

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BARBARA SCHMIDT,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1021,

Respondent.

Case No. SF-CO-176-M

PERB Decision No. 2080-M

November 24, 2009

Appearances: Law Offices of Randal M. Barnum by Randal M. Barnum, Attorney, for Barbara Schmidt; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Barbara Schmidt (Schmidt) of a dismissal of an unfair practice charge by a Board agent. The charge alleged that Service Employees International Union, Local 1021 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)¹ by abandoning Schmidt's grievances. Schmidt alleged that SEIU's inaction with regard to her employment concerns constituted a breach of SEIU's duty of fair representation in violation of MMBA section 3500.

The unfair practice charge alleges that SEIU breached its duty of fair representation by failing to file grievances on behalf of Schmidt, abandoning grievances filed on behalf of Schmidt and generally failing to take satisfactory action to protect Schmidt from numerous acts

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

of alleged wrongdoing perpetrated by her employer, the Greater Vallejo Recreational District (District). The Board agent dismissed numerous allegations as either untimely or beyond the scope of PERB's jurisdiction. With regard to the remaining allegations, the Board agent held that Schmidt failed to demonstrate that SEIU's conduct was either without rational basis or devoid of honest judgment. Accordingly, the Board agent dismissed the remainder of the allegations for failure to state a prima facie case.

We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters (attached) as a decision of the Board itself, subject to the following discussion regarding the applicability of *Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982 (*Meredith*) to the instant case.

DISCUSSION

On appeal, Schmidt claims that *Meredith* compels a finding that SEIU's inaction in this case constitutes a breach of its duty of fair representation. In that case, the charging party received a poor performance evaluation and was rejected on probation. The union failed to provide any representation at either the evaluation meeting or the rejection on probation meeting. Moreover, it appeared the charging party's union representative provided representation to other District employees to the charging party's detriment. Later, when the charging party sought to appeal his rejection on probation, the union again failed to provide meaningful representation. In particular, the union only met briefly with the charging party on two occasions and, following the second meeting, the union did not return the charging party's calls.

The Board in *Meredith* explained that when a charge alleges that an exclusive representative breached its duty of fair representation by failing to act on behalf of an employee, PERB looks to whether “the cumulative actions of the exclusive representative, considered in their totality, [are] sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee.” (*Meredith*, citing *American Federation of State, County and Municipal Employees, International, Council 57 (Dehler)* (1996) PERB Decision No. 1152-H.) A prima facie case may be established based on an overall pattern of conduct even if any one action by the exclusive representative, standing alone, would not constitute a breach of the duty of fair representation. (*Ibid.*)

Applying this legal framework, the Board found:

When viewed as a whole, the above alleged facts show that SEIU made no effort to represent Meredith regarding his rejection on probation despite Meredith’s multiple attempts to enlist SEIU’s assistance. Under these circumstances, SEIU could not have made an ‘honest and reasonable determination’ about the merits of Meredith’s case.

Unlike the union in *Meredith*, SEIU did make an effort to represent Schmidt. For example, SEIU wrote several letters on Schmidt’s behalf and initiated at least one grievance. In addition, an SEIU steward accompanied Schmidt to a “back to work” meeting when she returned to work on January 10, 2008, and SEIU wrote and submitted the January 23, 2008, letter regarding Schmidt’s work assignment. Moreover, SEIU and Schmidt appeared to remain in contact through at least March 10, 2008. Based on these facts, we find that SEIU was responsive to Schmidt’s complaints and that it did not unlawfully ignore or otherwise fail to address Schmidt’s concerns. Accordingly, we conclude *Meredith* does not compel a finding that SEIU breached its duty of fair representation.

We, therefore, agree with the Board agent that Schmidt failed to allege a prima facie case that SEIU breached its duty of fair representation and find the dismissal of this charge was warranted.

ORDER

The unfair practice charge in Case No. SF-CO-176-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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February 9, 2009

Barbara Schmidt

Re: Barbara Schmidt v. SEIU Local 1021
Unfair Practice Charge No. SF-CO-176-M
DISMISSAL

Dear Ms. Schmidt:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 27, 2008. Barbara Schmidt (Ms. Schmidt or Charging Party) alleges that SEIU Local 1021 (Union or Respondent) violated the Meyers-Miliias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation. Charging Party is employed by the Greater Vallejo Recreation District (District or GVRD) and the Union is the exclusive representative of the position in which she is employed.

Charging Party was informed in the attached Warning Letter dated January 8, 2009, that certain allegations contained in the charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless these allegations were amended to state a prima facie case or withdrawn prior to January 16, 2009, the allegations would be dismissed.

The main concerns addressed in the Warning Letter included: a) the Charging Party's failure to provide facts establishing the timeliness of her allegations; b) allegations that the Union failed to assist Charging Party in her pursuit of extra-contractual matters for which there is no Union duty of fair representation; and c) Charging Party's failure to provide sufficient facts upon which PERB could base a finding that the Union acted arbitrarily, discriminatorily or in bad faith.

On January 14, 2009, a first Amended Charge was filed. The Amended Charge contains a number of attached documents. General Manager Shane McAfee is the highest ranking manager at the District. Recreation Superintendent Phillip McCoy and Recreation Supervisors Eileen Brown and Toni DeHaven are supervisors reporting to the General Manager. Charging Party is a Recreation Coordinator. Prior to January 10, 2008, Charging Party reported to Recreation Supervisor Eileen Brown. After January 10, 2008, Charging Party was told to

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.

report directly to Recreation Superintendent, Phillip McCoy. Throughout the time period of this charge, Charging Party was in contact with a number of Union representatives, including: Temporary Worksite Coordinators Gail Byrdsong and Kathy O'Neil, Worksite Coordinator Marie Avincula,² Union Steward Brad Nicolet and Union Representative Ian Arnold.

The memorandum of understanding (MOU) between the Union and the District is available through the Union's website. The grievance procedures outlined in the MOU do not provide for final and binding arbitration. The MOU does not define what constitutes discipline of an employee, and does not provide for progressive discipline of employees. It does state that employees should be provided notice of disciplinary action, a description of the proposed action to be taken, effective dates of the action, and an opportunity to respond before the discipline is imposed. Indeed,

A unit member may respond to the action within ten (10) days of the receipt of the action. If the unit member elects to respond in person, a meeting shall be scheduled with the General Manager or designee at which meeting the employee shall be afforded the opportunity to respond to the proposed action. The unit member is entitled to representation at this meeting. The General Manager or designee may amend, modify, revoke or sustain any or all of the charges. The General Manager or designee will provide written notice of the unit member's right to appeal to an Adjustment Board and the time within which that appeal must be made. Appeals to the Adjustment Board must be filed in writing within ten (10) working days of the receipt of the decision of the General Manager.

A grievance is defined as the misinterpretation or misapplication or violation of the MOU. The first step is for the employee to discuss the grievance with his or her immediate supervisor, and give the supervisor five days to respond. The MOU does not specify whether the supervisor's response must be in writing. If the employee is dissatisfied with the response, the employee may file a written grievance with the Superintendent, General Manager, or designee. The written grievance must be made within 10 days of the supervisor's response or the date the response was due, and must be signed by the employee and the Union president (or designee).

In her original charge, Charging Party alleged six separate instances when she requested Union assistance. The Amended Charge provides additional facts in support of each of these allegations. Each of these is addressed below.

1. The Union's failure to grieve a change in Charging Party's work hours.

² This individual's name is spelled both "Avincula" and "Advincula" in various attached documents. For the sake of consistency, the spelling, "Avincula" is adopted in this letter.

The original charge stated that Charging Party's hours were changed sometime in 2005. The following facts were alleged in the Amended Charge.

On September 7, 2006, Charging Party was ordered to change the hours of operation sign posted at the Foley Cultural Center (FCC). While other District properties would maintain hours from 8:30 a.m. to 5:00 p.m., FCC would be open from 9:00 a.m. until 6:00 p.m.. This change meant that Charging Party would have to take a one-hour lunch rather than the thirty minute lunch taken by employees assigned to work at other District locations, and work an hour later than her coworkers at other locations.

Also on September 7, 2006, Charging Party sent a memo to the "SEIU/Mike" requesting a review of her concerns about the change to her hours.

On May 25, 2007, Charging Party requested a transfer to the Vallejo Community Center (VCC). The main purpose for this request was because the Coordinator position at VCC worked from 8:30 a.m. to 5:00 p.m. with a 30 minute lunch.

On July 30, 2007, Union Worksite Organizer Marie Avincula filed a grievance over the District's September 5, 2006 change to Charging Party's work hours. On August 1, 2007, the District responded to Ms. Avincula, stating that the issue of Charging Party's hours had already been resolved through an earlier grievance of the same issue, and that the most recent filing would not be re-processed as a new grievance.

On August 8, 2007, there was some dispute between Charging Party and Ms. Avincula regarding whether the District had made a timely response to the July 30 grievance. Ms. Avincula believed that the District had responded in a timely manner, and Charging Party believed that the District had not met the established time frame for responding to a grievance. Charging Party believed that the District's failure to respond to a grievance should result in a restoration of her former work hours.

On August 15, 2007, after learning that the VCC hours would not be 8:30 a.m. to 5:00 p.m., as she had expected, Charging Party withdrew her request for transfer.

During a meeting on August 16, 2007, with Ms. Brown, Ms. Brown informed Charging Party that she would remain at FCC, the new Coordinator for VCC would be cross-trained at FCC. She also stated that if Charging Party was planning to retire after her 50th birthday, she should give the District at least three months' notice. Charging Party's notes from an all recreation staff meeting on that same day state that she was singled out by Mr. McCoy and was humiliated as a result.

On August 20, 2007, Charging Party was informed in writing by Mr. McAfee and Mr. McCoy that she would be transferred to the VCC, effective August 23, 2007.

On August 21, 2007, Charging Party made a written request to "SEIU/Marie/Kris" to file a grievance over an incident earlier that day, in which Mr. McAfee discussed Charging Party's

work performance with another staff member. The staff member later repeated Mr. McAfee's statements to three board members, one of whom responded, "I know this is the employee who has a grievance in."

2. Charging Party's return from Workers' Compensation leave.

Charging Party sustained a work-related injury on September 19, 2007. Her doctor authorized her to return to work with no restrictions on January 10, 2008. On January 22, 2008, Charging Party received a settlement check resolving her Workers' Compensation claims.

On Thursday, January 10, 2008, Charging Party was accompanied by Union Steward Brad Nicolet to a "Back to Work" meeting with Mr. McAfee. At that meeting, Mr. McAfee informed Charging Party that she would not be returned to her old position, but would retain her salary and title. Instead, Charging Party would be working with special events, overseeing contract classes and working on the class system. She would begin reporting directly to Mr. McAfee, rather than to a Recreation Supervisor. Charging Party requested a written job description for this new assignment, but was told that one did not exist. Her title was not changed. The hours for the new job assignment were 8:30 a.m. to 5:30 p.m., with possible weekend assignments, when she had never been asked to work weekends before.

Charging Party and Mr. Nicolet expressed concerns that because Charging Party would no longer be reporting to an intermediary supervisor, that she might be assigned duties out of her class, and also expressed concerns that she was not returned to her former position when her former position was being left vacant. Charging Party stated her concern that the reassignment was retaliatory in nature. The District's Activity Guide for Spring 2008 listed Charging Party as a Recreation Coordinator. The District's Activity Guide for Summer 2008 did not list Charging Party as a Recreation Coordinator.

3. Aggravation of Charging Party's Workers' Compensation injury.

Later on the day of January 10, 2008, Mr. McCoy gave Charging Party her first task pursuant to the new assignment. The task was due to be completed by 8:30 a.m. the following Monday. Because the 10th was a Thursday, Charging Party was given only Friday to complete the task. Meanwhile, Charging Party was not given a computer passcode, and had to log-on with a coworker's name and clearance. When she asked Mr. McCoy to explain one of the ten items on his assignment list, he told her to "figure it out."

After Charging Party returned to work without restrictions on January 10, her previous injury was aggravated by the assignment of new duties that had not been required of Charging Party with her previous assignment. This resulted in her doctor placing her on modified duties from January 16 through January 25, 2008. Her modifications included working a four hour day, with no more than one hour per day of repetitive use of both hands and lifting no more than five pounds.

On January 22, 2008, Charging Party wrote a memo to "Gail/SEIU," requesting that the Union send a memo to the District raising several concerns and demanding that Charging Party be returned to her former assignment. On January 23, 2008, a temporary Worksite Coordinator, Gail Byrdsong, wrote a letter to Mr. McAfee on behalf of Charging Party, raising concerns about her new work assignment and the District's failure to comply with the modified duties ordered by her doctor.

On January 30, 2008, Mr. McAfee responded to the Union's January 23 inquiry. In his response, he justified Charging Party's new assignment stating that he believed the hours were more to Charging Party's liking, the tasks were more suitable for her skill set, and the duties were not so unlike those of her previous assignment that her doctor's restrictions were no more able to be accommodated at one of the community centers than at her new assignment. The Union's letter did not explicitly ask that Charging Party be returned to her former position, and Mr. McAfee's response did not agree to return her to her former position.

4. Reprimand.

On January 14, 2008, Mr. McCoy wrote a memo regarding Charging Party's "unauthorized use in CLASS/Completing programs." The memo acknowledges that this was something that Mr. McCoy and Charging Party discussed when the error was discovered, that Charging Party did not make the errors knowingly, and that she would not repeat the mistake in the future. The memo directs Charging Party to "make every effort to use the CLASS system carefully in the future to avoid costly errors," but does not identify any consequence for the present or future failure to do so.

Charging Party's recollection of the conversation was that Mr. McCoy approached her not long after she had asked him for clarification of the assignment he had given her upon her return to work. He told her to figure it out, and she was obliged to search through the computer system to find the information necessary to complete the assigned task. The unauthorized class completions occurred during this time.

On January 16, 2008, Charging Party requested a meeting with Mr. McCoy, Mr. McAfee and Ms. Byrdsong, in part to discuss the memo she received on January 14 from Mr. McCoy, but also for the purpose of gaining more "direction/support" from her supervisors.

5 and 6. Ergonomics Study and Revised Work Restrictions.

According to Charging Party, while the duties in her old assignment included some computer work, they also included other varied tasks so that Charging Party was able to move positions frequently throughout the day. Assuming those working conditions to continue upon her return from medical leave, her doctor did not recommend any workplace restrictions. Her new assignment required her to sit at the computer almost exclusively, without much opportunity to change physical position or engage in other activities throughout the day. These new conditions exacerbated Charging Party's injuries, necessitating a second doctor's note and some workplace restrictions which would not otherwise have been necessary.

As noted above, the first doctor's note dated January 10, stated that Charging Party could return to work with no restrictions, but required that an ergonomic evaluation be completed, including the procurement of any new equipment deemed necessary. The ergonomic evaluation recommended the purchase of a new chair, adjustable keyboard tray and ergonomic keyboard for Charging Party.

The second doctor's note was issued on January 16, 2008. On that date, her doctor placed Charging Party on modified work from January 16 through January 25, 2008. During this period, Charging Party was restricted to the following working conditions: she was not to extend/flex her neck or reach above her shoulders; she could only occasionally use each hand, and could only lift/carry or push/pull up to five pounds. Her work day was further restricted to four hours per day, 20 hours per week and no more than one hour per day total of repetitive use of both hands. The doctor's note also stated: "Please note: if employer cannot accommodate these restrictions, Barbara J Schmidt must be regarded as being unable to work for this period." [Emphasis added.]

In the afternoon of January 16, Human Resources Administrator Kay Baughn instructed Charging Party to make a copy of the January 16 doctor's note for Mr. McCoy and deliver it to his office. Five minutes before the end of her shift on that day, Ms. Baughn informed Charging Party that she should not work her scheduled shift on January 17, and that Mr. McAfee would provide her further instructions on January 18 regarding the remainder of her shifts while under the most recent medical restrictions.

On January 22, 2008, Human Resources Administrator Kay Baughn sent Charging Party a notice that she was being placed on inactive status as of January 18, 2008, and that her dental and life insurance would cease on January 31, 2008 if she did not return to full active status before then.

On January 23, 2008, Ms. Byrdsong sent a letter to Mr. McAfee addressing Charging Party's concern that since her return from medical leave on January 10, the District had deliberately assigned her to more difficult work at a less desirable location and with less desirable hours. Ms. Byrdsong's letter also addressed the District's failure to accommodate Charging Party's doctor's medical restrictions from January 16-25. Ms. Byrdsong sent the letter to Mr. McAfee by e-mail, and provided a courtesy copy of that e-mail to Charging Party.

Though not explicitly stated in the facts, it appears that Charging Party did not return to work on January 25, the date her doctor's workplace restrictions were to have expired. Rather, it appears that her doctor maintained the workplace restrictions after the initial date indicated on the January 16 letter.

On January 30, 2008, Mr. McAfee responded to the January 23 letter. Essentially, Mr. McAfee states that Charging Party was already informed that the decision to transfer her to a different position at a different location with different hours was intended to accommodate her more limited physical abilities while utilizing her skills to greater advantage and alleviating

some of the concerns resulting from the late hours required at her previous position. According to Mr. McAfee, the duties of her new assignment were "not dissimilar" to those in her previous assignment.

Also on January 30, 2008, Ms. Byrdsong sent an e-mail message to Mr. McAfee, with courtesy copies sent to both Mr. McCoy and Charging Party, requesting the District's response to the January 23, 2008 letter and challenging the District's notice to Charging Party that her benefits would be reduced as a result of her inactive status.

On January 31, 2008, Charging Party requested that Ms. Byrdsong continue assisting her with her employment concerns, even after Ms. Avincula's expected return as the Worksite Coordinator for District employees on February 1. Ms. Byrdsong replied to Charging Party's request and informed her that February 1 would be her last day as a Temporary Worksite Coordinator for District employees.

On February 1 and 6, Charging Party sent e-mail messages to Ms. Byrdsong, requesting an update on the District's response to the Union's most recent letter. In an e-mail message dated 7:30 p.m. and 10:40 p.m. on February 6, 2008, and addressed to Ms. Byrdsong, Ms. Avincula and three other unidentified individuals, Charging Party states that she and her husband will be at the Union office in Fairfield, California before 10:00 a.m. on February 7, "to receive assistance from a SEIU 1021 representative."

Shortly after 11:00 p.m. on February 6, Ian Arnold, one of the recipients of Charging Party's e-mail, stated that Charging Party should schedule a meeting with Kathy O'Neil, as he would be out of the office the next day and there may not be someone available to assist her if she simply showed up at the office without a scheduled appointment.

It is not clear if Charging Party went to the Union office on the morning of February 7. However, at 4:33 pm on February 7, she sent an e-mail message to Mr. Arnold which states: "Ian-----You informed me today that an appointment was set up for tomorrow 2-8-08 and yet in your e-mail you direct me to set up an appointment. I will be in the Fairfield office tomorrow at 10am."

In the evening on February 7, Charging Party received an e-mail message from Kathy O'Neil, the new Temporary Worksite Coordinator for Solano County. In her e-mail message, Ms. O'Neil states that she is unable to meet with Charging Party until the next Tuesday, February 12, but that she would be happy to meet with Charging Party at that time.

On February 8, Charging Party sent e-mail messages requesting to meet with Union President Damita Davis-Howard, and Valerie McCan-Murrell, whose title is not provided. A meeting was scheduled to take place in the morning of February 12, with Charging Party, Kathy O'Neil and Damita Davis-Howard. It is not clear if that meeting ever took place.

On February 19, 2008, Charging Party sent e-mail messages to both Ms. Baughn and Ms. Avincula. Each of these e-mail messages were courtesy-copied to a number of other

individuals. In both e-mail messages, Charging Party requested additional information regarding a meeting scheduled for February 20, 2008.

On February 20, Charging Party sent e-mail messages to Ms. Baughn, requesting information regarding her right to take leave from her job under the federal Family Medical Leave Act (FMLA). Ms. Baughn responded that if Charging Party wished to apply for FMLA, she should send a formal request to the General Manager and read District policy #2045. Charging Party forwarded Ms. Baughn's e-mail responses to Ms. Avincula, stating that she was looking forward to meeting with her on February 26, along with Ms. Avincula, Ms. O'Neil and Mr. Arnold.

On February 24, Charging Party requested that Mr. McAfee "plac[e her] on FMLA as soon as possible." This request was made by e-mail message, and courtesy copies were provided to Ms. Avincula, Ms. DeHaven, Mr. Arnold and Ms. O'Neil.

On March 10, 2008, Charging Party spoke with Ms. Avincula. In their conversation, Charging Party stated that she had provided the District with a firm retirement date, which appears to have been April 1, and that she did so only because she did not trust that the grievance over her Workers' Compensation concerns would result in a ruling in her favor.

On March 25, Mr. McAfee challenged the relevance of Charging Party's grievance, given her announced retirement. Charging Party sent an e-mail response to Ms. Avincula on March 27, 2008, reminding her that her announced retirement date was intended as a precautionary measure, and that she still wished to pursue the grievance process with the Union's assistance.

On April 2, Charging Party sent an e-mail message to Ms. Avincula stating, in relevant part:

I am very concerned on my grievance progress [sic] as I have not heard from you/union on any up dates since Thursday, March 27, 2008. Plus, I sent you an e-mail request (March 27, 2008) and you have not replied back.

On Friday, March 28, 2008, I went and seen [sic] the doctor. The doctor still has me on 1/2 days with restrictions. I called Superintendent and faxed & called (left message) to the HR person on Friday, March 28, 2008 at 9:30am.

Please note: GVRD HR nor Superintendent never called me to inform me if I was able to return back to work for 1/2 days or if they had any position for me to work. This is the first communications that I received from GVRD.

Where do we stand on the grievance process with GVRD/Shane McAfee on setting up the meeting with a review committee?

I respectfully request to hear from you tomorrow and to set up a meeting on the unions position in my matter.

On April 11, Charging Party sent an e-mail message to Ms. Avincula, with courtesy copies to two others. The April 11 e-mail message states:

- It has been one week since I heard from you/SEIU on my grievance progress [sic].
- Can you please give me any information?
- Please read the attached bold e-mail information from a co-worker who works for GVRD at the North Vallejo Community Center.
- I am very up set [sic] that GVRD/Shane sent an e-mail out to all GVRD employees on my retirement.
- This is a privacy act on what is going on with me, I did not hold a job that everyone needed to know if I was working or not.
- What is this saying to the SEIU and SEIU members? (that the union gave up on me/grievance and that everything was dropped?)
- Does this not give you/SEIU the impression that GVRD/Shane plans on not meeting with the Union on my grievance?
- **I am still waiting for a copy of the correspondences that went back and forth with SEIU/you and GVRD/Shane.** [Emphasis in original.]
- Has SEIU/you and GVRD/Shane agreed on a resolution that I am not aware of?
- Marie, I am in the dark and I would appreciate it if you/SEIU could shade [sic] some light on this grievance?
- I respectfully request a reply no later than Tuesday, April 15, 2008 or SEIU/you will give me no chose [sic] but to take further actions. Once again, I thank you for your time and support in this matter. I look forward in hearing from you/SEIU before or on Tuesday, April 15, 2008.

Attached to this e-mail message was a copy of an e-mail message Charging Party received from a former coworker, informing her that her retirement had been announced by e-mail message.

On May 1, 2008, Charging Party contacted Ms. Avincula asking for an update "on any action that has been taken" on her behalf. This charge was filed on May 27, 2008.

Discussion

The attached January 8, 2009 Warning Letter explains that several of the concerns raised by Charging Party are beyond the scope of PERB's jurisdiction, either because they are untimely or because they allege violations of statutes not administered by PERB. Charging Party's First Amended Charge does not address these legal deficiencies. Accordingly, to the extent that Charging Party's allegations are untimely or beyond the scope of PERB's jurisdiction, they are hereby dismissed.

This does not resolve all of Charging Party's allegations, however. The attached January 8, 2009 Warning Letter also explains the standard applied by PERB to any facts alleged as evidence of a breach of the duty of fair representation. That standard is that a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

In her Amended Charge, Charging Party establishes that she has been in close contact with her Union representatives throughout the period from her return from a medical leave of absence in 2007 until a few weeks before she filed the original unfair practice charge. One of the concerns raised by Charging Party is that the constant turn-over of employees within SEIU has resulted in disrupted service to SEIU members, and especially to Charging Party. During this period she has worked off and on with the regular worksite coordinator, Marie Avincula, and during periods of her absence, Charging Party was assisted by Temporary Worksite Coordinators Gail Byrdsong and Kathy O'Neil. According to Charging Party, she met with Union representatives who assured her that they were taking action on her complaints, but no action was taken.

The facts provided by Charging Party tend to establish that the Union was responsive to some of Charging Party's concerns. For example, Charging Party alleges in the original charge that the Union never took action on her behalf when the District changed her work hours without notice. However, the Amended Charge includes a July 30, 2007 letter from Ms. Avincula titled, "Grievance – Change of Work Hours." The District responded to the grievance the next day. Indeed, according to the District, this issue had already been the subject of a grievance by the Union.

Charging Party also alleges that after she received a letter from her supervisor "for failing at [her] job," the Union did nothing. The letter in question is the January 14 memo from Mr. McCoy. It is not clear from the face of the memo that it satisfies the MOU's definition of discipline. There is no proposed adverse employment action to be taken on the part of the District and the memo does not contain a statement that the unit member has the right to respond to any charges lodged in the memo.

Assuming the memo could be considered discipline, Charging Party had the right, under the terms of the MOU, to respond to discipline and to elect to respond in person. Charging Party responded to the memo in writing on January 16, 2008, and requested a meeting with Mr. McCoy and Mr. McAfee as soon as possible. Her response to the January 14 memo was made on the same day that her doctor ordered significant workplace restrictions be implemented to prevent her further injury. On January 23, the Union sent a letter to the District which addressed a number of concerns regarding the new assignment following Charging Party's January 10 return from a medical leave of absence.

Charging Party also alleges that the Union failed to take any action on her behalf in response to the District's placing her on inactive status as of January 18, 2008. However, the District acknowledged in a March 25 letter from Mr. McAfee that the above-described concerns were the subject of a grievance when he questioned the continuing relevance of the grievance given Charging Party's retirement from the District.

As noted above and in the Warning Letter, in order to establish a breach of the duty of fair representation, Charging Party must provide facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard), *supra*, PERB Decision No. 1474-M.) Furthermore, there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. (San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544.) The contract's grievance provision does not provide for final and binding arbitration. Nor does it appear to cover Workers' Compensation-related concerns.

Nevertheless, facts provided in the Amended Charge tend to indicate that the Union did respond to Charging Party's requests for assistance, and wrote several letters and initiated at least two grievances on her behalf. Among the subjects addressed by the Union were Charging Party's concerns about the District's failure to accommodate her physical limitations in the workplace. The facts provided in the Amended Charge do not establish that Charging Party was ignored by the Union or that it failed to address her concerns. Rather, it appears from the facts that the Union transferred Charging Party's case to each successor Worksite Coordinator, and that each Worksite Coordinator met with Charging Party on at least one occasion, several of which meetings resulted in letters or grievances being sent to the District. Based on the facts provided, it is unclear in what manner the Union's assistance to Charging Party was without a rational basis or devoid of honest judgment.

Therefore, the allegations which fail to state a prima facie case are hereby dismissed based on the facts and reasons set forth in the January 8, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,³ Charging Party 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(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 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. (Regulation 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 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Charging Party files 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.) 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. (Regulation 32135(c).)

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

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,

TAMI R. BOGERT
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Damita Davis-Howard, President

AC

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027



January 8, 2009

Barbara Schmidt

Re: Barbara Schmidt v. SEIU Local 1021
Unfair Practice Charge No. SF-CO-176-M
WARNING LETTER

Dear Ms. Schmidt:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 27, 2008. Barbara Schmidt (Ms. Schmidt or Charging Party) alleges that the SEIU Local 1021 (Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation.

Charging Party is employed by the Greater Vallejo Recreation District (District), which is a subdivision of the City of Vallejo and a public agency as defined by the MMBA. The Union is Charging Party's exclusive representative.²

Specifically, Charging Party alleges as follows. The District changed her work hours in 2005 but the Union failed to file a grievance on time. Six months later she wanted to file a grievance concerning the same allegations but the Union refused, and they also failed to file NLRB charges at her request. She later went to the Union with a complaint about the District's hiring practices but nothing happened. On an unspecified date, she was transferred to a different facility that was run-down and dirty. She complained to the Union but it did not file a grievance.

On September 26, 2007, Charging Party took a leave of absence from work due to a bulging disk in her back. In January 2008, Charging Party won a Workers' Compensation case, but the Union did not file a grievance on her behalf. On January 10, 2008, she returned from sick leave with no medical restrictions. Despite the lack of restrictions, Charging Party was not returned to her former position but was assigned to a newly created job with new hours, new work location and new supervisor. She requested, but was not given a description of the new job.

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.

² The charge does not include Charging Party's title or position for the District.

On an unspecified date, Charging Party filed a new Workers' Compensation claim. She claims that the District's General Manager retaliated against her for filing the claim, and that the Union did not file a grievance on her behalf.

On an unspecified date, Charging Party was reprimanded at the new job and the Union again failed to file a grievance on her behalf. Additionally, Charging Party asserts that the District failed to comply with an ergonomics study and again, the Union failed to take action on her behalf.

On an unspecified date, Charging Party was verbally reprimanded by a supervisor for asking for assistance from co-workers regarding a new computer program that had been installed during a period of her absence from work, and on which she had not been formally trained. She complained to the Union that the employer's reprimand constituted verbal harassment and was creating a hostile work environment. In response, the Union wrote a memo, but did not file a grievance.

On January 16, 2008, Charging Party's doctor ordered her to work only half days as a result of the District's failure to comply with an ergonomic study that had been conducted to address Charging Party's Workers' Compensation claims. Even after her doctor faxed a medical release directly to her supervisor, her supervisor refused to release her for the remainder of her shift. At the end of that day, a District Human Resources officer informed Charging Party that she should not return to work for the remainder of the week. The District docked her for the four hours she was scheduled to work for the remainder of the week. She informed the Union of this fact, but again, no action was taken on her behalf.

On the basis of the above-alleged facts, Charging Party filed claims with the Department of Fair Employment and Housing. Although the District has expressed interest in settling these claims, Charging Party alleges that the Union still has made no effort to assist her with these concerns.

Discussion

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice

occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations on an alleged breach of the duty of fair representation begins to run when the charging party knew or should have known that further assistance from the union was unlikely. (IUOE Local 501 (Reich) (1986) PERB Decision No. 591.)

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that “unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith.” (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213.) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be “accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union’s power.”

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171).

There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. (San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544.) The general rule is that when a bargaining unit member is free to represent themselves or hire an attorney to pursue their claim, the union is not bound by the duty of fair representation. (CSEA and its Chapter 130 (Simpson) (2003) PERB Decision No. 1550.) This is especially true when the claims involve matters that are extra-contractual or the enforcement of state or federal statutes. (California School Employees Association (Garcia) (2001) PERB Decision No. 1444.)

With regard to when “mere negligence” might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union’s negligence breaches the duty of fair representation “in cases in which the individual interest at stake is strong and the union’s failure to perform a ministerial act completely extinguishes the employee’s right to pursue his claim.” (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

Additionally, while the duty of fair representation extends to grievance handling by the exclusive representative (Fremont Teachers Association (King) (1980) PERB Decision No.

125), a reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (California State Employees Association (Calloway) (1985) PERB Decision No. 497.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard), supra, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

Many of the concerns raised by Charging Party appear to be related to her Workers' Compensation claims. As noted above, where a member is free to pursue an extra-contractual matter on their own, like her claims to the Department of Fair Employment and Housing, and her claims for workers' compensation benefits, the Union does not have a duty to represent the employee. Indeed, it appears that Charging Party has already pursued her rights under the State's anti-discrimination and workers' compensation statutes.

Also noted above, the burden is on the Charging Party to provide facts upon which a complaint for breach of the duty of fair representation can be based. In the present charge, Charging Party notes that she made the Union aware of her concerns, but does not always provide dates when she did so, and does not give the name of any Union Representative to whom she spoke. Nor does she state whether the Union responded to her concerns. As explained above, the mere fact that the Union did not file a grievance on her behalf does not establish that the Union breached the duty of fair representation.

In order for PERB to find a breach of the duty of fair representation, the charge must include facts demonstrating that the Union's decision not to pursue a grievance on Charging Party's behalf was arbitrary, discriminatory or in bad faith. Relevant information would include facts regarding the manner in which Charging Party requested the Union's assistance, the names of Union Representatives with whom Charging Party communicated, the dates upon which she sought the Union's assistance, and the response, if any, from Union Representatives. In the absence of these facts, PERB is unable to determine whether the concerns raised by Charging Party were the types of concerns over which the Union has the duty to take action or explain its decision not to act, or conversely, whether the Union made a rational decision not to file a grievance on Charging Party's behalf. These facts are also necessary in order for PERB to distinguish between merely negligent behavior on the part of the Union which is not a violation of the Act, and arbitrary, discriminatory or bad faith conduct on the part of the Union which is a violation of the Act.

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, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before January 16, 2009, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC