STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Charging Party, v. COUNTY OF FRESNO, Respondent.	Case No. SA-CE-599-M PERB Decision No. 2125-M August 11, 2010

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521; Catherine E. Basham, Senior Deputy County Counsel, for County of Fresno.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union, Local 521 (SEIU) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the County of Fresno (County) made a unilateral change to its furlough policy in violation of the Meyers-Milias-Brown Act (MMBA)[1] by imposing furloughs on County employees in Bargaining Unit 31 (Unit 31). The Board agent dismissed the charge for failure to state a prima facie case of an unlawful unilateral change.

The Board has reviewed the dismissal and the record in light of SEIU's appeal, the County's response to the appeal, and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by

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

the record and in accordance with applicable law. Accordingly, the Board adopts them as the decision of the Board itself, supplemented by a brief discussion of SEIU's appeal.

DISCUSSION

SEIU is the exclusive representative of County employees in Unit 31 and several other County bargaining units. Prior to October 1993, the County Board of Supervisors enacted Personnel Rule 12060 regarding mandatory furloughs (furlough rule or Rule 12), that authorized the County to impose furloughs as "an alternative or adjunct to layoff[s]" in order to minimize the number of employees who would be laid off. Initially, several bargaining units, including Unit 31, were specifically exempt from the furlough rule. In November 1993, following an impasse in bargaining with Unit 31, the Board of Supervisors revised Rule 12 to no longer exempt Unit 31 from the furlough rule.[2] In or around 1996, the County published its personnel rules, including the furlough rule. Both parties acknowledge that the 1996 publication mistakenly listed Unit 31 as being exempt from the furlough rule. In March 2009, the County implemented mandatory furloughs for Unit 31 and other bargaining units, based upon the furlough rule as amended in 1993.

The original unfair practice charge alleged that the County's implementation of mandatory furloughs for Unit 31 in March 2009, was an unlawful unilateral change to existing furlough policy. Specifically, the charge alleged that "the County's Personnel Rule 12, Section 12060, which pertains to mandatory furloughs has now been unilaterally modified to remove Unit 31 from the exemption clause. . . . Unit 31 no longer appears in this exemption clause." Additionally, the charge alleged that the unilateral change was made "in

[2] The County and SEIU subsequently agreed to a temporary exemption of Unit 31 from the furlough rule for fiscal year 1994/1995 only. This temporary exemption was approved by the Board of Supervisors and signed by SEIU.

contravention of" the Full Understanding clause in the parties' memorandum of understanding (MOU).[3]

The amended charge alleged that, subsequent to the 1996 publication of the personnel rules, SEIU engaged in bargaining with the County, including a furlough addendum to the 1997-2001 MOU, with the understanding that Unit 31 was exempt from Rule 12. The charge alleges that the erroneous publication of the policy in 1996 created an ambiguity in the furlough rule, and that subsequent bargaining between the parties demonstrates that both parties recognized Unit 31 to be exempt from the furlough rule, such that the imposition of furloughs in March 2009 was a unilateral change from existing policy.

The Board agent's dismissal held that in the absence of any allegation or evidence that the Board of Supervisors amended the policy subsequent to 1993, the furlough rule established by the 1993 amendment is clearly "*the* policy that controls this dispute." (Emphasis in original.) The Board agent held that because the established furlough policy extended to Unit 31, the County did not change that policy when it imposed furloughs.

On appeal, SEIU argues the Board agent improperly determined material issues of fact that should be resolved at hearing. Primarily, SEIU argues that it was improper for the Board agent to determine that the relevant applicable policy was the policy adopted by the Board of Supervisors in 1993. SEIU essentially restates arguments made in the charge that the history

---

[3] The Full Understanding clause in the parties' 2004-2011 MOU, states in part:

> This MOU shall govern in case of conflict with provisions of existing County ordinances, rules and regulations pertaining to wages, hours, and other terms and conditions of employment, but otherwise such ordinances, rules and regulations shall be effective and the Board of Supervisors and other County Boards and Commissions retain the power to legislate pertaining to such matters subject to compliance with the Meyers-Milias-Brown Act and other applicable provisions of law provided such actions are not in conflict with the provisions of this MOU.

of bargaining furlough issues between the parties, subsequent to the 1996 erroneous publication of Rule 12, must be considered when determining the terms of the policy at the time of the imposition of furloughs in March 2009. SEIU contends the case must go to hearing to determine "whether the parties' current MOU is plagued by a mutual or unilateral mistake of fact." Furthermore, SEIU continues to argue that, in light of the mistaken understanding, the Full Understanding clause of the MOU cannot represent a valid waiver of the right to bargain regarding furloughs.

We find that the Board agent adequately addressed the significance and relevance of the erroneous 1996 publication and the parties' subsequent bargaining history, and that no material facts are in dispute with respect to the charge of unilateral change of the furlough policy at issue. As stated by the Board agent, the argument regarding past practice being urged by SEIU is misplaced.[4] SEIU does not dispute that the furlough policy established in 1993 applied to Unit 31. In fact, the charge included a copy of the policy as established in 1993. Moreover, except for the agreement to temporarily exempt Unit 31 for the 1994/1995 fiscal year, SEIU fails to allege or provide evidence that the Board of Supervisors amended the policy

[4] SEIU's argument that a hearing must be held to determine whether the parties' MOU was "plagued by a mutual or unilateral mistake of fact" is similarly misplaced. The imposition of furloughs consistent with Rule 12 was not a change in policy. Consequently, no duty to bargain existed with respect to the furloughs and the validity of the Full Understanding clause as a waiver of the right to bargain furloughs is not at issue. Furthermore, while no duty to bargain existed here, PERB does recognize unilateral mistake of fact as a defense to a bad faith bargaining charge in extraordinary circumstances. The instant charge does not allege facts to demonstrate extraordinary circumstances. (*San Diego Unified School District* (2007) PERB Decision No. 1883.) Therefore, whether the parties' MOU is plagued by a mistake of fact is not at issue. In addition, PERB has specifically rejected mutual mistake as a defense to bad faith bargaining, or as a means to create a duty to bargain over a replacement contract provision. The Board found in *Berkeley Unified School District* (2008) PERB Decision No. 1976, that to hold otherwise would "undermine the integrity and stability of the bargaining process [and] lead to careless bargaining by discouraging parties from verifying each other's statements during negotiations in the hopes that it will lead to an opportunity to renegotiate an unfavorable contract provision in the future." The Board held that "the proper place to resolve such mistakes is at the bargaining table." (*Ibid.*)

subsequent to 1993. Therefore, the charge does not demonstrate that the County's imposition of furloughs on Unit 31 was a change to the Rule 12 furlough policy.

Accordingly, the Board affirms the dismissal of the charge for failure to state a prima facie case of unilateral change in violation of the MMBA.

ORDER

The unfair practice charge in Case No. SA-CE-599-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

April 19, 2010

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

Re: *SEIU Local 521 v. County of Fresno*
Unfair Practice Charge No. SA-CE-599-M
DISMISSAL LETTER

Dear Ms. Steele:

The Service Employees International Union, Local 521 (SEIU) filed the above referenced unfair practice charge (original charge) with the Public Employment Relations Board (PERB or Board) on May 12, 2009. The charge alleges that the County of Fresno (County) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing the mandatory furlough policy for County Bargaining Unit 31 (Unit 31). In the attached Warning Letter dated October 14, 2009, PERB advised SEIU that the charge did not allege a prima facie violation of the duty to bargain. SEIU filed an amended charge on November 30, 2009.

1. The Original Charge

SEIU represents several of the County's bargaining units, including Unit 31. Prior to October 1993, the County Board of Supervisors enacted a personnel rule entitled "Mandatory Furloughs" (furlough rule). The furlough rule stated, in essence, that the County could impose furloughs as "an alternative or adjunct to layoff[s]" in order to minimize the number of employees who would be laid off. When the furlough rule was first enacted, several bargaining units, including Unit 31, were exempt from its provisions.[2]

In October 1993, the County reached impasse with Unit 31. Following impasse, the Board of Supervisors voted to extend the furlough rule to Unit 31. In November 1993, the County reached impasse with Unit 30. The Board of Supervisors then voted to extend the furlough

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

[2] The Warning Letter describes the history of the furlough rule in greater detail.

rule to Unit 30. These votes meant that the furlough rule "unquestionably" did not extend to several other bargaining units (the exempt units).[3]

In 1994, the County and SEIU agreed to exempt Unit 31 from the furlough rule, but only for the "fiscal year 1994/95." The Board of Supervisors approved that temporary exemption. Except for approving the temporary exemption for Unit 31, the last time the Board of Supervisors voted to amend the furlough rule was in November 1993.[4]

In or around 1996, the County published its personnel rules, including a version of the furlough rule (hereafter "the published version"). The language of the published version was identical to the furlough rule that had existed *prior* to the amendments of October and November 1993. In other words, the published version showed that Unit 31 was *exempt* from the furlough rule. As noted above, there is no evidence the Board of Supervisors approved the published version.

On March 5, 2009, the County implemented mandatory furloughs for Unit 31. In doing so, the County relied on the furlough rule, as last amended in 1993. In the original charge, SEIU alleged the County had unilaterally changed existing policy by applying the furlough rule to Unit 31, an otherwise exempt unit. The Warning Letter concluded that the furlough rule, as amended in 1993, remained in effect and thus the County had not unilaterally changed existing policy.

2. The Amended Charge

The amended charge alleges that after the County published the personnel rules in 1996, the County "always bargained" about Unit 31 furloughs. For instance, the parties' collective bargaining agreement for 1997-2001 included a "furlough" addendum. The addendum implemented furloughs during each year of the agreement. It also addressed certain effects of the furloughs, such as benefits, scheduling, and annual leave. According to the amended charge, the parties negotiated the addendum for Unit 31 "in reliance upon the fact"—or at least in the mistaken belief—"that Unit 31 is exempt from mandatory furloughs."[5]

---

[3] SEIU does not to contest the County's right to furlough employees in units that are covered by the furlough rule. Rather, SEIU asserts that Unit 31 became an exempt unit at a later date.

[4] The facts regarding the history of the furlough rule are taken from the County's position statement. That statement contains what appears to be the official actions of the Board of Supervisors. Thus, the history of the furlough rule does not appear to be in dispute. (See *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M (PERB Agent may rely on undisputed facts not contained in charge).) However, the current record ends with the Board of Supervisors' vote dated November 9, 1993.

[5] The County negotiated similar "furlough" addenda with three of the "unquestionably" exempt units.

DISCUSSION

As the Warning Letter indicated, Unit 31 was at one time exempt from the furlough rule. In late 1993 the County negotiated to impasse and the Board of Supervisors voted to extend the furlough rule to Unit 31. The Board of Supervisors then voted to temporarily suspend the furlough rule for Unit 31 during the "fiscal year 1994/95." Finally, it is clear from the amended charge that the parties negotiated—and the Board of Supervisors approved—an addendum regarding the effects of the 1997-2001 furloughs. However, like the original charge, the amended charge fails to allege that the Board of Supervisors has ever amended the furlough rule that was established in 1993.

Accordingly, the furlough rule established in 1993 is *the* policy that controls this dispute. The County applied—but it did not change—that policy when it announced the current round of furloughs. Accordingly, the County did not commit a "per se" violation of the duty to bargain. (See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

SEIU seems to argue that—due to the publication of the unapproved personnel rule in 1996—the County's furlough policy is "ambiguous." Thus, the argument continues, PERB must examine the parties' past practices to determine the furlough policy. According to the amended charge, that examination shows the parties have an "unequivocal" and "clearly established" past practice of *negotiating* over Unit 31 furloughs. SEIU's reliance on past practice is misplaced.

It is axiomatic that an employer cannot unilaterally change an established policy—assuming, of course, the policy is within the scope of representation. (*Grant Joint Union High School District* (1982) PERB Decision No. 196, 9.) If the established policy is clear, then PERB reads the policy and looks to see if the employer changed it. (*Glendora Unified School District* (1991) PERB Decision No. 876, p. 12.) If, on the other hand, the established policy is ambiguous, then PERB examines the parties' past practice to determine exactly *what* the established policy was. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 9 (*Marysville*).)

A past practice, even one of long duration, does not trump a clear, established policy. (*Marysville*, *supra*, PERB Decision No. 314, p. 9.) In *Marysville*, the written policy said employees were "entitled" to a 30-minute lunch period. Notwithstanding that language, the employer had for many years given employees a 50-minute lunch period. (*Id.* at pp. 2-3.) When the employer decided to limit the lunch period to 30 minutes, PERB held that the written policy controlled over the past practice. (*Id.* at p. 10.) PERB stated that the employer's failure to enforce the established policy in the past "does not mean that, ipso facto, it is forever precluded from doing so. (*Ibid.*)

In this case, the 1993 furlough rule is quite clear: the County can impose furloughs as "an alternative or adjunct to layoff[s]" in order to minimize the number of employees who would be laid off. Notwithstanding the rule's clarity, the County did, of course, negotiate about Unit

31 furloughs in 1994 and again in 1997. However, on neither occasion did the parties agree to permanently change the furlough rule. Nor did they agree to negotiate each time the need for furloughs arose. Thus, the County's failure in the past to simply enforce the furlough rule—without first negotiating with SEIU—"does not mean that, ipso facto", the County was "forever precluded from doing so." (*Marysville*, *supra*, PERB Decision No. 314, p. 10.)

CONCLUSION

The clear, established policy regarding Unit 31 allows the County to impose furloughs as "an alternative or adjunct to layoff[s]" in order to minimize the number of employees who would be laid off. The County did not change that policy when it recently imposed furloughs. Accordingly, for the reason discussed above, and for the reasons discussed in the Warning Letter, PERB hereby dismisses both the original and amended charges.

Right to Appeal

Pursuant to PERB Regulations,[6] 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[6] 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. (Cal. Code Regs, tit. 8, § 32635, subd. (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 Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

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. (Cal. Code Regs, tit. 8, § 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 _____
Harry J. Gibbons
Senior Regional Attorney

Attachment

cc: Catherine E. Basham, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

October 14, 2009

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

Re: *SEIU Local 521 v. County of Fresno*
Unfair Practice Charge No. SA-CE-599-M
WARNING LETTER

Dear Ms. Steele:

The Service Employees International Union, Local 521 (SEIU) filed the above referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on May 12, 2009. The charge alleges that the County of Fresno (County) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally changing the mandatory furlough policy for County Bargaining Unit 31.

BACKGROUND

1. The Furlough Policy

SEIU is the exclusive representative of several County bargaining units, including the Public Defenders in Unit 31. In August 1993, the County and several bargaining units bargained to impasse on furloughs. Thus, on August 3, 1993, the County Board of Supervisors adopted a personnel rule entitled "Mandatory Furloughs" (hereafter "the furlough rule"). The furlough rule stated, in essence, that the County could impose furloughs as "an alternative or adjunct to layoff[s]" in order to minimize the number of employees who would be laid off. The rule, however, contained an express exemption (exemption) for Unit 31 and several other units because those units were still bargaining with the County. The exemption read, with emphasis added, as follows:

> This [mandatory furlough] provision **does not apply to** employees represented by Representation Units 3, 4, 6, 18, 22, 29, **30**, **31**, 32, and 36.

The County subsequently reached impasse with Unit 31. Thus, on October 19, 1993, the Board of Supervisors voted to impose the furlough rule on Unit 31. It did this by amending the exemption to read, with emphasis added, as follows:

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

> This [mandatory furlough] provision **does not apply to** employees represented by Representation Units 3, 4, 6, 18, 22, 29, **30**, 32, and 36.

Finally, the County reached impasse with Unit 30. Thus, on November 9, 1993, the Board of Supervisors voted to impose the furlough rule on Unit 30. It did this by amending the exemption to read, with emphasis added, as follows:

> This provision **does not apply to** employees represented by Representation Units 3, 4, 6, 18, 22, 29, 32, and 36.

In 1994, the Board of Supervisors approved an agreement between the County and SEIU. The agreement stated that the furlough rule would "not be applied" to Unit 31 during the "fiscal year 1994/95." However, other than the temporary suspension of the furlough rule for the "fiscal year 1994/95," it appears that the last time the Board of Supervisors *amended* the language of the furlough rule was when it extended the rule to Unit 30 on November 9, 1993.[2]

2. Subsequent Events

In or around 1996, the County published its personnel rules, including a version of the furlough rule (hereafter "the published version"). The language of the published version was identical to the furlough rule that existed prior to the amendments of October and November 1993. Thus, the exemption read, with emphasis added, as follows:

> This [mandatory furlough] provision **does not apply to** employees represented by Representation Units 3, 4, 6, 18, 22, 29, **30**, **31**, 32, and 36.

In other words, the published furlough rule showed that Units 30 and 31 were once again *exempt* from the furlough rule.

In a letter dated January 28, 2009, the County informed SEIU that, pursuant to the personnel rules, the County was "invoking mandatory furloughs" for Unit 2 and Unit 12. The County enclosed a copy of the published version of the furlough rule. That enclosure generated a dialogue between the parties, because—in a letter dated February 20, 2009—SEIU "put on

---

[2] The facts regarding the history of the furlough rule are taken from the County's position statement. That statement contains what appears to be the official actions of the Board of Supervisors. Thus, the history of the furlough rule does not appear to be in dispute. (See *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M (PERB Agent may rely on undisputed facts not contained in charge).) However, the current record ends with the Board of Supervisors' vote dated November 9, 1993. If, for example, the Board of Supervisors' amended the furlough rule sometime *after* November 9, 1993, or the Board of Supervisors took some other action related to the rule, then SEIU can allege those facts in an amended charge.

record" its "position" that Unit 31 was exempt from the furlough rule. The County, apparently citing the 1993 amendments, contended that Unit 31 was not exempt from the furlough rule and asserted that the numbers "30" and "31" in *the published version* of the furlough rule were simply typographical errors.[3]

By letter dated March 5, 2009, the County notified SEIU that—consistent with its personnel rules—it was imposing mandatory furloughs on Unit 31 employees. The County ordered the employees to take "80 hours of mandatory furlough" beginning "in Fiscal Year 2009/2010." By letter dated May 1, 2009, and by other means, SEIU reiterated its position that Unit 31 employees were exempt from the furlough rule. The County disagreed and imposed furloughs.

DISCUSSION

The charge alleges that the County unilaterally changed existing policy by applying the furlough rule to Unit 31 employees.

The Act requires parties to bargain in good faith about matters "within the scope of representation." (Gov. Code, § 3505.) The scope of representation includes "wages, hours, and other terms and conditions of employment." (*Ibid.*) Hours, including a reduction in hours, fall within the scope of representation. (*San Ysidro School District* (1997) PERB Decision No. 1198.)[4] Furloughs are, in essence, a reduction in hours and thus are generally negotiable. (*Ibid.*)

An employer commits a "per se" violation of the duty to bargain when it changes a policy concerning a matter within the scope of representation without giving the union a chance to bargain. 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; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v.*

[3] In its position statement, the County asserts the following facts: the County converted to a new computer system in May 1996; as part of the conversion, the County retyped its personnel rules and, in doing so, the County "mistyped" the furlough rule and inadvertently reinserted the numbers "30" and "31." PERB has ignored these factual assertions about *how* the numbers "30" and "31" were reinserted into the published version of the furlough rule. Nevertheless, as noted above, the current records shows: (1) the Board of Supervisors voted to extend the furlough rule to Units 30 and 31 in 1993; and (2) the Board of Supervisors has not, at least according to the current record, rescinded or modified those votes.

[4] 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. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

City of Stockton (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

In this case, the parties seem to agree that *if* the furlough rule applies to a particular bargaining unit, then the County can order employees within that unit to take furloughs. Likewise, the parties seem to agree that *if* a bargaining unit is *exempt* from the furlough rule, then the County cannot order employees within that bargaining unit to take furloughs without first bargaining with SEIU. Thus, the question is whether Unit 31 was, or was not, exempt from the furlough rule.

The existing record shows that Unit 31 was, at one time, exempt from the furlough rule. The existing record also shows that in late 1993 the Board of Supervisors voted to discontinue that exemption and extend the furlough rule to Unit 31. Finally, the existing record shows that the Board of Supervisors voted to *temporarily* suspend the furlough rule for Unit 31 during the "fiscal year 1994/95." There is, however, no indication that the Board of Supervisors has—at any time since 1993—voted to permanently exempt Unit 31 from the furlough rule. Thus, although the furlough rule that was established in late 1993 continues to exempt several bargaining units, it does *not* exempt Unit 31. Rather, the exemption reads, in pertinent part and with emphasis added, as follows:

> This [mandatory furlough] provision **does not apply to** employees represented by Representation Units 3, 4, 6, 18, 22, 29, 32, and 36.

Because the rule does not apply to the listed units, *it necessarily applies to the unlisted units, including Unit 31*. Accordingly, the County did *not* unilaterally change the furlough rule or existing policy when it ordered Unit 31 employees to begin taking furloughs. To the contrary, the County simply applied a furlough policy that has remained unchanged since late 1993.

SEIU, however, counters that the furlough rule was in fact changed in 1996 when the County published a version that reinserted the numbers "30" and "31" into the exemption. If that published version is taken at face value, then it indeed *reestablishes* the exemptions that existed prior to the 1993 amendments, including the exemption for Unit 31. The problem, however, is this: the existing record fails to show that the *Board of Supervisors* voted to *reinsert* the number "30" and "31" into the furlough rule or that the Board of Supervisors otherwise amended the furlough rule that was established in late 1993. Accordingly, the furlough rule established in late 1993 appears to control this dispute.[5]

SEIU offers an additional reason the County cannot impose furloughs, namely the "Full Understanding Clause" in the parties' memorandum of understanding (MOU). That clause prohibits the parties from modifying "any matters set forth" in the MOU absent a mutual

[5] Again, it is possible that at some time after November 1993, the Board of Supervisors voted to once again exempt Unit 31 from the furlough rule. If so, then SEIU can allege that fact in an amended charge.

agreement to do so. SEIU argues that salaries are "set forth" in the MOU and that the County unilaterally reduced salaries when it invoked the furlough rule.

There are problems with this argument. First, the MOU does not "set forth" any furlough language Thus, the furlough rule does not fall with the plain meaning of the "Full Understanding Clause."

Additionally, the "Full Understanding Clause" reads, in pertinent part, as follows:

> This MOU shall govern in case of conflict with the provisions of the existing County ordinances, rules and regulations pertaining to wages, hours and other terms and conditions of employment, but otherwise such ordinances, rules and regulations shall be effective . . . .

In this case, both the MOU's salary language and the furlough rule arose out of the collective bargaining process. Neither provision expressly revokes or modifies the other. Thus, both provisions must be given meaning, if possible. Both provisions retain meaning if the salary language is considered the general rule and the furlough language is considered a limited exception that can only be used to "minimize the number of employees" facing layoffs. This interpretation reconciles the two provisions and ensures that no part of either provision is rendered superfluous. This interpretation also removes any possible conflict between the two provisions. Because there is no conflict between the two provisions, the furlough rule remains in effect in layoff situations.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case of a unilateral change in working conditions.[6] 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

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

charge or withdrawal is not filed on or before October 29, 2009,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Harry J. Gibbons
Senior Regional Attorney

HG

[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)