

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



UNION OF AMERICAN PHYSICIANS &  
DENTISTS,

Charging Party,

v.

COUNTY OF ORANGE,

Respondent.

Case No. LA-CE-518-M

PERB Decision No. 2138-M

October 25, 2010

Appearance: Lawrence Rosenzweig, Attorney, for Union of American Physicians & Dentists.

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Union of American Physicians & Dentists (UAPD) to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by rejecting a petition to sever five classifications from the County's Healthcare Professionals bargaining unit. The ALJ ruled that the County reasonably applied its local rule for unit modification to the petition and dismissed the complaint.

The Board has reviewed the proposed decision and the record in light of UAPD's exceptions and supporting brief, and the relevant law. Based on this review, the Board affirms the ALJ's dismissal of the complaint for the reasons discussed below.

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

## FACTUAL BACKGROUND

### Relevant Provisions of the County's Employee Relations Resolution (ERR)

Pursuant to MMBA section 3507, subdivision (a),<sup>2</sup> the County adopted its current ERR in May 1990. None of the ERR provisions discuss severance of classifications from an existing bargaining unit.

ERR section 3, "DEFINITIONS," provides, in relevant part:

EMPLOYEE ORGANIZATION shall mean an employee organization which has been verified in accordance with Section 7. of this Resolution.

EXCLUSIVELY RECOGNIZED EMPLOYEE ORGANIZATION shall mean an employee organization which has been certified in accordance with Section 10. of this Resolution.

ERR section 7, "VERIFICATION AS AN EMPLOYEE ORGANIZATION," provides, in relevant part:

To be verified as a County employee organization, an employee organization must comply with the following procedures:

- A. A request shall be submitted by the organization, signed by an authorized representative, to the Personnel Director, and shall contain the following information:
  - (1) Name and address of organization.
  - (2) A statement that the organization has, as one of its primary purposes, the representation of County employees in their employer-employee relations.
  - (3) A statement that the organization includes employees of the County as its members who have designated it to

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<sup>2</sup> MMBA section 3507, subdivision (a), authorizes a local public agency to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations," including rules for verification and recognition of employee organizations.

represent them in their employer-employee relations with the County.

- (4) Certified copies of the organization's constitution and by-laws.
- (5) The names of the employees it represents together with the class titles and departments where employed.
- (6) A designation of those persons who are authorized to act as representatives of the organization in any communications with the Personnel Director of the Board of Supervisors.
- (7) Proof of representation such as active membership cards which designate the employee organization as the representative of the employee in employer-employee relations or such other proof which in the judgment of the Personnel Director reasonably tends to demonstrate that the organization does in fact represent employees of the County.

ERR section 9, "MODIFICATION OF REPRESENTATION UNITS," provides, in relevant part:

- A. An employee organization or Exclusively Recognized Employee Organization may request the modification of an established representation unit by filing a request with the Personnel Director accompanied by a petition signed by the majority of the regular and probationary employees within the requested modified representation unit. The petition must include: a) full printed name of employee, b) signature, c) date signed. The signatures on the petition must have been obtained within the 30 days prior to the date the request is submitted. Requests for modification of an established representation unit may be filed only during the 30 days beginning nine months before the expiration of the unit's current Memorandum of Understanding.

The other subdivisions of ERR section 9 set forth procedures for posting notice of the unit modification request and resolution of challenges by other employee organizations.

Subdivision H states in full:

If agreement cannot be reached between the involved employee organizations or Exclusively Recognized Employee

Organizations and the Personnel Director, the matter shall be submitted to the Board [of Supervisors]. The Board shall hold a hearing at which time the involved employee organizations and the Personnel Director shall be heard. The Board shall make the final determination.

ERR section 11, "DECERTIFICATION PROCEDURE," provides:

- A. During the 30 days beginning nine months before the expiration of a unit's current Memorandum of Understanding, requests for decertification of an Exclusively Recognized Employee Organization may be submitted by employees, employee organizations or Exclusively Recognized Employee Organizations. The decertification requests should be submitted to the Personnel Director and must be accompanied by a petition signed by at least 50 percent of the regular and probationary employees within the representation unit. The petitions must contain: a) full printed name of employee, b) signature, c) date signed. Signatures on the petition must have been obtained within the 30 days prior to the date the request is submitted.
- B. When one or more employee organizations or Exclusive Recognized Employee Organizations have fully complied with A., above, and all other appropriate provisions of this Resolution, the Personnel Director shall arrange a secret ballot election to determine whether or not the Exclusively Recognized Employee Organization continues to represent a majority of the regular and probationary employees in the unit or whether another employee organization or Exclusively Recognized Employee Organization should be certified as the Exclusively Recognized Employee Organization. . . .

#### The Severance Petition

The Orange County Employees Association (OCEA) is the exclusive representative of the County's Healthcare Professionals bargaining unit. In August 2008, Drs. Donald Sharps (Sharps) and George Pascarzi (Pascarzi) contacted UAPD because they were dissatisfied with OCEA's representation. With the assistance of UAPD lead organizer Jake Baxter (Baxter), Sharps drafted a letter to County Human Resources Director Carl Crown (Crown) entitled "Petition of Intent to Sever from Orange County Employees Association and Modify Unit."

The letter, dated October 17, 2008, stated, in relevant part:

This letter is intended to serve Orange County Human Resources and the office of the CEO notice that the Psychiatrists, Physicians, and Dentists (Healthcare Professionals) in the County General Unit of Orange County want to sever, decertify, from the Orange County Employees Association [OCEA] and create a separate bargaining unit. The employees want this new unit to be represented exclusively by the Union of American Physicians and Dentists [UAPD], which represents over 4000 county and state physicians and dentists throughout California. It is our contention that OCEA has inadequately represented the interests of these classifications for the past 12 years and it is our right to seek new representation.

Attached is a petition as required by the (1990) Employee Relations Resolution Sections 9.A & 11.A containing signatures from at least 50 percent of the employees in the proposed bargaining unit demanding to sever from OCEA and to create our own bargaining unit with UAPD. These signatures were collected from October 15<sup>th</sup> to October 17<sup>th</sup> 2008. Therefore we respectfully request that a new bargaining unit be recognized by Orange County and be exclusively represented by UAPD.

Attached to the letter was a petition signed by 41 employees from the following five classifications in the Healthcare Professionals bargaining unit: Community Mental Health Psychiatrist, Physician, Physician Specialist, Public Health Medical Officer I, and Dentist.

Baxter testified that he “merged” ERR sections 9.A and 11.A in the letter because he thought those sections together would provide a basis for the severance petition in light of the ERR’s failure to address severance. He also testified that the petition was not a request to decertify OCEA as the exclusive representative of the entire Healthcare Professionals bargaining unit.

Sometime after submitting the petition, Sharps and Pascarzi met with Assistant Human Resources Director Shelley Carlucci (Carlucci) to discuss their severance request. Carlucci testified that she told the doctors the County was reviewing the petition for compliance with

the ERR. Carlucci admitted she told Sharps and Pascarzi that severance is not in the ERR, but she also testified she never told them severance could not be accomplished via the ERR.<sup>3</sup>

Crown responded to the petition by letter dated October 28, 2008. Crown's letter stated, in relevant part:

Based on our review, the petition does not meet the requirements of the Employee Relations Resolution (ERR) either for a Unit Modification or Decertification of the Orange County Employees Association as the Exclusively Recognized Employee Organization.

#### Unit Modification

Section 9.A. of the ERR provides that a request for modification of an established representation unit may be submitted by an employee organization or Exclusively Recognized Employee Organization. Your petition was submitted by employees who are currently members of the County Healthcare Professional Unit but it was not submitted by either an employee organization or an Exclusively Recognized Employee Organization. An employee organization is one that has been verified in accordance with the ERR and an Exclusively Recognized Employee Organization is one that has been certified in accordance with the ERR.

The Union of American Physicians and Dentists (UAPD) organization that you reference in your letter has not been verified as an Employee Organization and has not been certified as an Exclusively Recognized Employee Organization under the ERR. Nor has UAPD submitted a request for modification of an established representation unit.

#### Decertification

Section 11.A. of the ERR provides that a request for decertification may be submitted by employees, employee organizations or Exclusively Recognized Employee Organizations. The decertification request must be accompanied

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<sup>3</sup> On the other hand, the record fails to establish that Carlucci or Crown ever told UAPD which ERR section it could use to sever the classifications from the Healthcare Professionals bargaining unit. It appears that, in the absence of a severance rule in the ERR, both UAPD and the County were unsure how to go about processing the severance request at the time of the events alleged in the complaint.

by a petition signed by at least 50% of the regular or probationary employees within the representation unit. The psychiatrists and other petitioners are members of the Healthcare Professional Unit, and this petition does not contain 50 percent of the employees in that bargaining unit.

Based on the above review and analysis, the County can not grant your Petition of Intent to Sever from Orange County Employees Association and Modify Unit.

Upon receiving Crown's letter, Baxter requested a copy of the entire ERR; he testified he eventually received one from some of the employees who signed the petition. On November 6, 2008, UAPD Regional Administrator John Murrillo (Murrillo) requested in writing that the County verify UAPD as an employee organization pursuant to ERR section 7. Based on the information included with Murrillo's letter, the County verified UAPD in December 2008.

Meanwhile, on November 7, 2008, UAPD's counsel, Lawrence Rosenzweig, wrote Crown asserting that the five classifications in the severance petition were entitled to their own bargaining unit and requesting the County meet with UAPD to resolve the issue. Two days later, Baxter phoned Carlucci, who acknowledged that she received the letter and said the County would respond. She also told Baxter that the ERR did not contain any language about severance and that UAPD would need a showing of majority support to decertify OCEA.

Later that day, Baxter contacted Crown by phone. Baxter requested that the County process the petition "informally" because the ERR contained no severance procedure. According to Baxter, Crown responded that it was not in the County's best interest to create the unit and UAPD would need to follow the rules in the ERR.

During these calls, neither Carlucci nor Crown instructed Baxter on the proper procedure for severing the five classifications from the Healthcare Professionals bargaining unit. However, Carlucci testified that the County previously had used ERR section 9's unit

modification procedures to remove classifications from an existing bargaining unit and place them in a newly-created unit.

## DISCUSSION

The complaint alleged that the County's denial of the severance petition based on failure to comply with ERR sections 9.A and 11.A was contrary to the MMBA and thus an unfair practice. For the following reasons, we agree with the ALJ that the County did not violate the MMBA by applying section 9.A to the petition and then rejecting it based on its failure to comply with that section.

### 1. The County's Local Rules

The County's ERR contains no explicit severance provision. UAPD contends that this omission, in itself, violates the MMBA. While this might have been true as a general proposition in the days before PERB had jurisdiction over the MMBA, it is not so today.

In 2003, the Legislature amended MMBA section 3509, subdivision (a) to explicitly grant PERB the authority to adopt regulations "to 'fill in the gap' when a local agency has not adopted a local rule on a particular representation issue."<sup>4</sup> (*County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M.) This amendment reflected the Legislature's recognition that a local agency's failure to adopt representation rules could result in the agency "withholding recognition in violation of MMBA." (Assem. Com. on Public Employees, Retirement and Social Security, 3d reading analysis of Assem. Bill No. 1156 (2003-2004 Reg. Sess.) as amended May 7, 2003, p. 3.) Under PERB Regulation 61000,<sup>5</sup> a party may

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<sup>4</sup> MMBA section 3509, subdivision (a) states, in relevant part: "Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule."

<sup>5</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 61000 states: "Except as otherwise ordered pursuant to Chapter 1, or as provided for by Public Utilities Code, Division 10, Part 16, Chapter 5 (section



file a representation petition with PERB when a local agency has no applicable representation rule. (*County of Siskiyou/Siskiyou County Superior Court, supra.*) Because PERB regulations apply in such circumstances, the local agency's failure to adopt a particular local rule does not deprive a party of representation rights granted by the MMBA. Accordingly, the absence of an explicit severance rule in the County's ERR does not violate the MMBA.

The absence of an explicit local representation rule does not mean, however, that PERB regulations necessarily apply. Rather, PERB regulations will apply only when the agency's local rules contain no provision that can accomplish what the petitioner is seeking without placing an undue burden on the petitioner. In *County of Siskiyou/Siskiyou County Superior Court, supra*, the Board addressed whether a county's decertification rule provided a functional equivalent to PERB's regulations governing amendment of certification. Finding the purposes of the two procedures to be vastly different and the county's decertification procedures much more onerous than the regulations, the Board applied its regulations to the employee organization's petition to amend certification.

A comparison of County ERR section 9.A to PERB's severance regulations under the MMBA leads us to conclude that section 9.A applies to the petition in this case. Section 9.A, part of the unit modification provision, states in full:

An employee organization or Exclusively Recognized Employee Organization may request the modification of an established representation unit by filing a request with the Personnel Director accompanied by a petition signed by the majority of the regular and probationary employees within the requested modified representation unit. The petitions must include: a) full printed name of employee, b) signature, c) date signed. The signatures on the petition must have been obtained within the 30 days prior

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105140 et seq.), the Board will conduct representation proceedings and/or agency fee rescission elections under MMBA in accordance with the applicable provisions of this Chapter only where a public agency has not adopted local rules in accordance with MMBA section 3507.”

to the date the request is submitted. Requests for modification of an established representation unit may be filed only during the 30 days beginning nine months before the expiration of the unit's current Memorandum of Understanding.

(Emphasis added.)

PERB Regulation 61400 sets forth the procedure for filing a severance petition with PERB under the MMBA. Subsection (a) provides, in relevant part:

An employee organization may file a petition to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative by filing a petition for certification in accordance with the provisions of Article 3 of this Chapter.

After setting out the procedure for filing a petition for certification, PERB Regulation 61210 states in subsection (b), "The petition shall be accompanied by proof of at least 30 percent support of the employees in the unit claimed to be appropriate."

ERR section 9.A and PERB's MMBA severance regulations are largely identical and serve a similar purpose, namely to reconfigure an existing bargaining unit. Nothing in section 9.A indicates that it cannot be used to sever classifications from an existing unit. Indeed, Assistant Human Resources Director Carlucci testified that on several occasions an employee organization had used ERR section 9 in tandem with section 8, which sets out the procedures for establishing a new representation unit, to split an existing bargaining unit into two separate units.

There is one significant difference between ERR section 9 and PERB's severance regulations, however: the proof of support requirement. While PERB regulations only require a showing of 30 percent support within the new unit to be established, ERR section 9.A requires a showing of majority support (50 percent +1) "within the requested modified representation unit." It is unclear from the language of section 9.A itself whether the employee

organization must establish majority support within the unit from which the classifications would be severed or only within the new unit proposed for the severed classifications.

The complaint alleged that the County informed UAPD that a petition to sever classifications and place them in a new unit required proof of majority support within the unit from which the classifications would be severed. The evidence did not establish that the County made such a representation to UAPD. In the record, the only mentions of the majority support requirement by the County occur in connection with the ERR's decertification rule, section 11.A. Thus, we conclude that the County has not interpreted the language "within the requested modified representation unit" in section 9.A to mean the entire bargaining unit prior to severance.<sup>6</sup>

Nor do we find ERR section 9.A unreasonable because it requires a showing of majority support rather than the 30 percent support required by PERB Regulation 61210(b). When examining whether a local agency rule adopted pursuant to MMBA section 3507, subdivision (a) is reasonable, PERB's inquiry is not whether a different rule would be more reasonable or whether the rule is reasonable when measured against an arbitrary standard. Rather, the question is whether the rule "is consistent with and effectuates the purposes of the express provisions of the MMBA." (*City of San Rafael* (2004) PERB Decision No. 1698-M, citing *International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley* (1983) 34 Cal.3d 191.)

The majority support requirement in ERR section 9.A is distinguishable from the unreasonable majority requirements in *County of Imperial* (2007) PERB Decision No. 1916-M and *Service Employees International Union v. Superior Court* (2001) 89 Cal.App.4th 1390. In

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<sup>6</sup> In light of this conclusion, we need not decide whether a local rule requiring an employee organization to establish majority support for severance within the entire pre-severance bargaining unit would violate the MMBA.

*County of Imperial, supra*, the County's local rules required that at least 50 percent of bargaining unit employees cast votes in a representation election for the election to be valid. The Board held the rule was unreasonable because MMBA section 3507.1, subdivision (a) explicitly calls for an election to be won by a majority of votes actually cast. In *Service Employees International Union, supra*, the court's local rules required proof of majority support to obtain a decertification election. (89 Cal.App.4th at p. 1394.) The court held the rule was unreasonable because it required a greater showing of support to get an election than it did to actually win the election. (*Id.* at p. 1395.)

Unlike the majority requirements in the above cases, the majority support requirement in ERR section 9.A is not a prerequisite to an election; instead, it is the sole means of determining employee support for a unit modification. Thus, an employee organization need not establish a higher threshold of support than it would need to ultimately prevail on its petition. Moreover, PERB regulations for severance under the Educational Employment Relations Act (EERA),<sup>7</sup> Higher Education Employer-Employee Relations Act (HEERA),<sup>8</sup> and Ralph C. Dills Act (Dills Act)<sup>9</sup> require a showing of majority support among the employees in the proposed new bargaining unit. We therefore conclude that the majority support requirement in ERR section 9.A, as applied to a severance petition, is not contrary to the MMBA and thus constitutes a reasonable local rule.<sup>10</sup>

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<sup>7</sup> EERA is codified at Government Code section 3540 et seq. PERB Regulations 33050(b) and 33700(a) govern proof of support for a severance petition under EERA.

<sup>8</sup> HEERA is codified at Government Code section 3560 et seq. PERB Regulations 51030(b) and 51680(a) govern proof of support for a severance petition under HEERA.

<sup>9</sup> The Dills Act is codified at Government Code section 3512 et seq. PERB Regulation 40200(b) governs proof of support for a severance petition under the Dills Act.

<sup>10</sup> We express no opinion on whether the majority support requirement is reasonable as applied to any other type of petition.

Additionally, the difference in proof of support requirements between ERR section 9.A and PERB Regulation 61210(b) does not place an unreasonable burden on an employee organization seeking to sever classifications from an established County bargaining unit. For these reasons, we conclude that ERR section 9 is the functional equivalent of PERB's MMBA severance regulations and therefore ERR section 9, and not PERB regulations, applies to the severance petition in this case.

UAPD argues that ERR section 9 is unreasonable because the ultimate decision on a petition filed under that section is made by the County Board of Supervisors. To support this argument, UAPD relies heavily on Baxter's testimony that Human Resources Director Crown told him during a phone conversation that "it was not in their best interest to allow this." This statement is arguably uncorroborated hearsay that cannot support a factual finding.<sup>11</sup> However, even if the statement is true, it does not indicate that the board of supervisors cannot or will not make a fair and objective decision on UAPD's petition. First, UAPD failed to establish that Crown was speaking on behalf of the board when he made the statement. Second, the statement was made in response to Baxter's request that the County process the petition "informally" and Crown followed the statement with a comment that UAPD would have to follow the ERR rules. Taken in context, the statement does not establish bias on the part of the board of supervisors.

UAPD also points out that, because the board of supervisors has never held a hearing on an ERR section 9 petition, there is no "track record or body of law" for the board to follow. Among agencies subject to the MMBA, it is common for the final decision on representation

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<sup>11</sup> PERB Regulation 32176 states, in relevant part, "Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Crown did not testify at the hearing and it does not appear that any hearsay exception applies to the statement attributed to him by Baxter.

issues to be made by the local agency's governing board. (E.g., *County of Monterey* (2004) PERB Decision No. 1663-M [under county's local rules, the board of supervisors makes a final and binding decision on the appropriateness of a proposed bargaining unit]; see *County of Ventura* (2009) PERB Decision No. 2067-M [under county's local rules, ultimate decision on unit determination petition made by county civil service commission].) Nothing in the record establishes that the County Board of Supervisors lacks the ability to make a reasoned decision on a section 9 petition that comes before it for hearing. Accordingly, we find no basis for declaring ERR section 9 unreasonable on the grounds urged by UAPD.

2. The County's Application of ERR section 9.A to the Severance Petition

Having found that ERR section 9 is a reasonable local rule, that it allows for severance of classifications from an established unit, and that it applies to the severance petition in this case, we turn to whether the County reasonably applied the rule to the petition. The County denied the petition for failure to comply with the requirement in ERR section 9.A that a unit modification petition be filed by an employee organization or an Exclusively Recognized Employee Organization. To qualify as an "employee organization" under the ERR, the organization must have been verified by the County pursuant to ERR section 7. To qualify as an "Exclusively Recognized Employee Organization" under the ERR, the organization must have been certified by the County pursuant to ERR section 10. UAPD did not seek verification by the County until November 6, 2008. Therefore, it was not a verified employee organization when the petition was filed on October 17, 2008. Moreover, the petition was not filed by UAPD itself but by a group of employees, who also were not, and could not be, a verified employee organization. Therefore, the County properly denied the petition for failure to comply with ERR section 9.A.

UAPD nonetheless argues that the County used the verification requirement to deny the petitioners' representation rights. Specifically, UAPD asserts that "once the UAPD was verified the petition should have been activated by the County or the County should have told the UAPD to refile in its own name." Though the County could have taken either of those actions, there was no legal requirement that it do so. The County was not obligated to process a petition that had been rejected earlier on proper grounds, nor was the County required to solicit a new petition from UAPD. Consequently, this argument is without merit.

3. The County's Application of ERR section 11.A to the Severance Petition

The complaint also alleged that the County's denial of the petition for failure to comply with the majority support requirement in ERR section 11.A violated the MMBA. The ALJ concluded that section 11, the decertification provision, did not apply because the petitioners were not seeking to decertify OCEA as the exclusive representative of the entire Healthcare Professionals bargaining unit. UAPD argues on appeal that, because the petitioners listed section 11.A as one basis for their severance petition, the ALJ was required to rule on the reasonableness of that section. We disagree.

In *County of Orange* (2006) PERB Decision No. 1868-M, the Board held that a party lacks standing to challenge a local rule when the employer has neither "applied nor enforced" the rule to that party's detriment within the six months prior to the filing of the charge. The Board reasoned that such a standing requirement is necessary to ensure stability in local labor-management relations by preventing local rules from being perpetually vulnerable to challenge.

Here, the County denied the severance petition based in part on the petition's failure to comply with ERR section 11.A. Thus, unlike in *County of Orange, supra*, in this case the County actually applied the challenged local rule to the petition. Nonetheless, the rule was not applied to UAPD's detriment because the petitioners did not intend to decertify OCEA as the

exclusive representative of the entire Healthcare Professionals bargaining unit. A party cannot be harmed by the denial of something it did not seek in the first place. We therefore conclude that UAPD lacks standing to challenge ERR section 11.A.

Furthermore, to allow a party to challenge a local rule that it never intended to invoke would provide a means of circumventing the Board's ruling in *County of Orange, supra*, by allowing a party to file a representation petition solely for the purpose of obtaining standing to challenge a local rule. Such "sham" petitions would not serve to promote stability in local labor-management relations.

#### ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-518-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.