

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WHITTIER CITY EMPLOYEES ASSOCIATION,

Charging Party,

v.

CITY OF WHITTIER,

Respondent.

Case No. LA-CE-186-M

PERB Decision No. 1761-M

April 8, 2005

Appearances: David Twedell, Staff Representative, for Whittier City Employees Association; Liebert, Cassidy & Whitmore by Linda Jenson, Attorney, for City of Whittier.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Whittier City Employees Association (WCEA) of a Board agent's dismissal (attached) of its unfair practice charge. The unfair practice charge alleged that the City of Whittier (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by unilaterally changing its overtime policy.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the City's position statement, WCEA's response to the position statement, the Board agent's warning and dismissal letters, WCEA's appeal, and the City's response to the appeal. In light of this review, the Board adopts the Board agent's dismissal as a decision of the Board itself subject to the discussion below.

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

BACKGROUND

In the charge, WCEA alleges that the City unilaterally modified its Standard Operating Procedure (SOP) No. 21² by refusing to grant employees “comp time.” SOP 21 provides, in pertinent part:

It is the policy of the City of Whittier to avoid the necessity of overtime work whenever possible. If, in the judgment of the Department Head, work beyond the established work week is required, such work will be allowed. However, Department Heads must monitor its usage and compliance with budget amounts.

.....

TYPE OF COMPENSATION

Whenever possible, compensatory time off should be given as compensation for overtime worked. In those cases where the efficient operation of the department would be impaired by the granting of compensatory time off, overtime work shall be compensated by overtime pay in accordance with Article X, Section 12, of the Personnel Rules and Regulations.

.....

All compensation for overtime will be approved by the Department Head whether compensation is to be paid or the employee is to be given compensatory time off. Employees are given the choice of receiving either premium overtime pay or comp-time accrual for overtime worked. The amount of overtime cannot exceed budgeted amounts for the department. Department Heads will be expected to carefully monitor this expense and its proper usage. Overtime should be avoided whenever possible.

On August 30, 2004, the City filed a position statement in response to the charge. The City asserts that under SOP 21, read as a whole, the Department Head has the ultimate authority to determine how overtime is paid, noting the portion of SOP 21 that states: “In those cases where the efficient operation of the department would be impaired by the granting of compensatory time off, overtime work shall be compensated by overtime pay” The

²The most recent version was revised August 4, 1989.

City claims that since 1988, the City has interpreted SOP 21 to allow Department Heads to decide the form of overtime compensation. It is therefore unlikely that WCEA is unaware of this interpretation and has, up to this time, never objected to the policy. Moreover, SOP 21 was superseded by Article X, Sections 9 and 12 of the City's Personnel Rules and Regulations, which were negotiated by the parties. Those sections provide, in pertinent part, as follows:

Section 9. "Compensatory Time Off": It is the policy of the City of Whittier to avoid the necessity for overtime work whenever possible. If work beyond the established work week is required, such work shall be performed only with prior authorization of the Department Head.

In those cases where efficient operation of the department would be impaired by the granting of compensatory time off, overtime work shall be compensated in accordance with the provisions of Section 12 of this Article at the discretion of the Department Head with approval of the City Manager.

Section 12. "Overtime Pay": Overtime pay may be granted in lieu of compensatory time off for overtime work, conditioned on the efficient operation of the department, at the discretion of the Department Head and with approval of the City Manager, to any and all employees in the classified service, with the exception of those employees designated by the City as exempt under the Fair Labor Standards Act (FLSA).

These provisions were the culmination of six years of negotiations between the City and WCEA resulting in the adoption of the rules in January 1996. According to the City, these provisions clearly place the decision regarding the form of overtime compensation with the Department Head with the approval of the City Manager. The City attached documents to its response that indicate that these rules were negotiated. First, the parties' MOU effective, July 1, 1995 through June 30, 1998, Section 8H states:

Update Personnel Rules

City and WCEA representatives shall meet and confer and conclude said process to adopt updated City Personnel Rules and Regulations by June 1, 1995.

Second, by letter dated July 26, 1995 signed by WCEA President Henrene Barris and WCEA representative Fred Lowe, the parties agreed to the proposed July 5, 1995 update to the City's Personnel Rules and Regulations.

The City contends that since 1988, the practice has been for Department Heads to determine whether the efficient operation of their departments justifies compensatory time off or overtime pay. WCEA has never before grieved this issue and should have been aware of the practice during negotiations of the Personnel Rules and Regulations. WCEA was aware of the practice during February 2003, when in a proposal for a successor MOU, WCEA sought to modify the long-standing practice to provide employees with the option to choose between compensatory time off or overtime pay. Thus, the City concludes that WCEA waived its right to object to this practice.

Finally, the City asserts that in negotiations during 2002 over Sections 9 and 12 of the Personnel Rules and Regulations, WCEA Representative Susan Sturdevant (Sturdevant) acknowledged that Department Heads had discretion to grant either compensatory time off or overtime pay. At that time, WCEA did not propose changing this rule. In September 2002, the City indicated that it would agree to add a paragraph that employees could request either compensatory time off or overtime pay. This willingness to include such a paragraph is confirmed in a memo dated September 20, 2002 from Human Resources to Sturdevant. According to the City, in subsequent correspondence between the parties, WCEA has not proposed to modify Sections 9 and 12.

On January 6, 2005, instead of an amended charge, WCEA filed a response to the City's position statement. It points to a July 29, 2002 letter from Human Resources to WCEA in which the City sent WCEA a proposed consolidation of City documents for review. With regard to overtime compensation, SOP 21 was proposed to be replaced with Article X,

Sections 9 and 12 of the Personnel Rules and Regulations. WCEA notes the statement in the letter that the consolidation of documents is intended to “reflect current practice.” According to WCEA, this shows that there was no agreement at that time on the issue. WCEA denies that the alleged change was ever negotiated. WCEA further disagrees with the City’s interpretation of SOP 21. Also attached are two pay stubs showing computation for compensatory time off and a memo dated November 1, 2002 from Stuart McFeely (McFeely), the parks maintenance supervisor, to Senior Park Maintenance Worker, Tim Skobel (Skobel) regarding excess compilation of compensatory time off. The memo required Skobel to: “either a) request pay for the hours accrued in excess of the eight-hour limit or b) use the Compensatory time off prior to May 26, 2002 (sic).” The memo further stated, in pertinent part:

As you will recall, the Director of Parks has directed that Senior Park Maintenance Workers may accrue up to eight hours of Compensatory time off. This falls within the Director’s discretion. Please refer to S.O.P. #21 and Personnel Rules and Regulations Article X., Section #9.

In the dismissal, after evaluating SOP 21 and Article X, Sections 9 and 12 of the Personnel Rules and Regulations, the Board agent concluded that the City has discretion to grant compensatory time off or to pay employees for overtime work. Contrary to WCEA’s contention, the November 1, 2002 memo attached to its January 6, 2005 response supports the notion that the City has exercised discretion in the past regarding the form of payment for overtime. The Board agent also found that the Personnel Rules and Regulations appear to have been in effect for some period of time. The Board agent thus concluded that the City has not made a change in policy.

DISCUSSION

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c),³ PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)⁴ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

We agree with the Board agent that WCEA has failed to show that the City has made a change in policy. It is true that SOP 21 appears to be internally inconsistent. On the one hand, it vests with the Department Head the authority to allow overtime and to require compensation for overtime in compliance with Article X, Section 12 of the Personnel Rules and Regulations. Under Section 12, authority to determine the mode of compensation for overtime rests with the Department Head, with approval of the City Manager. On the other hand, SOP 21 allows employees to choose between compensatory time off and overtime pay. Reading SOP 21 and

³PERB Regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

⁴When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Article X, Sections 9 and 12 of the City's Personnel Rules and Regulations⁵ together, Department Heads are authorized to determine whether overtime is compensated via compensatory time off or overtime pay. WCEA argues that the July 29, 2002 letter from Human Resources indicates a lack of agreement by the parties on this issue. We disagree; that letter merely suggested a proposed consolidation of City policies for review in order "to eliminate redundancies, inconsistencies and reflect current practice." In its charge, WCEA alleges that after receiving this letter:

There were (sic) some discussion between the Association and the City on the consolidation but the parties did not come to agreement.

However, in the January 6, 2005 response to the City's position statement and in its appeal, WCEA denies that it negotiated this policy. WCEA cannot have it both ways.

In its January 6 response and on appeal, WCEA refers to a memo dated November 1, 2002 from McFeely to Skobel regarding his excess accrual of compensatory time. The memo clearly states that employees' ability to accrue up to a maximum eight hours of compensatory time off "falls within the Director's discretion" and refers to SOP 21 and Article X, Section 9 of the Personnel Rules and Regulations. Section 9 states that "overtime work shall be compensated in accordance with the provisions of Section 12 of this Article [X] at the discretion of the Department Head with the approval of the City Manager." Contrary to WCEA's claim, this shows that the City's policy has been to place the authority to determine how overtime compensation is paid with the Department Head, not the employee.

⁵We agree with the Board agent's finding that Article X, Sections 9 and 12 of the City's Personnel Rules and Regulations, appear to have been in effect in their current form for some time. According to the City, it has been in effect at least since January 1996. WCEA has not disputed this fact.

We therefore find that the facts, as alleged by WCEA, describe a current practice that confers authority on Department Heads to determine the mode of compensation for overtime and conclude that there was no change in policy.

ORDER

The unfair practice charge in Case No. LA-CE-186-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 324-0142
Fax: (916) 327-6377



January 6, 2005

Michael Koskie, Attorney
City Employees Associates
254-B Lindero Avenue
Long Beach, CA 90803

Re: Whittier City Employees Association v. City of Whittier
Unfair Practice Charge No. LA-CE-186-M
DISMISSAL LETTER

Dear Mr. Koskie:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 28, 2004. The Whittier City Employees Association (WCEA) alleges that the City of Whittier violated the Meyers-Milias-Brown Act (MMBA)¹ by unilaterally changing its overtime policy.

I indicated to you in my attached letter dated December 22, 2004, 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 December 29, 2004, the charge would be dismissed.

On or about December 28, I received a telephone call from Robin Nahin. She stated that Charging Party would provide additional information. I extended the time for filing an amended charge by one week. On January 3, 2005, I received a facsimile copy of a letter sent to me on that date by Staff Representative David Twedell.

With the letter, Twedell attached pay stubs and a memorandum from the Park Maintenance Supervisor that demonstrate that management authorized employee Tim Skobel to "either a) request pay for the hours accrued in excess of the eight-hour limit or b) use the Compensatory time off prior to May 26, 2002." The memo also stated

As you will recall, the Director of Parks has directed that Senior Park Maintenance Workers may accrue up to eight hours of Compensatory time off. This falls within the Director's

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.

discretion. Please refer to S.O.P #21 and Personnel Rules and Regulations Article X., Section #9.

Thus, the information provided with the letter demonstrates that in the past the employer has exercised its discretion pursuant to SOP 21 and the Personnel rules as set forth in my letter of December 22, 2004.

With the letter, Twedell also denies that the personnel rules were ever negotiated. However, the rules appear to have been an employer policy in effect for some period of time.

The letter does not present sufficient facts to demonstrate that there was a past practice whereby employees had a absolute choice between overtime pay or compensatory time. Nor does it demonstrate that the employer has made a unilateral change in policy by using its discretion to inform Parks Department employees that they will only be allowed to take overtime in the form of pay at this time.

Therefore, I am dismissing the charge based on the facts and reasons contained here and in my December 22 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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. (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

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

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).)

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

By Bernard McMonigle
Bernard McMonigle
Administrative Law Judge

Attachment

cc: Linda Jenson, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
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December 22, 2004

Michael Koskie, Attorney
City Employees Associates
254-B Lindero Avenue
Long Beach, CA 90803

Re: Whittier City Employees Association v. City of Whittier
Unfair Practice Charge No. LA-CE-186-M
WARNING LETTER

Dear Mr. Koskie:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 28, 2004. The Whittier City Employees Association (WCEA) alleges that the City of Whittier violated the Meyers-Milias-Brown Act (MMBA)¹ by unilaterally changing its overtime policy.

On October 29, 2004, I discussed this charge with WCEA representative Robin Nahin. She indicated that she would send more information. However, to date nothing additional has been received by this office.

You allege that the Parks Department has refused to grant "comp time" to employees in violation of Standard Operating Procedure No. 21. SOP 21 states in part, "Employees are given the choice of receiving either overtime pay or comp-time accrual for overtime worked."

SOP 21 also states,

Whenever possible, compensatory time off should be given as compensation for overtime worked. In those cases where the efficient operation of the department would be impaired by the granting of compensatory time off, overtime work shall be compensated by the overtime pay in accordance with Article X, Section 12, of the Personnel Rules and Regulations.

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.

In August 2004, the City responded to this unfair practice charge and included information on current personnel rules that were negotiated by the City and the WCEA. Article X, section 12 states,

“Overtime Pay”: Overtime pay may be granted in lieu of compensatory time off for overtime work, conditioned on the efficient operation of the department, at the discretion of the Department Head and the approval of the City Manager, to any and all employees in the classified service, with the exception of those employees designated by the City as exempt under the Fair Labor Standards Act (FLSA).

The WCEA contends that in this manner the City has made a unilateral change on a matter within the scope of bargaining.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),² PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)³ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

It appears from both a complete reading of SOP 21 and Section 12 of the personnel rules that the employer has the discretion to grant compensatory time off or to pay employees for overtime work. The facts that you have presented with your charge do not demonstrate that the employer has made a unilateral change in this policy. Accordingly, this charge must be dismissed.

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

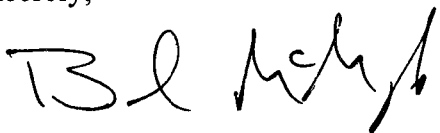
² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

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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 December 29, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

A handwritten signature in black ink, appearing to read "Bernard McMonigle". The signature is written in a cursive style with a large initial "B" and a distinct "M" and "C".

Bernard McMonigle
Regional Attorney

BMC