

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



SOLOMON SAHLE,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1021,

Respondent.

Case No. SF-CO-199-M

PERB Decision No. 2261-M

May 8, 2012

Appearances: Solomon Sahle, on his own behalf; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021.

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

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Service Employees International Union, Local 1021 (SEIU) to a proposed decision by a PERB administrative law judge (ALJ). The underlying unfair practice charge was filed on April 8, 2009 by Solomon Sahle (Sahle), an employee of the Alameda County Medical Center (ACMC) represented exclusively by SEIU. PERB's Office of the General Counsel issued a complaint in March 2010, alleging that SEIU's conduct was inconsistent with its duty of fair representation and thus violated sections 3507 and 3509(b) of the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32604(b).²

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

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

THE ALJ'S DECISION³

The ALJ conducted a formal hearing in October 2010 at which Sahle testified and adduced documentary evidence, and at which SEIU presented four witnesses and adduced documentary evidence. The ALJ's proposed decision includes proposed factual findings, legal conclusions and a remedy. We conclude the findings are free of prejudicial error and adopt the proposed findings of fact as the findings of the Board itself, as supplemented by our factual discussion below.

The proposed decision does not address the MMBA violations alleged in PERB's complaint. Instead, the ALJ reframed the issue and concluded that SEIU arbitrarily or perfunctorily failed to file a grievance challenging ACMC's failure to reclassify Sahle, thereby breaching SEIU's duty of fair representation. The ALJ proposed remedial orders requiring that SEIU pursue for Sahle a reclassification grievance, provide Sahle independent counsel at SEIU expense, and pay Sahle a portion of any award obtained with interest.

We address below the MMBA violations alleged in PERB's complaint. We conclude Sahle failed to prove these violations. We consider next the conclusions of law and the remedy in the proposed decision. As discussed below, we conclude that the ALJ's conclusions present an unalleged violation which we may not entertain. Accordingly, we shall dismiss the complaint.

³ SEIU requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Modesto* (2008) PERB Decision No. 1994-M.) Based on our review of the record, all of the above criteria are met in this case. Therefore, SEIU's request for oral argument is denied.

BACKGROUND

Factual Summary

Sahle commenced employment for ACMC in 1998 at Highland Hospital in Oakland. In 2002, he became a respiration inhalation aide in the respiratory therapy department.

In or about 2005, Sahle began discussing with the anesthesia department chair a possible assignment in that department as a part-time backup anesthesia technician. The anesthesia technician position would afford Sahle a pay increase, but Sahle would be required to obtain anesthesia training and state certification. An SEIU official informed Sahle and ACMC officials that the anesthesia technician position would have to be posted.

In 2007, Sahle requested that SEIU's worksite organizer (a different SEIU employee) attend a meeting with ACMC officials. At this August meeting, an arrangement was confirmed under which Sahle would receive anesthesia technician training from the anesthesiology department chair. Sahle would work part-time in the anesthesia department to receive the training while working reduced hours in the respiration inhalation aide position to accommodate his training. Sahle believed the arrangement included ACMC's commitment to place him part-time in an anesthesia technician position at the conclusion of his training. No written agreement was produced at or after the meeting. Sahle commenced training in the anesthesia department in September 2007. In September 2007, the SEIU reassigned its worksite organizer who had attended the August 2007 meeting. Sahle's training was completed in December 2007.

In early January 2008, Sahle's supervisor in the respiratory therapy department informed him that the anesthesia technician training was complete and directed him to resume reporting full time to his respiration inhalation therapy aide position in respiration therapy.

Believing the arrangement was that he would now be awarded a part-time position as an anesthesia technician, Sahle pushed to get the necessary paperwork processed. The paperwork included, inter alia, signatures from the two department chairs/managers, one of whom was then on a long-term leave. Sahle sought SEIU's assistance. The SEIU's staff had changed in September. The replacement SEIU worksite organizer met with Sahle, and advised Sahle that he should defer pursuing an anesthesia department position until Sahle's respiratory therapy department manager returned from leave to sign off.

By February 2008, Sahle had obtained permission from the anesthesia department chair to report there twice per week in order to maintain his newly-acquired anesthesia technician skills. Sahle followed this schedule through December 2008. He resigned outside employment at a restaurant to free up the time to report to the anesthesia department. During 2008, ACMC did not post an anesthesia technician position, and Sahle did not seek certification.

In the summer of 2008, SEIU assigned yet a different worksite organizer to Sahle's area at ACMC. Sahle desired closure on his perceived arrangement and approached the SEIU worksite organizer for help. SEIU's worksite organizer investigated the situation and consulted with the then-new ACMC labor relations director. Both were new to Sahle's situation. In October 2008, the SEIU worksite organizer proposed to ACMC's labor relations director that ACMC implement the arrangement Sahle believed he had made for a position in the anesthesia department, and in addition pay Sahle retroactively at the anesthesia technician rate for his 2008 time in the anesthesia department. ACMC's new labor relations director expressed lack of knowledge of any arrangement for Sahle to become a part-time anesthesia technician. He responded by requesting SEIU to have Sahle complete and submit

questionnaires describing Sahle's duties in the respiratory therapy and anesthesia departments. Sahle did so. APMC's labor relations director then approved back pay for Sahle's 2008 time in the anesthesia department, and so notified SEIU. No promotion or transfer was approved. APMC posted no anesthesia technician position. Sahle did not seek certification.

In December 2008, SEIU informed Sahle about the back pay. Before Sahle could retrieve his back pay, APMC's labor relations director reversed his earlier decision. Citing alleged reports from the anesthesia department chair and the respiratory therapy department manager, APMC's labor relations director claimed that Sahle had not performed anesthesia department tasks independently but instead merely shadowed another worker. Thus, claimed APMC, Sahle was due no back pay.

In January 2009, Sahle's supervisor in the respiratory therapy department directed him to cease reporting to the anesthesia department. Sahle renewed the effort to obtain a part-time position as an anesthesia technician to which he believed he was entitled. On his behalf, SEIU contacted APMC's labor relations director to arrange a meeting, including respiratory therapy and anesthesia department officials, to sort out Sahle's situation. The meeting was scheduled for late February 2009. APMC's labor relations director attended, as did Sahle, the SEIU worksite organizer, Sahle's respiration therapy department supervisor and Sahle's respiration therapy department manager. The anesthesia department chair, who had approved Sahle's training and his 2008 time in the anesthesia department, did not attend. At the meeting, APMC officials claimed that APMC had no budget for a part-time anesthesia technician position and denied that APMC ever had agreed to award Sahle such a position. They demanded documentation of Sahle's alleged arrangement. Neither Sahle nor SEIU could

produce documentation. ACMC then offered Sahle a much-reduced amount of back pay, which Sahle declined.

Sahle pressed SEIU for documentation of his arrangement. SEIU's worksite organizer referred him to the SEIU supervisor. In late March 2009, Sahle met with the SEIU supervisor, and requested that she produce documentation supporting his arrangement. He asserted the documentation would be found in the files kept by the SEIU worksite organizers previously assigned to ACMC. SEIU's supervisor testified that she inquired of the worksite organizer who had attended with Sahle the August 2007 meeting at which the training regime was confirmed. There were no records. SEIU's supervisor communicated this to Sahle.

SEIU's memorandum of understanding (MOU) provides, inter alia, that an employee may challenge by grievance a failure to grant a requested reclassification, where the employee believes he/she is being worked out of classification and that there has been a substantial change in the employee's duties not covered by the classification. Sahle filed no such grievance, nor did he request that SEIU do so on his behalf.

PERB's Complaint

On or about April 8, 2009, Sahle filed his unfair practice charge. On or about March 17, 2010, PERB's Office of the General Counsel issued a complaint, alleging in pertinent part:

4. On or about January 2008,⁴ [SEIU] failed to provide Charging Party with documentation of an agreement for Charging Party to be promoted to the position of Anesthesia Technician II following completion of required training.

⁴ At the hearing, the ALJ amended this allegation by changing the date to January 2009.

5. On or about January and February 2009, [SEIU] failed and refused to respond to Charging Party's inquiries regarding his proposed transfer.

6. On or about February 24, 2009, [SEIU] advised Charging Party that it would try to obtain documentation of an agreement for Charging Party to be promoted to the position of Anesthesia Technician II following completion of required training; subsequently, [SEIU] failed and refused to respond to Charging Party's inquiries regarding his proposed promotion and failed to obtain or provide the requested information.

At the hearing, SEIU moved to dismiss as untimely the allegation in paragraph 4 concerning conduct in January 2008. The ALJ thereupon amended the complaint to restate the allegation as occurring in January 2009. Nonetheless, the ALJ permitted Sahle to adduce background evidence regarding alleged conduct of SEIU's agents in and before January 2008.⁵ No other amendments were proposed or made to the PERB complaint.

DISCUSSION

We consider first our jurisdiction. The complaint alleges breach of the duty of fair representation, and violation of MMBA sections 3506 and 3509(b) and PERB Regulation 32604(b). The MMBA imposes on organizations exclusively representing employees the duty of fair representation. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*Attard*); *Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213 (*Hussey*).) Accordingly, PERB has jurisdiction over the complaint's allegations.

⁵ We note that such background evidence is appropriately admitted. (*Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board* (1960) 362 U.S. 411, 416 [events occurring prior to the limitations period may be utilized to shed light on the true character of matters occurring within the limitations period].)

Under the MMBA an employee organization must represent fairly the employees whom it exclusively represents. (*Attard; Hussey*.) A breach of the duty of fair representation is established where the employee organization's conduct is arbitrary, discriminatory or in bad faith. (*Redland Teachers Association (Faeth & McCarty)* (1978) PERB Decision No. 72; *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124 (*Rocklin*); *Vaca v. Sipes* (1967) 386 U.S. 171.)⁶ The duty applies to the conduct of a union undertaken in the exercise of its exclusive right to represent employees, viz., either negotiating a contract or MOU (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330), or enforcing employee rights under a procedure vesting in the union the exclusive right to access at least one step in the grievance process, customarily the final step or arbitration. (*Conley v. Gibson* (1957) 355 U.S. 41.)

We next examine PERB's complaint in light of the hearing record.

Paragraph 4 of PERB's complaint as amended alleges that "on or about January 200[9] [SEIU] failed to provide [Sahle] with documentation of an agreement for [Sahle] to be promoted to the position of Anesthesia Technician II following completion of required training." Whether SEIU had a fair representation duty to provide Sahle with the documentation of "an agreement to be promoted" depends on whether such an agreement existed. We conclude it did not.

The hearing record establishes that in August 2007, at Sahle's request, SEIU's worksite organizer attended a meeting, also attended by Sahle and various ACMC officials. At the meeting, an arrangement was discussed for Sahle to be assigned part-time for training to the

⁶ PERB relies on federal private sector labor relations case law when interpreting analogous provisions of California's public sector labor relations statutes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

ACMC's anesthesia department.⁷ Prior to August 2007, Sahle and ACMC's anesthesia department chair had reached already an understanding about the training, and SEIU's worksite organizer was invited to the August 2007 meeting not to negotiate an agreement for Sahle, but to obtain SEIU's assent for the arrangement. We conclude, therefore, that SEIU's worksite organizer attended the August 2007 meeting with Sahle in a ceremonial capacity representing SEIU, and not as Sahle's representative for negotiating the arrangement.⁸ Notwithstanding this ceremonial role, however, we conclude that during the August 2007 meeting SEIU's worksite organizer operated pursuant to SEIU's exclusive status, implicating SEIU's duty of fair representation.

The hearing record also establishes that the arrangement (the "agreement" alleged in PERB's complaint) finalized at the August 2007 meeting was for Sahle's training, to be accomplished by a part-time reassignment from his position in the respiratory therapy department to a part-time training assignment in the anesthesia department. SEIU⁹ disputes Sahle's contention that the arrangement included an "agreement to be promoted" into a part-time position in the anesthesia department.

We conclude that the preponderance of evidence favors the account urged by SEIU, namely, that at the August 2007 meeting there was no "agreement to be promoted" but merely

⁷ Prior to August 2007, a different SEIU worksite organizer had consulted with Sahle and/or ACMC officials, opining that if ACMC were to open a position in the anesthesia department the new position would have to be posted for applications under the MOU vacancy provisions.

⁸ An employer which negotiates separately with an employee over terms and conditions of employment, absent sanction by the union, risks a charge of bypassing the union. (*Lake Elsinore School District* (1987) PERB Decision No. 646.)

⁹ ACMC's labor relations director testified as well in support of the SEIU interpretation of the August 2007 arrangement.

an arrangement for training which thereafter might, or might not, include a promotion to a part-time anesthesia technician position, depending upon uncertain future events, to wit, ACMC's posting a position, Sahle's successful completion of the training, and Sahle's certification by the State for anesthesia work. The allegation of an "agreement to be promoted" in paragraph 4 of PERB's complaint is not proved up and shall be dismissed. We look next at paragraph 5.

Paragraph 5 of PERB's complaint as amended alleges that "[o]n or about January and February 2009, [SEIU] failed and refused to respond to [Sahle's] inquiries regarding his proposed transfer."

The hearing record establishes that by January and February 2009 SEIU's then-current worksite organizer was well aware of the arrangement Sahle believed he had made for a promotion, and had sought in the fall of 2008, albeit unsuccessfully, to secure for Sahle implementation of that arrangement. Fall 2008 discussions between SEIU and ACMC's labor relations director devolved from an initial agreement for back pay, to ACMC denying that there was an arrangement and denying as well that Sahle ever had worked other than as a trainee in the anesthesia assignment. During January and February 2009, Sahle did inquire regularly of SEIU regarding his perceived right to an anesthesia department position. SEIU was responsive, although not as responsive as Sahle expected or desired. SEIU's worksite organizer, in cooperation with the ACMC labor relations director, arranged a meeting with ACMC officials and Sahle to discuss Sahle's situation. At the February 24, 2009 meeting SEIU represented Sahle and sought, again unsuccessfully, to convince ACMC to agree to the arrangement Sahle believed he had made for a promotion. ACMC again denied that there ever was an arrangement for promotion. Sahle rejected ACMC's reduced offer of back pay for his 2008 time in the anesthesia department.

We conclude that the preponderance of evidence demonstrates that SEIU did respond to Sahle's inquiries. The allegation in paragraph 5 of PERB's complaint, that SEIU "failed and refused" to respond to Sahle's inquiries, is not proved up and shall be dismissed. We look next at paragraph 6.

Paragraph 6 of PERB's complaint as amended alleges that "[o]n or about February 24, 2009, [SEIU] advised [Sahle] that it would try to obtain documentation of an agreement for [Sahle] to be promoted to the position of Anesthesia Technician II following completion of required training; subsequently, [SEIU] failed and refused to respond to [Sahle's] inquiries regarding his proposed promotion and failed to obtain or provide the requested information."

The hearing record establishes that following the February 24, 2009 meeting with SEIU and ACMC officials, Sahle requested that SEIU provide him documentation he believed existed of the agreement for him to be promoted following his training in the anesthesia department. SEIU's worksite organizer referred Sahle to the SEIU supervisor, with whom Sahle met in March 2009. Following that meeting the SEIU supervisor requested that the SEIU worksite organizer who had attended the August 2007 meeting with Sahle provide the documentation. No documentation was found, and the SEIU supervisor so notified Sahle.

We conclude that the preponderance of evidence demonstrates that following February 24, 2009, SEIU did respond to Sahle's inquiries and did attempt to provide documentary information in its possession supporting the arrangement Sahle believed he had made for promotion to the anesthesia technician position. There was no such information, and SEIU so informed Sahle. PERB's complaint alleges as well that SEIU failed to obtain such information, and in any event, did not provide such information to Sahle. As to these latter allegations, we rely on our conclusion discussed above in respect to paragraph 4 of PERB's

complaint, namely, that the preponderance of evidence indicates there was no “agreement to be promoted.” We conclude therefore that SEIU did not fail to obtain or to provide to Sahle “documentation of an agreement for [Sahle] to be promoted to the position of Anesthesia Technician II.” The allegations in paragraph 6 of PERB’s complaint, that SEIU “failed and refused to respond to [Sahle’s] inquiries regarding his proposed promotion and failed to obtain or provide the requested information,” are not proved up and shall be dismissed.

In sum, we conclude that a preponderance of the evidence fails to support the violations alleged in PERB’s complaint. These allegations shall be dismissed.

We turn now to the violation determined by the ALJ, namely, that SEIU breached its duty of fair representation to Sahle by neither initiating, nor grieving a denial of, a reclassification study request on behalf of Sahle pursuant to Section 325 of the MOU. Contrary to the ALJ’s conclusion, we conclude that this violation was unalleged and not fully litigated. We explain.

PERB will consider an unalleged violation if the following requirements are met:

(1) adequate notice and opportunity to defend has been provided the respondent; (2) the conduct is intimately related to the subject matter of the complaint and part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross examined on the issue. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee*); *Eureka City School District* (1985) PERB Decision No. 481.) Absent any of these requirements, PERB will not consider the unalleged violation. (*Tahoe-Truckee*.)

Our unalleged violation policy affords all parties litigating disputes under California's public labor relations statutes adequate notice and a fair opportunity to litigate their claims. PERB adjudicates an unalleged violation only where the foregoing criteria are met.

We conclude there is insufficient evidence in the hearing record to justify our consideration of the unalleged violation, viz., that SEIU breached its duty of fair representation to Sahle by not requesting, and/or failing to grieve a denial of, a reclassification study request on behalf of Sahle pursuant to Section 325 of the MOU.

1. SEIU had insufficient notice that the unalleged violation was being litigated and had no opportunity to defend.

The transcript of the hearing before the ALJ indicates that both Sahle and SEIU believed the dispute turned on the existence of an agreement by ACMC to train Sahle and thereafter to place him in a part-time position in the anesthesia department. PERB's complaint alleged existence of such agreement and faulted SEIU for making insufficient effort to assist Sahle in establishing the agreement's existence. Neither the charge nor the complaint alleged that Sahle sought reclassification pursuant to the MOU, or that SEIU could or should have sought reclassification for Sahle pursuant to the MOU, or that SEIU could or should have grieved ACMC's failure to reclassify Sahle.

2. The conduct was not intimately related to the subject matter of the complaint, although it was part of the same course of conduct.

The complaint's subject matter concerned documentation of an agreement Sahle believed had been made, and Sahle's allegations that SEIU had not provided the documentation and had failed to respond to his requests for the documentation. We conclude that neither the charge nor the complaint alleged that Sahle sought reclassification pursuant to the MOU, or that SEIU could or should have sought reclassification for Sahle pursuant to the

MOU, or that SEIU could or should have grieved ACMC's failure to reclassify Sahle.

Although the conduct of SEIU deemed by the ALJ to constitute a violation was part of the same course of conduct, we conclude that this is not sufficient, standing alone as it does, to enable us to consider the unalleged violation.

3. The reclassification issue was not fully litigated.

We conclude the reclassification issue was not fully litigated. Sahle made no claim that SEIU should have, or failed to, pursue reclassification on his behalf. Had SEIU known that its representation obligations to Sahle allegedly included a ministerial duty to press ACMC for Sahle's reclassification, SEIU might have adduced evidence on this issue. It did not. The proposed decision acknowledges this expressly, observing that SEIU did not present evidence going to this issue.

4. The parties had no opportunity to examine and cross examine on the MOU provision relating to reclassification.

Neither party understood during the hearing the significance of the MOU provision (Section 325) supporting the ALJ's theory of SEIU's violation of its duty of fair representation. Sahle built his case around his belief in the existence of an arrangement, which was external to the MOU. SEIU introduced the MOU to explain workplace practices regarding transfers and promotions, such as posting of positions, and the right to compensation for out-of-class work. Had Sahle or SEIU understood the ALJ's theory of the violation, either or both could have presented evidence or cross-examined witnesses on the context surrounding the practices under Section 325. Neither did so.

In sum, we conclude that neither Sahle's unfair practice charge nor PERB's complaint placed SEIU on notice of the allegation that it had a ministerial duty to pursue, and to grieve denial of, a reclassification study on behalf of Sahle. Sahle proceeded on his belief that he had

a “deal” with the anesthesia department chair to receive training and thereafter a part-time job in the anesthesia department. Sahle wanted SEIU to enforce his deal. When the ACMC declined to honor the deal, Sahle faulted SEIU, which was unable to provide him written documentation for his deal. Both Sahle’s unfair practice charge and PERB’s complaint allege only that SEIU failed to produce documentation of Sahle’s deal. Neither mentions reclassification, and neither mentions a grievance. In accordance with our unalleged violation policy, we decline to entertain the unalleged violation concerning reclassification.¹⁰

In reaching this determination we do not hold that individual employees are responsible to ascertain for themselves all available contractual remedies. Upon being presented by an employee with a possible grievance, the exclusive representative has a duty to investigate and make an “honest reasonable determination” whether to pursue a grievance, which determination may not be arbitrary, discriminatory nor taken in bad faith.¹¹ We conclude rather that in this case SEIU did not violate the MMBA as alleged in the charge and the complaint, and that under our policy we may not consider the unalleged violation determined by the ALJ.

At the hearing, Sahle and SEIU addressed the allegations in his charge and PERB’s complaint. We have assessed those alleged violations and conclude Sahle’s proof fails to establish a violation. We shall dismiss them. As for the unalleged violation, we have

¹⁰ The ALJ suggests we may entertain here the unalleged violation, and sustain his conclusions, on the basis of PERB Regulation 32645, authorizing the Board to “disregard any error or defect in the original or amended charge, complaint, answer or other pleading which does not affect the substantial rights of the parties.” We decline the invitation to do so here for the reasons outlined above, while reserving the right to proceed in that fashion in an appropriate case.

¹¹ *International Union of Operating Engineers, Local 39 (Siroky)* (2004) PERB Decision No. 1618-M; *Sacramento City Teachers Association (Fanning, et al)* (1984) PERB Decision No. 428; *Rocklin*.

concluded that under our policy we may not entertain it. The parties lacked notice, the allegations were not litigated and the MOU provision at the core of the ALJ's theory lacked necessary evidentiary context. Consequently, the unalleged violation may not be the basis for a conclusion that SEIU breached its duty of fair representation to Sahle.

CONCLUSION

Based on the findings of the ALJ, as supplemented herein, and the conclusions of law herein, and on the entire record in this case, we hold that Sahle has failed to prove by a preponderance of evidence the violations of the MMBA alleged in PERB's complaint. We further hold that the violation of the MMBA determined by the ALJ was unalleged, and that under our unalleged violation policy we may not consider it. We therefore reverse the proposed decision and dismiss the complaint.

ORDER

The complaint and the underlying unfair practice charge in Case No. SF-CO-199-M are hereby DISMISSED.

Chair Martinez and Member DowdinCalvillo joined in this Decision.