**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

| | |
|---|---|
| COUNTY OF SOLANO,<br><br>Employer,<br><br>and<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021,<br><br>Exclusive Representative. | Case No. SF-IM-191-M<br><br>Administrative Appeal<br><br>PERB Order No. Ad-458-M<br><br>January 9, 2018 |

Appearances: Azniv Darbinian, Assistant County Counsel, for County of Solano; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union Local 1021 (Local 1021) from an administrative determination (attached) in which PERB's Office of the General Counsel denied Local 1021's request for factfinding under section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] The factfinding request, which the Office of the General Counsel rejected as untimely, stems from a dispute between Local 1021 and the County of Solano (County) over the County's proposal to create an additional work unit comprised of Employee Benefit Specialists within the Employment and Eligibility Division of the County's Health and Social Services Department.

[1] 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 Board has reviewed the case file in its entirety in light of the issues raised by Local 1021's appeal. We find the administrative determination to be well-reasoned and in accordance with applicable law. We deny Local 1021's appeal and adopt the administrative determination as the decision of the Board itself.

## FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are adequately set forth in the attached administrative determination and are summarized here for context. On May 19, 2017, negotiations between Local 1021 and the County regarding the County's proposal to create an additional work unit affecting Employment Benefit Specialists reached impasse, and, pursuant to the County's local rules, a representative of the County contacted the State Mediation and Conciliation Services (SMCS) about mediation of the dispute.

On June 30, 2017, SMCS Mediator Joseph Rios (Rios) advised the parties' representatives via e-mail that he had been "assigned" as the mediator for their dispute, pursuant to the County's request. Local 1021 Field Representative Greg Carter (Carter) asserts in a sworn declaration that Local 1021 was not provided an opportunity to select from other mediators, as contemplated by the "mutual agreement, the selection … of a particular mediator" option under the County's local rules. However, he and the County's representative proceeded to exchange several messages regarding their availability for scheduling the mediation. On July 3, 2017, Carter agreed to mediation on either August 3 or 10, 2017, and the parties did conduct mediation on August 10, 2017.

At approximately 7:44 p.m. on August 14, 2017, Local 1021 attempted to file with PERB a request for factfinding regarding this dispute. Local 1021's request states that impasse was declared on May 19 and that a mediator was appointed on June 30, 2017. The following day, the

Board agent assigned to the case contacted Local 1021's legal counsel Kerianne Steele (Steele) and informed her that the request was untimely, as it was sent via facsimile to PERB on the 45th day after the appointment of a mediator, but after the close of regular business hours.

After further communications, Steele submitted a position statement, which included a copy of the County's local rules and Carter's declaration indicating that Local 1021 had not agreed to the appointment of Rios as the mediator until July 3, 2017, after Carter had met with Local 1021 members. Local 1021's position statement argued that "PERB must honor the provision in the County's local rules that confers upon the employee organization the right to mutually agree upon the selection and scheduling of a mediator," and that, because "[i]t is the date of mutual agreement that triggers the deadline … to invoke factfinding," Local 1021's request for factfinding on August 15 was still timely, as it was submitted within 45 days of July 3, 2017.[2]

## THE PARTIES' POSITIONS

Local 1021 argues on appeal that it has advanced a reasonable interpretation of the process for appointing or selecting a mediator under the County's local rules, and that the

[2] The provision at issue appears in Article 5, section 16.A.2. of the local rules. That provision reads, in relevant part:

> As soon as either party declares impasse or if a declaration of impasse is deemed to have occurred pursuant to Section 16 (A)(1) above, the County shall notify the California State Mediation and Conciliation Service that the parties have failed to reach agreement and shall obtain therefrom either (1) a designated mediator; (2) upon mutual agreement, the selection and scheduling of a particular mediator; or (3) a list of seven mediators. If the parties are provided a list of seven mediators, the parties shall select one from the list by, after a toss of coin (with the winner of the coin toss to decide which party shall move first), alternately striking names until one name remains. That person remaining shall serve as the mediator.

Office of the General Counsel erred by ignoring this interpretation and finding Local 1021's request untimely under a different method and timeline for appointing or selecting a mediator. Although Local 1021 concedes that the Office of the General Counsel is responsible for determining whether a request for factfinding is timely under the MMBA and PERB Regulations, it maintains that PERB has no authority to raise defenses to a factfinding request or to advance interpretations of the public agency's local rules that the public agency itself has not asserted. Because the County itself did not object to the timeliness of Local 1021's request for factfinding, but instead proceeded with selection of a factfinding panel until PERB's administrative determination raised the timeliness issue, Local 1021 contends that the administrative determination exceeded PERB's authority and should be reversed.

In its response to the appeal, the County objects that Local 1021's interpretation of the local rules would permit it to unilaterally extend the deadline for requesting factfinding by indefinitely withholding its "agreement" to the designation or appointment of a mediator long after such designation or appointment has already occurred. According to the County, this interpretation would frustrate the legislative purpose of ensuring that any factfinding that may occur as to a particular dispute begins relatively soon after the parties have reached impasse. The County contends that, under Board precedent, "it is up to the union to keep track of the statutory window period and to file its request for factfinding within that period," and that, because Local 1021 failed to do so here, the Board should affirm the administrative determination and deny both Local 1021's appeal and the underlying request for factfinding.

## DISCUSSION

MMBA section 3505.4, subdivision (a), provides, in relevant part:

> The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30

> days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

PERB Regulation 32802, subdivision (a), incorporates these same timelines. Under the statute, one of two events must occur before the exclusive representative has "not only a right, but a strict window period within which to request factfinding." (*City & County of San Francisco* (2014) PERB Order No. Ad-419-M, pp. 16-17, citing *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 6-7.) Those two events are the written declaration of impasse or the appointment of a mediator. (*Santa Cruz Central Fire Protection District* (2016) PERB Order No. Ad-436-M (*Santa Cruz*), pp. 5-6; *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M, pp. 5-6.)

As noted in the administrative determination, the statute contemplates three options, and thus three potentially different timelines, for the exclusive representative to submit a timely request for factfinding to PERB. The employee organization must request that the parties' differences be submitted to factfinding not sooner than 30 days, but not more than 45 days, following: (1) the appointment of a mediator pursuant to the parties' agreement to mediate, (2) the selection of a mediator pursuant to the parties' agreement, or (3) a mediation process required by the public agency's local rules. Which of these three options applies will necessarily depend upon the facts and circumstances of each case, including whether the parties have agreed to a process for selecting a mediator and whether the public agency has local rules which include a process for selecting a mediator.

PERB has declared the above timelines to be "clear and unambiguous." (*Santa Cruz, supra,* PERB Order No. Ad-436-M, p. 5.) However, PERB has no control over the procedures or timelines for conducting mediation or selecting a mediator that may be included in a public agency's local rules. The Legislature expressly authorized public agencies to "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," including "[a]dditional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." (MMBA, § 3507, subd. (a)(5).) It presumably contemplated the possibility that a public agency's local rules might provide for several mutually exclusive methods for selecting a mediator and/or initiating the mediation process without specifying which of the various methods is the default or which shall apply under what circumstances. Insofar as reasonable minds may differ over such provisions, PERB may not substitute its judgment for that of the local agency or rewrite its local rules to conform to PERB's preferences or views as to what might be more reasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338-339; see also *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13; *City of Glendale* (2007) PERB Order No. Ad-361-M, p. 4; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830.)

Here, for example, the County's local rules provide that a mediator be designated by SMCS, that he or she be selected by mutual agreement of the parties, or, that he or she be selected by the parties alternately striking names from a list of candidates until one is left. They do not, however, identify any of these mutually exclusive procedures as the default method for selecting a mediator, or specify whether they are to be applied in any particular order. A logical

inference is that they are to be applied in the order in which they appear in the local rules. That is, upon being contacted by one or both parties, SMCS may simply assign a mediator based on the agency's available personnel. If the assigned individual is unacceptable to one or both parties, then they proceed to the second option to determine if they can mutually agree on another individual. If, however, the parties cannot select a mediator by mutual agreement, then they would proceed to the next method of alternately striking names as a means of resolving that disagreement and allowing the mediation process to proceed.

However logical or reasonable this might seem to us, the local rules do not in fact specify a default preference or order of application for selecting a mediator, and we consider it both unnecessary and improvident, particularly in the context of a factfinding request, to make findings or conclusions as to whether the local rules conform to our interpretation or what we regard as logical or reasonable. (*Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, pp. 16-17; see also *City & County of San Francisco* (2014) PERB Order No. Ad-415-M, pp. 13-14.) As we noted in *Workforce Investment Board* (2014) PERB Order No. Ad-418-M, PERB's role in reviewing a factfinding request is limited. (*Id*. at pp. 32-33.) Under MMBA section 3505.4 and PERB Regulation 32802, all that is required to trigger the MMBA factfinding process is either the parties' participation in mediation, or absent mediation a declaration of impasse by one of the parties, plus a request by the exclusive representative for factfinding, accompanied by a statement that the parties have been unable to effect a settlement. (*Workforce Investment Board.*)

Moreover:

> In reviewing a factfinding request PERB relies on the parties' representations concerning the status of their bargaining and or mediation discussions and does not assess an employer's defenses to its duty to bargain. Nor does PERB determine whether the party

> seeking factfinding has articulated with sufficient clarity its position on the issue. These are matters properly left to clarifying discussions between the parties and for resolution in an unfair practice proceeding if either party files a charge. To inject such issues into a factfinding investigation would encourage both delay and gamesmanship, thus defeating the principal purpose of factfinding, namely, through intervention of a neutral to assist the parties in reaching a voluntary and prompt resolution of their differences and thereby promote "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."

(*Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M, p. 33, fns. omitted, citing MMBA, § 3500.)

As a general matter, where the exclusive representative has made a request for factfinding that is timely under any plausible interpretation of the public agency's local rules and accompanied by a statement that the parties have been unable to effect a settlement to their dispute, PERB must accept the request as timely and allow the parties to proceed to factfinding. (*Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M, pp. 32-33; *City of Folsom* (2015) PERB Order No. Ad-423, pp. 2-3, 5-6.) The problem here is that, while the local rules appear to contemplate selection of a mediator by mutual agreement of the parties as one option, Local 1021's conduct was inconsistent with that option, regardless of whether it was the default option or simply one option among others. Despite being informed as early as June 30, 2017 that Rios had been "assigned" to this dispute Carter's correspondence expressed no reservations about having Rios serve as the mediator, nor suggested any other mediator or any alternative process whereby the parties would mutually agree on the identity of the mediator. Instead, his conduct implicitly accepted that Rios would serve as the mediator as "assigned," and his correspondence concerned itself solely with matters of availability and scheduling a date for the

mediation. Regardless of the availability of an option to select a mediator by mutual agreement, Local 1021, by its conduct, appears to have permitted the appointment of a mediator by SMCS pursuant to the first-stated option in the local rules and/or pursuant to an implied agreement to mediate with knowledge that Rios had been assigned to the case by SMCS.

Local 1021 also complains on appeal that, while the Office of the General Counsel is responsible for determining whether a factfinding request is timely, under *Workforce Investment Board, supra*, PERB Order No. Ad-418-M, it does not "assess an employer's defenses to its duty to bargain" or have authority to raise issues or advance interpretations of a local agency's public rules that the agency itself has not advanced. The MMBA itself is silent on this subject and, unlike unfair practice proceedings, PERB does not as yet have detailed regulations or a well-developed decisional law assigning burdens of proof in MMBA factfinding proceedings or specifying whether all factual assertions must be accepted as true, even where, as here, the requesting party's own filings include contradictory facts, such as Local 1021's acknowledgement in its factfinding request form, that a mediator was appointed on June 30, 2017. (cf. *County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 20-22.) The issue is one of first impression. However, we find it unnecessary to decide the issue here because, even accepting Local 1021's interpretation that the County's local rules guarantee it an absolute right to select a mediator by mutual agreement, Local 1021's communications and other conduct were inconsistent with that interpretation and/or with the exercise of that right.

Again, we make no pronouncement as to the parties' rights and obligations under the County's local rules. To the extent Local 1021 alleges that it was denied the opportunity to mutually select Rios or a different mediator in violation of the County's local rules, it has the option of litigating that issue in separate unfair practice proceedings where PERB is better

equipped to resolve complex legal and material factual disputes and to determine what remedial measures, if any, are appropriate.

## ORDER

Service Employees International Union Local 1021's appeal from the administrative determination in Case No. SF-IM-191-M is hereby DENIED.

Chair Gregersen and Member Winslow joined in this Decision.

# PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

August 24, 2017

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Azniv Darbinian, Assistant County Counsel
County of Solano
675 Texas Street, Suite 6600
Fairfield, CA 94533

Re: County of Solano / SEIU Local 1020
Case No. SF-IM-191-M
**ADMINISTRATIVE DETERMINATION**

Dear Interested Parties:

On August 15, 2017,[1] the Service Employees International Union Local 1021 (SEIU) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[2] SEIU's factfinding request form, completed and signed by SEIU Field Representative Greg Carter (Carter), states that the dispute concerns the "Meet and Confer/Impasse process" with respect to Bargaining Unit 5. The request further states that impasse was declared on May 19 and a mediator was appointed on June 30.

## Facts

On August 15, the undersigned Board agent contacted SEIU's legal counsel Kerianne Steele (Steele) and explained that the request for factfinding was untimely as it was filed more than 45 days after the appointment of a mediator. Steele asserted that a mediator was appointed on June 30 thus the request had to be filed on or before August 14, exactly 45 days later. The Board agent agreed and stated that it appeared that SEIU's request was submitted by facsimile at 7:44 p.m. on August 14, and that PERB Regulation 32135(b) provides that "All documents, …, shall also be considered 'filed' when received during a regular PERB business day by facsimile transmission at the appropriate PERB office together with a Facsimile Transmission Cover Sheet…." Since PERB's business day ends at 5:00 p.m. in accordance with

[1] All dates are in the year 2017.

[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 MMBA and PERB Regulations may be found at www.perb.ca.gov.

Government Code section 11020, it appeared SEIU's factfinding request was filed the next business day on August 15, which was outside of the period to timely request factfinding.

Later that day, Steele informed the Board agent that SEIU would not withdraw SEIU's request for factfinding. Steele subsequently submitted an Entry of Appearance and Position Statement, the Declaration of Greg Carter Regarding Sufficiency of SEIU Local 1021's Factfinding Request, and a proof of service.

In the Position Statement, SEIU asserts:

> SEIU Local 1021 has previously challenged through an unfair practice charge the impasse resolution procedures in the County's local rules. Except in one respect that is not relevant here, the Public Employment Relations Board's ("PERB") Administrative Law Judge ("ALJ") upheld the County's impasse resolution procedures in its local rules as reasonable. (See Exhibit B[3] to the Declaration of Greg Carter.) In that earlier case, the ALJ did not analyze the process for selecting and scheduling an arbitrator [*sic*], (Section 16(A)(2)), yet she expressed deference to the County's rulemaking authority in all but one respect. Therefore, PERB must honor the provision in the County's local rules that confers upon the employee organization the right to mutually agree upon the selection and scheduling of a mediator. It is the date of mutual agreement that triggers the deadline in Government Code section 3505.4(a) to invoke factfinding. (See Government Code section 3505.4(a) ["but not more than 45 days, following the appointment *or selection of a mediator pursuant* to the parties' agreement to mediate or *a mediation process required by a public agency's local rules*," emphasis supplied].)

SEIU provides a copy of the County's Local Rules, including Section 16, "Impasse, Mediation and Fact-Finding," which provides, in relevant part:

> If a party does not request, in writing, to participate in mediation and/or fact-finding within the specified time limits below, the party shall be deemed to have waived its rights to mediation and/or fact-finding. If a party waives its participation in mediation and/or fact-finding, the County may, after holding a public hearing regarding the impasse, implement the last, best and final offer.
>
> A. Mediation

[3] Exhibit B is a copy of HO-U-1184-M, October 27, 2015, which "was not expressly adopted by the Board itself" and "may not be cited in other cases as precedent."

> 1. If representatives of the County and the recognized employee organization have reached impasse, then either may file with the other party a written declaration of impasse and its detailed position on all issues. As a means to resolve the impasse, the parties may mutually agree to use mediation.
>
> 2. As soon as either party declares impasse or if a declaration of impasse is deemed to have occurred pursuant to Section 16(A)(1) above, the County shall notify the California State Mediation and Conciliation Service that the parties have failed to reach agreement and shall obtain therefrom either (1) a designated mediator; (2) upon mutual agreement, the selection and scheduling of a particular mediator; or (3) a list of seven mediators. If the parties are provided a list of seven mediators, the parties shall select one from the list by, after a toss of coin (with the winner of the coin toss to decide which party shall move first), alternately striking names until one name remains. That person remaining shall serve as the mediator. All mediation proceedings shall be private. The mediator shall make no public recommendation, nor take any public position, at any time concerning the issues. The mediator shall not hold a hearing or make any recommendation (except privately to the parties), nor have authority to resolve the dispute.
>
> 3. If mediator fees are incurred for mediation, they shall be divided equally by the number of parties in mediation.
>
> 4. If the dispute is not settled within 45 calendar days after the appointment of the mediator, or upon agreement in writing by both parties within a longer period, the mediation shall be deemed to have concluded. Mediation shall be deemed concluded when at least one party determines mediation is unsuccessful and sends written notice to that effect to the other party.

SEIU also provides Carter's sworn Declaration wherein he asserts, among other things, the following:

> 5. Although the County's local rules expressly provide SEIU Local 1021 the opportunity to endeavor to reach "mutual agreement [regarding the] selection and scheduling of a particular mediator," SMCS and the County never provided SEIU Local 1021 that opportunity. Instead, on June 30, 2017, Joseph Rios [(Rios)] sent Marc Fox [(Fox)] and me an email … that said "I am assigned to your request." (He did not state anything about being "appointed.") SEIU Local 1021 was not provided an opportunity to select from various mediators. In my prior experience, when either SEIU Local 1021 or the County contacts

> SMCS to request a neutral, SMCS issues the parties a list of five or seven arbitrators or mediators and we have a conversation over the phone about who to select.
>
> 6. [] Rios and [] Fox exchanged several emails back and forth regarding scheduling of the mediation. It was not until July 3, 2017, after I conferred with my members that [] on behalf of SEIU Local 1021, I expressed our mutual agreement to mediate with [] Rios on the dates August 3 or August 10, 2017. The parties did proceed to mediate on August 10, 2017, which is one of the dates SEIU Local 1021 had mutually agreed to. A true and correct copy of the emails exchanged between [] Rios, [] Fox and me are attached hereto, marked as Exhibit C, and are incorporated by reference as though fully set forth at length herein.
>
> 7. I prepared and filed a factfinding request on August 15, 2017.[4] In the field of the PERB form that asks the date a mediator was appointed (if applicable), I wrote June 30, 2017, since that was the date that the County has mentioned to me in a letter dated August 11, 2017 as an "appointment" date. I have since reviewed the County's local rules more closely. The County was obligated under the local rules to obtain our mutual agreement to select and schedule a particular mediator. (Exhibit B, p. 21.) It was not appropriate, in light of the County's local rules, for SMCS to unilaterally appoint a mediator to our table. If the County requested of SMCS that a mediator be "appointed," that request was improper.
>
> 8. Given that SEIU Local 1021 did not express mutual agreement to select and/or schedule [] Rios as the mediator until July 3, 2017, SEIU Local 1021's factfinding demand was clearly timely. PERB and the County cannot ignore Article 5, Section 16(A)(2), which provides SEIU Local 1021 the right to mutually agree to and schedule a mediator.

SEIU also provides copies of the electronic mail (e-mail) messages from SMCS Mediator Rios. On June 30 at 2:22 p.m., Rios sent an e-mail message to County representative Fox and Carter, labeled "Subject: County of Solano v SEIU 1021 impasse mediation request," and stating: "Good Afternoon[,] I am assigned to your request. Currently, I am available July 13 or 14. Will any of these dates work? Let me know." Fox replied to all at 4:19 p.m. the same day and stated: "Joe, sorry, but July 13 and 14 do not work. What dates from July 24 — August 4 (but not either Tuesday) might you have available?" Rios replied to all at 4:21 p.m. the same day and stated: "Currently, July 24, 25, 28, 31 and Aug 3 are available."

[4] The sworn declaration appears to contradict SEIU's assertion that it filed the request on August 14.

On July 3, at 7:57 a.m., Fox replied to all and stated: "The County is available on (in date preference): Friday, July 28 from 1-5 [p.m.,] Monday, July 24 all day[,] Monday, July 31 all day[.]" Carter replied to all at 1:00 p.m. and stated: "Hello Joe, Unfortunately none of those dates work for us. I can offer the following dates: Thursday August 3rd 1-5 pm [and] Thursday [A]ugust 10th 1-5 pm."

On August 17, at 6:46 p.m., Steele forwarded to PERB, by e-mail message, a copy of a letter authored by the County of Solano and asked the undersigned Board agent to "Please confirm that PERB has concluded that SEIU Local 1021's request satisfies the requirements of the statute/local rule." The attached letter was from Assistant County Counsel Azniv Darbinian (Darbinian) to Steele and was dated August 16. Therein, the County "acknowledge[d] the Factfinding Request made by SEIU, Local 1021, dated August 14, 2017," and designated the County's panelist and also suggested two individuals to potentially serve as the neutral.

On August 18, the undersigned Board agent received Steele's e-mail message, reviewed the County's August 16 letter, and called Darbinian to confirm that the County was waiving the 45-day timeline. Darbinian informed the undersigned that the County was "not waiving the timeliness issue. We were actually operating under the good faith belief that they got their request in on the 14th, August[,] before 5 o'clock. We received a copy of their request after 5:00 o'clock, we received it at 5:30 or 6:00 and that is what our acknowledgement is, that if they did not get it to PERB before 5:00 we are certainly not waiving the timeliness issue."

The same day, the undersigned Board agent sent a letter notifying the parties that SEIU's factfinding request was denied. The letter also informed the parties that a written administrative determination confirming the denial of the factfinding request would be provided to the parties.

**Discussion**

MMBA section 3505.4, subdivision (a) provides as follows:

> (a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

PERB Regulation 32802 provides as follows:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The factfinding timelines provided in the MMBA and PERB Regulations are clear and unambiguous. (*Santa Cruz Central Fire Protection District* (2016) PERB Order No. Ad-436-M, p. 5 (*Santa Cruz*).) One of two events must occur before the exclusive representative has "not only a right, but a strict window period within which to request factfinding." (*City & County of San Francisco* (2014) PERB Order No. Ad-419-M, pp. 16-17, citing *Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 6-7.) Those two events are the written declaration of impasse or the appointment of a mediator. (*Santa Cruz*, *supra*, PERB Order No. Ad-436-M, pp. 5-6, citing *City of Redondo Beach* (2014) PERB Order No. Ad-409-M and *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M.)

SEIU's factfinding request stated that the mediator was appointed on June 30, which was confirmed by SMCS Meditator Rios' e-mail message of the same date. After the Board agent informed Steele that the request was untimely because it was not filed within 45 days following the date that the mediator was appointed, SEIU filed a Position Statement asserting that Carter erred in stating the mediator was appointed on June 30, and, instead, after reviewing the County's local rules, Carter determined that "[t]he County was obligated under the local rules to obtain our mutual agreement to select and schedule a particular mediator" and "[i]t was not appropriate, in light of the County's local rules, for SMCS to unilaterally appoint a mediator to our table [and] [i]f the County requested of SMCS that a mediator be 'appointed,' that request was improper." Carter asserts that "[g]iven that SEIU Local 1021 did not express mutual agreement to select and/or schedule Mr. Rios as the mediator until July 3 [] SEIU Local 1021's factfinding demand was clearly timely."

As shown above, section 3505.4(a) provides three options: "The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, *following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules*." (Emphasis added.)

As also shown above, Local Rule Section 16(A)(2), also provides three options:

> [T]he County shall notify the California State Mediation and Conciliation Service that the parties have failed to reach agreement and shall obtain therefrom either (1) a designated mediator; (2) upon mutual agreement, the selection and scheduling of a particular mediator; or (3) a list of seven mediators.

The information provided by SEIU is devoid of authority supporting its assertion that "[i]t is the date of mutual agreement that triggers the deadline in Government Code section 3505.4(a) to invoke factfinding" because section 3505.4(a) contemplates any of three methods to start the 45-day clock: "following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules." The first method does not require "mutual agreement," and the third method provides for mediation as required by local rules. The information provided by SEIU indicates that the parties proceeded under the first method of section 3505.4, appointment, or they proceeded under the third method of section 3505.4, local rules. If they proceeded under the local rules, it appears that the parties proceeded under the first option of the local rules, "a designated mediator," which, like section 3505.4, does not require "mutual agreement."[5]

The information provided by SEIU is also devoid of information demonstrating that "SEIU Local 1021 was not provided an opportunity to select from various mediators." SEIU provides no information demonstrating that it objected to the appointment of Mediator Rios or was denied the right to demand that the parties mutually select the mediator. By its own words, SEIU claims that "when either SEIU Local 1021 or the County contacts SMCS to request a neutral, SMCS issues the parties a list of five or seven arbitrators or mediators and we have a conversation over the phone about who to select," yet SEIU did not object or request "a list of five or seven arbitrators" when it learned on June 30 that Mediator Rios had been "assigned to your request."

It is undisputed that Mediator Rios was appointed on June 30 and SEIU submitted its request for factfinding at 7:44 p.m. on August 14. The request, therefore, was filed on August 15, which is more than 45 days after the appointment of Mediator Rios. (PERB Regulation 32135(b); Gov. Code, § 11020.) Accordingly, the factfinding request does not satisfy the requirements of MMBA section 3505.4, subdivision (a), and PERB Regulation 32802, and is therefore denied.

**Right to Appeal**

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code

[5] It is unnecessary to reach SEIU's assertion that "PERB's [ALJ] upheld the County's impasse resolution procedures in its local rules as reasonable" because the reasonableness of the County's local rules is not at issue in this matter.

Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) 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. (*Ibid.*)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-8231
Facsimile: (916) 327-7960
E-File: PERBe-file.Appeals@perb.ca.gov

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

**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 Cal. Code Regs., tit. 8, § 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. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Sincerely,

Mary Weiss
Senior Regional Attorney

MW