STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF SAN JOAQUIN, Charging Party, v. SAN JOAQUIN COUNTY CORRECTIONAL OFFICERS ASSOCIATION, Respondent.	Case No. SA-CO-12-M PERB Decision No. 1703-M November 5, 2004

Appearance: Renne, Sloan, Holtzman & Sakai by Jeffrey Sloan, Attorney, for County of San Joaquin.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the County of San Joaquin (County) of a Board agent's dismissal (attached) of the County's unfair practice charge. The charge alleged that the San Joaquin County Correctional Officers Association (Association) violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in a sick-out from December 8 through December 11, 2002. The County alleged that this conduct constituted a violation of PERB Regulation 32604(d)[2] and the San Joaquin County Employer-Employee Relations Policy Sections 12 and 13.[3]

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

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

[3]Section 12 covers Resolution of Impasses and section 13, Unfair Employer-Employee Relations Practices.

By letter dated October 20, 2004, the County provided a new Notice of Appearance that the County has changed its legal representative and is jointly represented by Jeffrey Sloan of the law firm Renne, Sloan, Holtzman & Sakai LLP and by David Wooten, assistant County counsel. In the October 20 letter, the County also requested that the unfair practice charge and appeal be withdrawn with prejudice. Attached to the letter is a notice that the parties have jointly agreed to a comprehensive settlement agreement covering this unfair practice charge signed by David Wooten, representing that Gary Padula, president of the Association, agrees to the request for withdrawal.

Having reviewed the record in this matter, the Board finds the withdrawal to be in the best interests of the parties and to be consistent with the purposes of the MMBA. Accordingly, the Board grants the withdrawal.

ORDER

The request by the County of San Joaquin to withdraw its appeal in Case No. SA-CO-12-M is hereby GRANTED. Therefore, the appeal and unfair practice charge is hereby WITHDRAWN WITH PREJUDICE.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377

February 28, 2003

Harry G. Lewis, Attorney
Curiale, Dellaverson, Hirschfeld, Kelly & Kraemer
727 Sansome Street
San Francisco, CA 94111

Re: County of San Joaquin v. San Joaquin County Correctional Officers Association
Unfair Practice Charge No. SA-CO-12-M
DISMISSAL LETTER – 2nd Amended Charge

Dear Mr. Lewis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 13, 2002. The County of San Joaquin alleges that the San Joaquin County Correctional Officers Association violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in a "sick out" from December 8 through December 11, 2002.

I indicated to you in my attached letter dated January 10, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 31, 2003, the charge would be dismissed.

I received a letter and a first amended charge on February 3, 2003 and a letter and a second amended charge on February 13, 2003. The amended charges contained additional facts and the letters contained additional argument which is summarized below.

The first amended charge reiterated that the Association sponsored a sick out by correctional officers that violated MMBA section 3505, was an unfair practice under PERB Regulation 32604(d) and violated San Joaquin County Employer-Employee Relations Policy Sections 12 and 13. It added in the pertinent part of paragraph 3:

> During the two weeks preceding the sick out, certain Association representatives approached other correctional officers and informed them that they would be engaging in a "sick out" from December 8 through December 12 and instructed them not to come to work on these days. These Association representatives

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> told the other correctional officers that they would be paid for their absences so long as they obtained doctors notes and advised them on how to obtain such notes. At least one of the Association representatives specifically indicated that the "sick out" was being coordinated by the Association and that he was acting at the direction of the Association President Gary Padula.

The 1st amended charge also stated in paragraph 7 that the parties had participated in mediation with State Mediator Paul Roose from February 26 to July 22, 2002. When mediation was unsuccessful, the parties mutually agreed to submit the matter to fact finding. The fact-finding hearing commenced on January 28, 2003 and was expected to be completed on February 3, 2003.

Finally in paragraph 8, the 1st amended charge reiterates that the Association provided a memorandum to its members urging them to return to work as required by section 13(1)(C) of the County Employer-Employee Relations Policy. The 1st amended charge then adds that:

> The County alleges that this memorandum was either not sent at all to the membership, or not sent on a timely basis.

A letter accompanying the 1st amended charge argues that the above-described allegations are sufficient to demonstrate that the Association was responsible for the sick out and that this conduct was a violation of the Association's duty to participate in good faith in the County's impasse procedures. The letter continues that the Association's failure at once to order its members to return to work also constituted a violation of the County Policy.

The second amended charge rewrites paragraph 3 to read:

> a. During the two weeks preceding the sick out, certain Association representatives, including Correctional Sergeant Steven Williams, approached other correctional officers and informed them that the Association had authorized a "sick out" from December 8 through December 12 and that Association members should stay home from work on those dates.
>
> b. Williams and other Association representatives told the other correctional officers that they would be paid for their absences so long as they obtained doctors notes and advised them on how to obtain such notes.
>
> c. On at least one occasion, Williams specifically indicated that the message about the "sick out" came directly from Association President Gary Padula.

Charging party also provided a letter that argues that County Sanitation District No. 2 v. Los Angeles County Employees Assn. (1985) 38 Cal.3d 564 does not address the issue of whether a strike during the pendency of an impasse procedure is an illegal pressure tactic and thus an unfair practice. The letter continues that the MMBA under PERB's administration is like the Educational Employment Relations Act (EERA)[2] under which a strike during impasse procedure could evidence the unfair practice of refusing to participate in good faith in the impasse procedures. (San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 8.) The letter also argues that the sick out was an unfair practice as a partial strike. (El Dorado Union High School District (1985) PERB Decision No. 537.) Finally, the letter asserts that the sick out was an unfair practice as a violation of the County's Employer-Employee Relations Policy that specifically prohibits strikes.

The 2nd amended charge and accompanying argument raise 5 issues. First, is there sufficient information to find that the Association was responsible for instigating the sick out? Second, regardless of responsibility for the strike, did the Association's failure to send out "at once" a memorandum to its members regarding the sick out violate the County's Employer-Employee Relations Policy? Third, if the Association was responsible for the sick out, was it an unfair practice as a violation of the Association's duty to participate in the impasse procedures? Fourth, was the sick out an unfair practice as a partial strike? Fifth, was the sick out an unfair practice as a violation of the County's Employer-Employee Relations Policy?

Association Responsibility

PERB will apply common law agency principles to determine whether an individual acts as an "agent" of the employee organization. (Compton Community College District (1989) PERB Decision No. 728.) A union will not be held liable unless one or more persons in authority were responsible for what transpired. (Longshoremen and Warehousemen v. Hawaiian Pineapple Co. (9th Cir. 1955) 226 F.2d 875.) Thus, the charge must demonstrate that agents of the union participated in, ratified, instigated, encouraged, condoned, or in some way directed the action for the union to be held liable. (Compton Community College District (1989) PERB Decision No. 728.) The burden of proving such an agency relationship is on the charging party. (Mount Diablo Unified School District (1978) PERB Decision No. 44.)

Here charging party alleges that Correctional Sergeant Steven Williams approached other correctional officers and informed them that the Association had authorized a "sick out" from December 8 through December 12, that Association members should stay home from work on those dates, that they would be paid for their absences so long as they obtained doctors notes, advised them on how to obtain such notes, and on at least one occasion, specifically indicated that the message about the "sick out" came directly from Association President Gary Padula.[3]

---

[2] EERA is codified at Government Code section 3540 et seq.

[3] The charge also alleges that other Association representatives told correctional officers that they would be paid for their absences so long as they obtained doctors notes and advised them on how to obtain such notes. Without the identity of these representatives, it is impossible to determine whether they were agents of the Association. In addition, the

Sergeant Williams is not identified as an Association officer or official so it must be assumed that he does not hold such office. There is no evidence that Sergeant Williams was acting for the Association under either a theory of actual or apparent authority. Thus, Sergeant Williams cannot be found to be an agent of the Association. (Los Angeles Community College District (1982) PERB Decision No. 252; Aladdin Hotel Corp. (1977) 229 NLRB 499 (The mere fact that an employee prominent in the organizing campaign may have engaged in unlawful conduct is not alone sufficient to establish agency.).)

There are no allegations that the Association's officers participated in the sick out or in any other way supported it. The only other allegations related to agency concern President Padula's statements to the press. As discussed in the Warning Letter, these statements merely recognized that a job action was in progress and attempted to explain it to the public. Therefore, there has not been a showing that the Association was responsible for the sick out and the allegation must be dismissed.

Association's Memorandum to its Members

Section 13(1)(C) of the County's Employer-Employee Relations Policy reads in pertinent part:

> Upon notification confirmed in writing by the County to the recognized employee organization that certain of its members are engaged in a work stoppage, the recognized employee organization shall, at once, in writing direct such members to return to work immediately. Such notification by the recognized employee organization shall not constitute an admission by it that a strike is in progress or has taken place or that any particular member is or has engaged in a work stoppage. The notification shall be made solely on the request of the County. In the event that a work stoppage occurs, the recognized employee organization agrees to take all reasonably effective and affirmative action to secure the members return to work as promptly as possible. Failure of the recognized employee organization to issue such order and or take such action shall be considered in determining whether or not the recognized employee organization caused or authorized the strike.

Charging party asserts that the Association failed to comply with its obligation under the policy to "at once, in writing direct such members to return to work immediately." This is based on a statement in the charge that "The County alleges that this memorandum was either not sent at all to the membership, or not sent on a timely basis."

---

statements attributed to these representatives do not advocate that officers participate in the sick out, but only that they would receive sick leave if they provided a doctor's note and how to obtain such notes.

It is unclear whether this allegation is sufficient to demonstrate that the Association failed to comply with the County rule because it does not allege a fact but rather one fact and in the alternative a contradictory fact and a legal conclusion. PERB Regulation 32615 requires:

> (a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:
>
> . . . . . .
>
> (5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice;

The allegation does not appear to be a clear and concise statement of facts. However, it is unnecessary to decide whether the allegation meets the requirement of the regulations because it is legally insufficient to state a prima facie violation of the MMBA. That is, even assuming that the Association refused to send out the memorandum, such conduct is not an unfair practice based on the reasons that follow.

As mentioned in the Warning Letter, under the MMBA, employees and their unions have a right to strike unless and until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. (County Sanitation District No. 2 v. Los Angeles County Employees Assn. (1985) 38 Cal.3d 564.)[4] Charging party argues that this ruling does not prohibit PERB from finding the sick out to be an unfair practice. MMBA section 3509 reads 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 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

[4] Board decisions under the Educational Employment Relations Act have found that the right to strike is limited based in part on relevant Education Code provisions. (Compton Unified School District (1987) PERB Order No. IR-50; Sacramento City Unified School District (1987) PERB Order No. IR-49.)

Subsection (b) describes an unfair practice as "any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507..." It goes on to require that PERB find conduct to be an unfair practice consistent with existing judicial interpretations of the MMBA. It would be contrary to these Legislative mandates to find a strike to be an unfair practice where the California Supreme Court has determined that it did not violate either the MMBA or the common law. This is especially true given the direction provided in MMBA section 3510(a): "The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter."

Charging party argues that the Court in Sanitation Workers did not consider the facts as presented by this case, i.e. an employee organization striking while it is required to participate in good faith in the impasse resolution procedures. Charging party is correct that the strike in Sanitation Workers did not occur during impasse procedures. However, the act of striking, in the absence of other indicia of bad faith, does not demonstrate a violation of the Association's obligation to participate in the impasse procedures in good faith. (National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO (1960) 361 U.S. 477) There the court found that "...there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining."

This is consistent with the treatment of this issue by the California Supreme Court under EERA which provides for mandatory impasse procedures. In San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 the Court found that "if [the Association's] strike were held *legal* it would not constitute a failure to negotiate in good faith. As an *illegal* pressure tactic, however, its happening could support a finding that good faith was lacking." (emphasis in the original.)[5] Therefore striking during the statutorily mandated impasse procedure might support a finding of bad faith but by itself is insufficient to demonstrate bad faith. Here, there is no other indicia of bad faith participation by the Association and thus the sick out was not an unfair practice.

It would be antithetical to the employees' right to participate in a legal strike under the MMBA to require at the same time their union to order the employees back to work. Thus, if the sick out was not illegal then Section 13(1)(C) of the County's Employer-Employee Relations Policy requiring the Association to order its members back to work is inconsistent with the MMBA. MMBA section 3509(f) states:

> (f) The board shall not find it an unfair practice for an employee organization to violate a rule or regulation adopted by a public agency if that rule or regulation is itself in violation of this chapter. This subdivision shall not be construed to restrict or

[5] The court's decision was premised on the determination that the statutory impasse procedures were included in EERA for the purposed of heading off strikes in the public schools. Under MMBA there is no statutory impasse procedure. Rather the employer may under section 3505 and 3507 adopt reasonable rules for such procedures.

> expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive.

Because, under the circumstances of this case, the rule itself violates the MMBA, the Association's failure to comply with the rule is not an unfair practice. Accordingly, this allegation must be dismissed.

If one assumes for sake of argument that it was demonstrated that the Association was responsible for the sick out, then three questions remain: was the sick out an unfair practice as a violation of the Association's duty to participate in the impasse procedures, as a partial strike, or as a violation of the County's Employer-Employee Relations Policy.

Sick Out as Unfair Practice

As discussed above, based on Sanitation Workers and Insurance Agents the sick out was not an unfair practice under the MMBA. Thus, the Association did not commit an unfair practice even if it was responsible for the sick out.

Sick Out as Partial Strike

Next the charging party argues that the sick out should be an unfair practice as a partial strike. It has long been recognized that a partial strike where employees attempt to strike and work at the same time is illegal under the EERA. (Los Angeles Unified School District (1990) PERB Decision No. 803.) However, charging party was unable to provide any authority for the proposition that a sick out was the equivalent of a partial strike. Nor was I able to locate any authority supporting this theory. Logically, a sick out is not a partial strike because the employees are not at the work location doing a portion of the job. Rather, they are away from the job site and substitutes are performing their work. Thus, this theory does not state a prima facie violation of an unfair practice under the MMBA.

Sick Out as Violation of County Rule

Finally the charging party asserts that the Association's conduct should be an unfair practice because it violates the County's Employer-Employee Relations Policy against striking.

The County Policy section 13(1)(C) reads in pertinent part:

> It is recognized by the County and all recognized employee organizations that strikes, work stoppages, lock outs and other forms of concerted work action are inimical to stable, harmonious employer-employee relations and that all parties will strive towards a working environment which will preclude consideration of such actions. No employee or employee organization, its representatives or member shall cause, engage, or participate in, instigate, or encourage concerted acts of work

> stoppage or strikes, however, under no circumstances shall an employee's statutory or constitutional rights be unlawfully infringed.

Because Sanitation Workers gives employees a right to strike under the circumstances of this case, the policy, constrained by its own language from infringing on employee rights, does not prohibit the strike. Thus, participation in a legal strike does not violate the policy.

Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and my letter of January 10, 2003.

Right to Appeal

Pursuant to PERB Regulations,[6] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) 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.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

---

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

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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document 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 (3) 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. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

Robert Thompson
General Counsel

Attachment

cc: Paul Q. Goyette, Attorney

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377

January 10, 2003

Harry G. Lewis, Attorney
Curiale, Dellaverson, Hirschfeld, Kelly & Kraemer
727 Sansome Street
San Francisco, CA 94111

Re: County of San Joaquin v. San Joaquin County Correctional Officers Association
Unfair Practice Charge No. SA-CO-12-M
WARNING LETTER

Dear Mr. Lewis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 13, 2002. The County of San Joaquin alleges that the San Joaquin County Correctional Officers Association violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in a "sick out" from December 8 through December 11, 2002.

The County employs approximately 200 Correctional officers and Sergeants in a bargaining unit exclusively represented by the Association. They work 12-hour shifts in several locations in the County, including the Main Jail, South Jail and Honor Farm. Approximately 42 employees work on each shift.

The Association and the County began negotiating a new contract in August 2001 to replace a contract that expired on December 12, 2001. After jointly declaring impasse on November 7, 2001, the parties completed several days of mediation with State Mediator Paul Roose and are presently scheduled to participate in a fact-finding hearing before arbitrator Joe Henderson beginning on January 28, 2003.

On November 27, 2002, Assistant Sheriff Stan Hein sent a letter to all County Correctional Officers and Correctional Sergeants notifying them that the Sheriff's Administration had received information concerning a planned "sick-out". The letter continued that such concerted activity would be illegal as a threat to public safety and that all officers would be required to submit a note from a health care provider if the officer called in sick.

On December 8 and continuing through December 11, 2002 an average of 65% of the bargaining unit members called in sick for each shift. The normal percentage of employees who call in sick is 5 to 7% (2 to 3 employees). None of the Association's officers called in sick. Pursuant to Section 13(1)(C) of the County's Employer-Employee Relations Policy the

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

County requested the Association to direct its members to return to work.[2] The Association's attorney responded on December 11, 2001 that the Association had no part in organizing or promoting the sick out by its members. The letter contained an undated memo addressed to Association members from the Association Board of Directors that quoted Section 13(1)(C) of the County's policy and formally requested them to return to work if they were medically capable to do so.

On December 10, Association President Gary Padula was reported in the Stockton Record as saying that the sick-out was unsanctioned and "[b]ut when you're in a dangerous job and you feel you're not getting the respect from the people above you, that's frustrating." He also commented on the County's offer of a 2.4% raise over two and a half years, saying, "[w]e won't accept that, the problem is, we're the only one at the table who's bargaining." The same day the Lodi News-Sentinel quoted Mr. Padula as saying, "[t]he members took it upon themselves (to strike)." The story also stated, "Padula said he wasn't sure how many – if any – county correctional officers will call in sick today." Padula was quoted as saying, "I really would like to see resolution."

Based on these factual allegations, the charge does not state a prima facie violation of the MMBA for the reasons that follow.

Under the MMBA, employees and their unions have a right to strike unless and until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. (County Sanitation District No. 2 v. Los Angeles County Employees

---

[2] Section 13(1)(C) reads in pertinent part:

> Upon notification confirmed in writing by the County to the recognized employee organization that certain of its members are engaged in a work stoppage, the recognized employee organization shall, at once, in writing direct such members to return to work immediately. Such notification by the recognized employee organization shall not constitute an admission by it that a strike is in progress or has taken place or that any particular member is or has engaged in a work stoppage. The notification shall be made solely on the request of the County. In the event that a work stoppage occurs, the recognized employee organization agrees to take all reasonably effective and affirmative action to secure the members return to work as promptly as possible. Failure of the recognized employee organization to issue such order and or take such action shall be considered in determining whether or not the recognized employee organization caused or authorized the strike.

Assn. (1985) 38 Cal.3d 564.)[3] It is not clear that there are sufficient facts presented here to determine whether the sick out constituted an illegal strike. However, even assuming that the sick out was illegal, this charge must be dismissed for other reasons.

Before an employee organization can be held legally responsible for a sick out, it must be demonstrated that the participants were acting as agents of the organization rather than as individuals. (Compton Community College District (1989) PERB Decision No. 728.) In that case the Board was faced with determining whether a union was responsible for an employee sick out. It found that two passages from North River Energy Corporation v. United Mine Workers (11th Cir. 1981) 664 F.2d 1184 described the charging party's burden regarding agency of the union:

> In showing union complicity, the company must therefore prove that the agents of the union participated in, ratified, instigated, encouraged, condoned, or in any way directed the authorized strike for the union to be held liable.
>
> It is necessary, however, that the acts of a union agent be committed within the scope of this general apparent authority and on behalf of the union . . . . The only activity which North River relies upon which is indicative of union authorization, ratification, or approval, is the fact that all of the union officials and committeemen failed to work their shifts in each of the six subsequent strikes. This fact, in itself, cannot be construed as participation and authorization by the union as an entity in the strike.

In the present case, the Association's officers did not call in sick during the period December 8 through December 11, 2001. Nor are there any facts that indicate that the Association ratified, instigated, encouraged or condoned the sick out. Charging Party asserts that Association President Padula's comments concerning the sickout as recorded in the local newspapers on December 10 support a finding of agency. I am unable to find any statement in these reports that instigate or give support to the employees who called in sick. Rather I find that these comments merely recognize that the job action is in progress and attempt to explain to the public the reasons for the employees' conduct.

Finally, there are no allegations that the Association failed to comply with its obligations under Article 13(1)(c) of the County's Employer-Employee Relations Policy. Thus, the Association cannot be held responsible for the sick out.

---

[3] Board decisions under the Educational Employment Relations Act have found that the right to strike is limited based in part on relevant Education Code provisions. (Compton Unified School District (1987) PERB Order No. IR-50; Sacramento City Unified School District (1987) PERB Order No. IR-49.)

Charging Party asserts that the National Labor Relations Board ruling in Jeddo Coal Company (2001) 334 NLRB No. 86 support a finding of agency. In Jeddo the NLRB adopted an Administrative Law Judge's decision concerning a coal strike involving picketing at secondary employers. The NLRB General Counsel presented two theories of agency regarding Mine Workers' Local 803. The first is based on series of cases beginning with Mine Workers (Garland Coal Co.) (1981) 258 NLRB 56 in which the NLRB found agency between the International Union, the district and local mine committee based on a delegation of contractual duties. The decision explains that these findings are consistent with the Supreme Court's decision in Carbon Fuel Co. v. Mine Workers (1979) 444 U.S. 212 which held that the International was not liable in damages where it did not instigate, support, ratify, or encourage the wildcat strikes. This theory is consistent with PERB's analysis of this issue and the analysis above. Thus it does not mandate a different result than the one reached above.

The second theory was premised on the NLRB's longstanding rule that when a union authorizes a picket line, it is required to retain control over the picketing. The second theory is not applicable to this case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 31, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robert Thompson

Robert Thompson
General Counsel