

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FIDEL JOSHUA,

Charging Party,

v.

SEIU LOCAL 1021,

Respondent.

Case No. SF-CO-233-M

PERB Decision No. 2225-M

November 30, 2011

Appearance: Fidel Joshua, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Fidel Joshua (Joshua) of a Board agent's dismissal (attached) of his unfair practice charge. The charge, as amended, alleged that SEIU Local 1021 (SEIU) breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)¹ by failing to file a grievance on his behalf concerning his employment with the City and County of San Francisco, Recreation and Parks Department. The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Joshua's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

¹ The MMBA is codified at Government Code section 3500 et seq.

DISCUSSION

In his appeal, Joshua presents new factual allegations that were not presented in the original charge or the amended charge. “Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.” (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when “the information provided could not have been obtained through reasonable diligence prior to the Board agent’s dismissal of the charge.” (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On March 22, 2011, the Board agent issued a letter advising Joshua that the charge failed to state a prima facie case and warning him that the charge would be dismissed unless he amended the charge to state a prima facie case. Joshua filed amended charges on April 14 and May 18, 2011. Thereafter, on August 9, the Board agent dismissed Joshua’s charge, as amended. Joshua filed an appeal from the dismissal on September 5, 2011. The appeal includes new factual allegations concerning other actions by SEIU representative Margo Reed. While not all of the allegations are identified by date, at least one concerns a conversation that occurred on an unspecified date in March 2011. The appeal provides no reason why these allegations could not have been alleged in the original charge or in the two amended charges. Thus, we do not find good cause to consider these new allegations.

Even if we were to consider the new allegations as part of the charge, they fail to establish a prima facie violation of the duty of fair representation. Joshua alleges that SEIU failed to file a “grievance” on his behalf. However, as noted by the Board agent, it is not clear whether the “grievance” he wanted filed was a grievance under an applicable collective bargaining agreement or a complaint in another forum. As set forth in the August 9, 2011 dismissal letter, the duty of fair representation attaches only when the union possesses the

exclusive means by which an aggrieved employee can obtain a particular remedy. (*County of San Diego* (2008) PERB Decision No. 1989-M.) In addition, the union does not have a duty to represent an employee with respect to extra-contractual proceedings that are not within the scope of a collective bargaining agreement. (*Ibid.*; *California School Employees Association (Garcia)* (2001) PERB Decision No. 1444.) Moreover, in the absence of evidence that the exclusive representative's negligence foreclosed any remedy for the grievant, "a breach of the duty of fair representation is not stated merely because an exclusive representative declines to proceed or negligently forgets to file a timely appeal of a grievance." (*Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991, citing *SEIU Local 99 (Jones)* (2007) PERB Decision No. 1882 and *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)* (1984) PERB Decision No. 430; see also *United Teachers of Los Angeles (Strygin)* (2010) PERB Decision No. 2149 [failure of the exclusive representative to file a grievance does not rise to the level of a breach of the duty of fair representation, where the employee failed to file a grievance on his own behalf and the union's failure to file did not completely extinguish his right to file a grievance].) Accordingly, the charge fails to establish a prima facie violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-233-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

I haven't received anything from you concerning my grievance. I submitted my statement to you on April 7, 2010. You sent me an email on the April 12, 2010 (sic) stating that you were typing as fast as you can. That was 5 days ago. I'm being questioned by several people in our department about the grievance and nothing has been sent back to me for review as you stated would occur. Have you submitted anything to HR? And what is the procedure when submitting a grievance? Something just doesn't feel right. I need clarity ASAP.

The e-mail messages show that on multiple dates between April 12, 2010 and April 22, 2010, Mr. Joshua asked Ms. Reed for a status report or update or documentation. On April 22, 2010 Mr. Joshua sent an e-mail message to Ms. Reed stating that he had expected a status report on April 20, 2010, but had not yet received anything, and that "not knowing what is going on with the paperwork is added stress."

The second amended charge generally alleges that Ms. Reed failed to comply with SEIU bylaws. SEIU Bylaw Article 12.3 provides that a steward's roles and responsibilities include: mobilizing, educating and informing members of union activities; resolving worksite issues and processing grievances; and providing timely and effective representation for the members.

Mr. Joshua also alleges that a Collective Bargaining Agreement (CBA) between the San Francisco Community College District (SFCCD) and SEIU provides at Article 10 for a grievance procedure. This Article provides that the SFCCD's failure to timely respond at any step entitles the grievant to advance to the next step, and states, "time is of the essence in all processing of grievances."

Position of the Respondent

SEIU filed a position statement dated September 13, 2010. The position statement includes a declaration by Ms. Reed. In the declaration, Ms. Reed states that Mr. Joshua had approached her in April 2010 because he and another bargaining unit employee wanted to file a harassment and discrimination claim against another employee.

Amendment of Pleadings

A lay person is not expected to know the difference between an amendment to a charge and amended charge. (*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332.) Where a later charge incorporates the pleadings of an original charge, all will be considered one pleading. (*Ibid.*) It is assumed herein that Mr. Joshua intended for his first and second amended charges to incorporate by reference the original charge.

Duty of Fair Representation

As stated in the Warning Letter, unions under the MMBA “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.”

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 (Wylar)* (1993) PERB Decision No. 970.)

The duty of fair representation attaches only when the union possesses the exclusive means by which an aggrieved employee can obtain a particular remedy. (*County of San Diego* (2008) PERB Decision No. 1989-M.) The union does not have a duty to represent an employee with respect to extra-contractual proceedings that are not within the scope of a CBA. (*Ibid.*; *California School Employees Association (Garcia)* (2001) PERB Decision No. 1444.) In the original charge, Mr. Joshua alleges he sought to file grievances against two supervisors. Mr. Joshua does not allege that he sought to file grievances under an applicable CBA or that a specific provision of the CBA was violated.² He does not explain on what basis he sought to file grievances against the supervisors. It is not clear whether the “grievance” he wanted the union to file was a grievance under a CBA provision or a complaint designed for another forum, such as the Equal Employment Opportunity Commission.³ According to the declaration submitted by Ms. Reed, he was seeking to pursue a claim for discrimination and harassment against another employee. This matter would not necessarily be covered by a CBA and its grievance procedure.

In the first amended charge, Mr. Joshua alleges that he sent multiple e-mail messages to Ms. Reed and she did not respond by April 22, 2010. A delay in filing grievances, alone, is not a violation where it is not established that the union’s conduct foreclosed any remedy for Charging Party. (*United Teachers of Los Angeles (Strygin)* (2010) PERB Decision No. 2149.)

² In his second amended charge, Mr. Joshua appears to allege a violation of a CBA between SFCCD and SEIU. Because Mr. Joshua’s employer was the RPD for the City and County of San Francisco, not the SFCCD, it does not appear that this CBA covers him at all.

³ In his initial charge, Mr. Joshua states he was retaliated against because he pursued a complaint with the EEOC.

Mr. Joshua does not allege that SEIU ultimately failed to file a grievance, or that he was unable to file a grievance of his own, or that SEIU's conduct in any way prevented him from obtaining a remedy. Mr. Joshua alleges that Ms. Reed did not respond to him within the time frame she promised, but he does not allege that she never acted.

PERB generally does not have jurisdiction over the internal affairs of a union unless there is a substantial impact upon employer-employee relations. (*International Brotherhood of Electrical Workers, Local 1245 (Gallardo)* (2010) PERB Decision No. 2146-M.) Mr. Joshua appears to allege that Ms. Reed violated SEIU bylaws, which are internal rules of the union. No facts are alleged to show that the purported violation of these bylaws had a substantial impact upon employer-employee relations.

Right to Appeal

Pursuant to PERB Regulations,⁴ 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

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).)

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See 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,

M. SUZANNE MURPHY
General Counsel

By 

Laura Davis
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



March 22, 2011

Fidel Joshua
316 Valencia Street #213
San Francisco, CA 94103

Re: *Fidel Joshua v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-233-M
WARNING LETTER

Dear Mr. Joshua:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 9, 2010.¹ Fidel Joshua (Mr. Joshua or Charging Party) alleges that SEIU Local 1021 (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)² by breaching its duty of fair representation.

Summary of Facts Alleged by Charging Party

It is presumed that, at all times relevant, Mr. Joshua was employed by the City and County of San Francisco, Recreation and Parks Department (RPD) in a position in a bargaining unit exclusively represented by SEIU.

On March 30, Mr. Joshua notified the RPD Human Resources Department that he would file a grievance against his supervisors, Karla Rosales and James Wheeler. On April 2, Mr. Joshua notified SEIU representative Margo Reed (Ms. Reed) of his intent to file the grievance. Ms. Reed asked Mr. Joshua to provide his statement of the grievance and she would review it. After reviewing Mr. Joshua's statement of the grievance, Ms. Reed stated, "this is serious and the timing couldn't be worse. I'm applying for a supervisor position and filing this could hurt my chances." Subsequently, Ms. Reed repeatedly failed to respond to Mr. Joshua's telephone calls and e-mail messages.

Mr. Joshua then filed a complaint with the Equal Employment Opportunity Commission (EEOC). After Ms. Reed learned of this complaint, she asked to meet with Mr. Joshua. During this time Mr. Joshua was harassed and retaliated against because he had complained to the EEOC. Mr. Joshua and others in his position (Directors) recently had to re-apply for their jobs. The RPD is restructuring. Although Mr. Joshua is one of the most qualified individuals

¹ All dates herein are in the 2010 calendar year unless otherwise stated.

² The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

in the RPD, he was not offered re-employment. Mr. Joshua believes he was not offered re-employment because of the lack of response from his union representative, Ms. Reed.

Duty of Fair Representation

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).

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.)

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.)

PERB Regulation 32615(a)(5)³ 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

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

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.)

Mr. Joshua alleges that he took steps to file a grievance against his supervisors, for unspecified reasons, on March 30. He consulted with Ms. Reed about the grievance and she stated that filing the grievance could hurt her chances for a promotion. Subsequently she refused to return his phone calls and e-mail inquiries. As a result of this failure, Mr. Joshua alleges, the RPD failed to re-employ him. These facts do not demonstrate that SEIU treated him in a way that was arbitrary, capricious, or in bad faith. Mr. Joshua does not allege, for example, that he was unable to pursue his grievance, that Ms. Reed's failure to respond affected the outcome in any way, or that SEIU failed to perform a ministerial act. Mr. Joshua does not establish any causal connection between Ms. Reed's failure to respond and the employer's decision not to re-employ him.

PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB lacks jurisdiction to enforce other statutory schemes. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) For example, PERB lacks jurisdiction to enforce laws prohibiting discrimination on the basis of race. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) Accordingly, PERB has no jurisdiction over Mr. Joshua's allegations that he was retaliated against⁴ because he had made a complaint to the EEOC.

For these reasons the charge, as presently written, does not state a prima facie case.⁵ 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

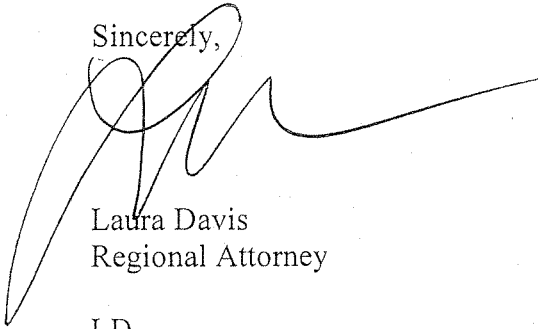
⁴ Mr. Joshua does not specify whether SEIU or the employer retaliated against him.

⁵ 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.*)

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PERB. If an amended charge or withdrawal is not filed on or before April 4, 2011,⁶ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

A handwritten signature in black ink, appearing to be 'Laura Davis', written over the word 'Sincerely,'.

Laura Davis
Regional Attorney

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⁶ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)