STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF OAKLAND, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Exclusive Representative.	Case No. SF-IM-195-M PERB Order No. Ad-462-M April 30, 2018

Appearances: Sloan Sakai Yeung & Wong by Timothy G. Yeung, Attorney, for City of Oakland; Weinberg, Roger & Rosenfeld by Anthony J. Tucci, Attorney, for Service Employees International Union Local 1021.

Before Gregersen, Chair; Shiners and Krantz, Members.

DECISION

SHINERS, Member: The issue before the Public Employment Relations Board (PERB or Board) in this appeal from an administrative determination is whether PERB's Office of the General Counsel, when it decides the sufficiency of a factfinding request filed under the Meyers-Milias-Brown Act (MMBA or Act),[1] must determine that the subject of the parties' dispute is within the scope of representation. In two prior decisions, the Board has held that the General Counsel is not required to make such a determination. In its appeal, the City of Oakland (City) provides no compelling reason why the Board should depart from that precedent here. Accordingly, we affirm the Board agent's approval of Service Employees International Union Local 1021's (SEIU or Union) factfinding request, and deny the City's appeal and stay request.

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

FACTUAL AND PROCEDURAL HISTORY

On December 5, 2017, SEIU-represented City employees commenced an open-ended strike. On December 7, 2017, SEIU filed with PERB's Office of the General Counsel a request for factfinding pursuant to MMBA section 3505.4 and PERB Regulation 32802.[2] The factfinding request stated the Union and the City were unable to effect a settlement in their "meet and confer over 'essential employee' status." Attached to the request was an e-mail from SEIU's counsel to the City's counsel dated December 7, 2017, declaring impasse in negotiations over whether Animal Control Officers were "essential employees."

On December 11, 2017, with the strike still ongoing, the City filed with PERB's Office of the General Counsel a request for injunctive relief. The City asked PERB to seek an injunction establishing a minimum required staffing level for Animal Control Officers for so long as the strike might continue. The City contended the injunction was necessary to protect the public health and safety under *County Sanitation District No. 2 v. Los Angeles County Employees Association* (1985) 38 Cal.3d 564 (*County Sanitation*).[3]

On December 13, 2017, the City filed an objection to SEIU's factfinding request. The City asserted that the subject of which public employees are essential under *County Sanitation* is outside the scope of representation under the MMBA, and therefore beyond the reach of the Act's factfinding provisions. The City further contended that its negotiations with SEIU over essential employees did not bring the subject within the scope of representation.

---

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

[3] We take notice of PERB's case file in Injunctive Relief Request No. 738. (See *County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 5, fn. 5 ["PERB may take administrative notice of matters included in its own files"].)

SEIU responded to the City's objection on December 14, 2017. The Union maintained that its factfinding request met all procedural requirements, and that factfinding is available for single issue negotiations. SEIU argued the City was required to complete the factfinding process before filing a request for injunctive relief, but opined that PERB need not decide that issue now because it is appropriate for resolution in an unfair practice charge.

Later on December 14, 2017, the Board agent notified the parties by e-mail that SEIU's factfinding request was approved, and that a formal administrative determination would follow. Also that day the Board itself granted the City's request for injunctive relief but did not direct the General Counsel to proceed to court because the strike had ended.

The administrative determination issued on January 8, 2018. After noting the City's position that disputes over essential employees are not subject to factfinding because they fall outside the scope of representation, the Board agent stated, citing *Workforce Investment Board* (2014) PERB Order No. Ad-418-M, that she was not empowered to resolve that issue in this proceeding. The Board agent then concluded that SEIU's factfinding request satisfied all procedural requirements, approved the request, and directed the parties to select their panel members.

The City filed a timely appeal from the administrative determination, along with a request to stay the administrative determination pending resolution of the appeal. SEIU filed a timely response to the appeal and stay request.

DISCUSSION

This appeal presents an issue the Board has addressed twice before: when determining the sufficiency of a factfinding request under the MMBA, must the Office of the General

Counsel determine whether the subject of the parties' dispute is within the scope of representation? We again answer that question "no."

Sufficiency of SEIU's Factfinding Request

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 states, in relevant part:

> (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:
>
> [¶ . . . ¶]
>
> (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.
>
> (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

The City does not dispute that SEIU's factfinding request satisfied all of the procedural requirements in the above-quoted statute and regulation. Nonetheless, the City argues that the Board agent should have denied the Union's request because the subject of the parties' dispute, i.e., whether the City's Animal Control Officers are essential employees prohibited from striking, is outside the scope of representation. "[W]e agree that factfinding is ultimately required only for disputes over matters within the scope of representation." (*County of*

Ventura (2018) PERB Order No. Ad-461-M, p. 5.) But neither the MMBA nor PERB Regulations require the Office of the General Counsel to determine whether the subject of the parties' dispute is within the scope of representation before approving a factfinding request. And in two prior decisions, the Board has declined to adopt such a requirement.

In *Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M, the parties failed to reach agreement on midterm layoffs. Appealing the approval of the union's factfinding request, the employer argued that the layoff decision was outside the scope of representation and that the union had not requested to meet and confer over the effects of that decision. The Board held that whether the subject of the parties' dispute is within the scope of representation is "properly left to clarifying discussions between the parties and for resolution in an unfair practice proceeding if either party files a charge." The Board further noted that requiring a preliminary determination of the scope issue before approving a factfinding request would defeat the "the principal purpose of factfinding, namely, through intervention of a neutral to assist the parties in reaching a voluntary and prompt resolution" of their dispute. (*Id*. at p. 33, fns. omitted.)

In *County of Ventura*, *supra*, PERB Order No. Ad-461-M, the parties failed to reach agreement over the content of the county's firearm manual for deputy sheriffs. In its appeal, the county argued that use of force policies for sworn peace officers are outside the scope of representation and thus not subject to factfinding. The Board, relying on *Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M, again declined to adopt a requirement that the Office of the General Counsel make a preliminary determination on scope issues before approving a factfinding request. (*County of Ventura*, *supra*, at pp. 6-7.)

Like the employers in *Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M and *County of Ventura*, *supra*, PERB Order No. Ad-461-M, the City argues that SEIU's factfinding request should have been denied because the subject of the parties' dispute is outside the scope of representation. But, as those decisions make clear, the Office of the General Counsel was not required to determine the scope issue before approving SEIU's request. And the City does not provide any compelling reason why the Board should create an exception to this rule for the subject of essential employees. Accordingly, we again decline to require the Office of the General Counsel to make a preliminary scope of representation decision as part of its determination of whether a factfinding request satisfies the requirements for approval under MMBA section 3505.4 and PERB Regulation 32802.

The City nonetheless argues that this case differs from *Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M[4] because whether the subject of essential employees is within the scope of representation is a purely legal issue that does not require PERB to engage in a factual inquiry. The Board has discretion to decide legal and factual issues that arise from a factfinding request. (*City & County of San Francisco* (2014) PERB Order No. Ad-415-M, p. 12.) But it routinely has declined to exercise that discretion when the resolution of the legal and factual issues is "better suited to the unfair practice proceedings, with no resulting prejudice to the parties." (*Id*. at p. 14; *County of Ventura*, *supra*, PERB Order No. Ad-461-M at pp. 7-8; *City of Folsom* (2015) PERB Order No. Ad-423-M, pp. 5-6.)

We believe the unfair practice process is the appropriate avenue for resolving whether the subject of essential employees is within the scope of representation. Neither the Board nor the courts have addressed whether a public employer must meet and confer with an employee

[4] Because it was filed before *County of Ventura*, *supra*, PERB Order No. Ad-461-M issued, the City's appeal does not address that decision.

organization over essential employees. The parties' briefs on appeal do not address this issue in significant depth. Moreover, the extant case law on essential employees in general is sparse. Under these circumstances, it would be imprudent for the Board to decide this complex and important issue within the confines of an appeal of a factfinding request.

The City could obtain adjudication of this issue in one of two ways. It could refuse to participate in factfinding, thereby drawing a charge of refusing to participate in mandatory impasse resolution procedures, and then raise the scope of representation issue as a defense. (*County of Ventura*, *supra*, PERB Order No. Ad-461-M, p. 8.) Or, as the City suggests in its appeal, it could file a charge against SEIU alleging the Union unlawfully insisted to impasse on a non-mandatory subject of bargaining. Either course would allow the Board to decide the issue based on a full factual record with complete legal arguments (see *City of Pinole* (2012) PERB Decision No. 2288-M [Board declined to decide solely on the pleadings whether public employees have a statutory right to a particular pension contribution]), and afford the responding party notice and full opportunity to be heard on an issue that could lead to liability (*City & County of San Francisco*, *supra*, PERB Order No. Ad-415-M, pp. 13-14). Additionally, unfair practice proceedings would be the appropriate place to address SEIU's argument, raised in its opposition to the appeal, that the City was required to exhaust factfinding procedures before filing a request for injunctive relief.

Request for Stay

We deny the City's request for a stay because the request is moot in light of this decision.

ORDER

The City of Oakland's appeal from the administrative determination and request for stay in Case No. SF-IM-195-M are hereby DENIED.

Chair Gregersen and Member Krantz joined in this Decision.