PERB Reg. 32603; *County of Monterey* (2004) PERB Decision No. 1663-M, Proposed Dec., p. 27-29.) For this reason, we hereby deny the appeal and affirm the administrative determination.

In light of the above finding, we need not reach the issue of exhaustion of internal remedies by Local 39, as urged by the City.

⁷ MMBA section 3509(b) provides, in pertinent part:

(b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. . . .

Moreover, MMBA section 3507(d) provides:

Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

ORDER

The administrative determination in Case No. SA-RR-1148-M of the Office of the General Counsel that the Public Employment Relations Board lacks jurisdiction to consider International Union of Operating Engineers, Stationary Engineers, Local 39's Petition for Recognition is hereby AFFIRMED.

Members Banks and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377



March 20, 2015

Israel Lara, Interim City Manager
City of Parlier
1100 East Parlier Avenue
Parlier, CA 93646

Marina Magdaleno, Business Representative
International Union of Operating Engineers, Stationary Engineers Local 39
4644 E. Jacquelyn Ave.
Fresno, CA 93722

Re: Case No. SA-RR-1148-M
Administrative Determination

Dear Ms. Magdaleno:

The above-referenced Request for Recognition petition was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2014 by the International Union of Operating Engineers, Stationary Engineers Local 39 (Local 39).

Local 39 was informed in the attached letter dated February 9, 2015 that, based on the City of Parlier's (City) Employer-Employee Relations Rules (EERR) section 4.05.050¹ which provides for petitions to request representation of employees, PERB lacks authority to process the petition. Local 39 was advised that, if there were any additional facts which would demonstrate that PERB has authority over this matter pursuant to PERB Regulation 61000,² it should submit the information. Local 39 was further advised that, unless it submitted such information or withdrew the petition prior to February 24, 2015, the petition would be dismissed.

On February 11, 2015, Local 39 filed a letter stating that the City's rules were inconsistent with and thus repugnant to the MMBA. Local 39's February 11, 2015 letter, however, does

¹ It appears these rules were adopted and continued in effect in 1981 by the City in October 1997.

² The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations may be found at www.perb.ca.gov.

not deny that the City's local rules provide for petitions to request representation of employees. Further, Local 39's February 11, 2015 letter fails to demonstrate that PERB has authority over this matter pursuant to PERB Regulation 61000. Accordingly, this petition based on the facts and reasons contained in the February 9, 2015 letter.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (PERB Regulation 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(a) and 32130; see also Gov. Code, § 11020, subd. (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 PERB 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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (PERB Regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (PERB Regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (PERB Regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see PERB 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.

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A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal 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 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 (PERB Regulation 32132).

Sincerely,

James Coffey
Regional Attorney

JC

cc: Israel Lara, Interim City Manager