STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CUAUHTEMOC WALLY GUTIERREZ, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 221, Respondent.	Case No. LA-CO-77-M PERB Decision No. 2277-M June 29, 2012

Appearances: Cuauhtemoc Wally Gutierrez, on his own behalf; Tosdal, Smith, Steiner & Wax by Fern M. Steiner, Attorney, for Service Employees International Union, Local 221.

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

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Cuauhtemoc Wally Gutierrez (Gutierrez) to a proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint, and underlying unfair practice charge, alleged that the Service Employees International Union, Local 221 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against Gutierrez and unreasonably suspending his union membership. The complaint alleged that this conduct constituted violations of sections 3503 and 3506 of the MMBA and thus unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32604, subdivision (b).[2] In the proposed decision, the ALJ found no violation of the MMBA and ordered that the complaint and unfair practice charge be dismissed.

[1] 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.

We have reviewed the entire record in this matter and given our full consideration to the exceptions and the response thereto. Based on our review, we find the ALJ's proposed decision to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, we hereby adopt the proposed decision as the decision of the Board itself subject to the following discussion of Gutierrez's exceptions.

BACKGROUND

By the following summary, we do not disturb the ALJ's findings of fact, but merely add to them from the record evidence where necessary for purposes of addressing Gutierrez's exceptions. At all relevant times, Gutierrez was an electronic security technician for the County of San Diego (County) in a bargaining unit exclusively represented by SEIU. He was a SEIU member, a SEIU steward and a member of a SEIU labor-management committee.

In June 2008, Gutierrez was involved in organizing a campaign to encourage fellow employees to drop their full union membership and become agency-shop fee payers. Gutierrez and others involved in this effort were dissatisfied with the service they were receiving from SEIU, and believed that their drop membership campaign would get SEIU's attention. Gutierrez testified that he created the drop membership form, which was edited with help from others and then circulated to the membership.[3] As a result, approximately 97 SEIU members[4]

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[3] Gutierrez's testimony at the PERB formal hearing was as follows:

> Q Did you create that document?
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> A This one, I created, and I think it was, we had to change some wording, so I really don't remember who helped me. . . .

(PERB Transcript.)

[4] Gutierrez testified at the PERB formal hearing that there were 221 employees, of which "60 some odd were non-members" and then through the drop membership campaign 97 more became non-members, for a total of "approximately 150 to 160." (PERB Transcript.)

dropped their full union membership, and SEIU stopped receiving their full union dues. Gutierrez, however, opted to maintain full union membership, and retain his position as steward.

By letter of July 2, 2008, Kathy Griffee (Griffee), a registered nurse for the County and a member of SEIU's executive board in the position of RN Chair, filed internal union charges against Gutierrez. Griffee requested that Gutierrez be disciplined on two separate charges: (1) gross disloyalty unbecoming a member; and (2) advocating or engaging in dual unionism or secession.[5]

On July 15, 2008, SEIU President Sharon-Frances Moore (Moore) received four calls from SEIU members stating that Gutierrez had been performing union duties on County time.[6] Moore called the County's Labor Relations Manager, Susan Brazeau (Brazeau), and informed her of the reports she had received. Brazeau confirmed at the PERB formal hearing that she had in the past complained to SEIU about employees engaging in union activities "in places or at locations where they shouldn't be." (PERB Transcript.) Moore requested that Brazeau make sure that Gutierrez was taking the appropriate time, was where he should be and was being held accountable for his whereabouts. In response to Moore's call, Brazeau investigated

[5] Griffee testified at the PERB formal hearing: "When individuals were asked why they were putting drop notices in people's mailboxes at their workplace, they were told Wally said to do it." She further testified in response to the question why she filed charges: "Because I was concerned for the Union strength and unity." (PERB Transcript.)

[6] In response to a question as to what she would do if the reports about Gutierrez were verified, Moore testified at the PERB formal hearing: "Try to figure out how we couldn't get a charge filed against us if he was actually doing union work on County time." She further testified: "It has to be sanctioned, it has to be within a specific time, we have to make sure that, depending on the facility, we get permission to enter the facility. It depends, based on the contract." (PERB Transcript.)

the matter. Gutierrez testified at the PERB formal hearing that Brazeau called him directly[7] and that Brazeau's call scared him. The next morning, on July 16, 2008, Gutierrez appeared at Moore's office before work with proof that he had been on jury duty on July 15, 2008. The matter was immediately dropped.

Gutierrez's union disciplinary hearing occurred on August 27, 2008.[8] At the hearing, Gutierrez admitted that he encouraged other union members to drop their membership. He testified as follows:

> We changed our membership from full members to agency fee. And did we do it to put pressure on the union? Absolutely. If you look on the website, that's clear what we said we were going to do. Now, if I'm going to be thrown out for that, then I need to be thrown out for that, because that's what we did.

On September 5, 2008, the trial body sustained the charge of disloyalty, dismissed the charge of dual unionism and imposed a two-year suspension. Gutierrez appealed the decision to the International. The suspension was held in abeyance during the pendency of the appeal. By letter of January 28, 2009, the International executive board adopted the International Appeals Committee's recommendation that the appeal be denied. The report of the Appeals

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[7] Brazeau's testimony at the PERB formal hearing was as follows:

> Q [by Gutierrez] Did you investigate the allegations?
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> A Yes, I did. I made a phone call. I called the department, as I recall, and my memory is shaky here, but it was either the group HR director -- I probably mentioned it to him so that he could follow up to make sure that you were at your job where you were supposed to be.

(PERB Transcript.) Brazeau's testimony does not suggest that she called Gutierrez. Given the vagueness of her testimony and Gutierrez's testimony to the contrary, however, the ALJ's factual finding that Brazeau called Gutierrez need not be disturbed. It is not material to the resolution of the issue raised on appeal whether Moore's call to Brazeau constitutes an adverse action. Gutierrez also testified that Brazeau wanted him followed. Gutierrez's assertion finds no support in Brazeau's testimony, as previously determined by the ALJ.

[8] As the ALJ noted, the appointment of a trial body is ostensibly required by the bylaws unless the charge is untimely or unspecific.

Committee to the International executive board re-stated the relevant portions of the disciplinary hearing transcript including Gutierrez's efforts to encourage members to drop their membership and his efforts to petition for an agency fee election.[9] The report stated:

> He also testified that, in an effort to put pressure on the Local 221 President to meet with members of his bargaining unit, he gathered signatures among bargaining unit members to file a petition with the Public Employment Relations Board ("PERB") to rescind the agency shop of his bargaining unit. He said that he had the legal right to encourage members to switch their memberships, and to attempt to rescind the agency shop of his bargaining unit, and that he should not be discriminated against for engaging in those activities. He stated that he remained a loyal and active member of the union, and that he never advocated secession from or decertification of the union.

In recommending that the suspension be upheld, the report explained:

> Brother Gutierrez admitted that he was a leader of the effort to convince members to change their memberships, which injured the local financially and weakened it at a critical time – while it was in the process of negotiating a successor memorandum of understanding with San Diego County. Local 221 denied that Brother Gutierrez was singled out for discriminatory treatment; it stated that the charges were filed against him, and not other members who were involved in similar activity, because he is a Steward who misused his position to harm the Local, which undermined its ability to present a strong united front to the county.

[9] On July 24, 2008, Gutierrez filed a petition for an election to rescind SEIU's agency shop provision with PERB, after having obtained the requisite proof of support. He believed that employees would benefit from greater choice. On October 27, 2008, PERB conducted the election for agency fee rescission. A majority of the members voted to rescind the agency fee provision. On November 7, 2008, PERB certified the election results. The agency fee rescission petition was filed with PERB after Griffee filed her charges against Gutierrez. Therefore, the petition was outside the scope of the disciplinary proceedings. At the disciplinary hearing, however, Gutierrez brought up the subject of the agency fee rescission petition. At the PERB formal hearing, Gutierrez called seven witnesses, apart from himself, four of whom were supporters. There was some confusion in their testimony about there being a distinction between the campaign to drop membership and the campaign to petition for an agency fee rescission election. Griffee testified at the PERB formal hearing that some members who had dropped their membership in response to the drop membership campaign were "taken aback" to learn at the union hall that they were not members and could no longer access member benefits. (PERB Transcript.)

In late 2008, a union election was held to elect a bargaining team to begin the bargaining process with the County. In 2009, negotiations for a successor agreement commenced.

THE PROPOSED DECISION OF THE ALJ

The ALJ identified the two issues to be determined at the formal hearing as whether SEIU retaliated against Gutierrez and whether SEIU unreasonably suspended Gutierrez's membership. Regarding the former, the ALJ determined that while Gutierrez engaged in protected activity, which SEIU had knowledge of, Moore's call to Brazeau did not constitute an "adverse action." Regarding the latter, the ALJ determined that Gutierrez's suspension was reasonable.

GUTIERREZ'S EXCEPTIONS

Gutierrez filed three exceptions. First, Gutierrez asserts that the ALJ erred in concluding as a matter of law that Moore's call to Brazeau did not constitute adverse action. Second, Gutierrez asserts that the ALJ erred in concluding as a matter of law that his suspension was reasonable. Third, Gutierrez asserts that the ALJ's preparation of a proposed decision without the benefit of a transcript "makes excepting to the ALJ's findings of fact difficult."

SEIU'S RESPONSE

SEIU argues that Gutierrez's exceptions have no merit. Regarding the adverse action issue, SEIU asserts that the ALJ's conclusion is consistent with Board precedent. Regarding the suspension issue, SEIU asserts that Gutierrez misstates the Board precedent. Regarding the transcript issue, SEIU asserts that Gutierrez could have requested a transcript for the preparation of his exceptions, but did not do so.

DISCUSSION

Adverse Action

The ALJ concluded that Gutierrez was engaged in protected activity and that SEIU had knowledge of this activity. Thus, Gutierrez established the first two elements of the retaliation test under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). The ALJ then concluded, however, that Moore's call to Brazeau did not rise to the level of an adverse action, the third element of Gutierrez's burden under *Novato*. As a result, the ALJ did not reach the fourth and final element of a retaliation case, nexus or unlawful motive.

As Gutierrez acknowledges, the adverse action standard is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) Prior Board precedent supports the view that the adverse action element of the retaliation test is not met in this case. For example, in *San Francisco Unified School District* (2009) PERB Decision No. 2057, the Board found that an employer's disparaging remarks about an employee did not constitute adverse action. In *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S, the Board found that an employer advising an employee that the employer would be pursuing an adverse action against that employee did not constitute an adverse action. The Board held: "Although [charging party] may have been apprehensive about a possible future adverse action, his subjective reactions do not establish the required adverse action."

Here, the matter of whether Gutierrez was conducting union business on County time was raised, investigated and resolved within two working days. The matter was then dropped, with no consequences to Gutierrez. Gutierrez testified he was scared by the call, but his

subjective reaction does not establish the required adverse action. In addition, as the ALJ appropriately determined, there is no support in the record for Gutierrez's claim that Brazeau wanted him followed. Accordingly, we concur in the ALJ's conclusion that a reasonable person would not consider Moore's call to Brazeau to have had an adverse impact on Gutierrez's employment.

Gutierrez relies on two Board decisions to support his position that he suffered an adverse action. In *California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S (*Hackett*), the employee organization argued that charging parties suffered no adverse action as a result of being named in a civil lawsuit and being subject to other charges. Charging parties responded they were harmed not just by the emotional stress but by "loss of reputation, hours of work preparing a defense, los[t] vacation time and costs for legal counsel." The employee organization excepted to the hearing officer's conclusions that the charging parties suffered adverse action and that the employee organization acted with unlawful motive. The Board upheld the conclusions of the hearing officer. Gutierrez relies in main on the following passage in *Hackett*:

> As the ALJ stated, it is well established that when a party shows a clear intent to take a disputed action against another, the harm occurs at that time and not when the wrongful act is completed.

The problem, however, is that the Board merged its discussion of adverse action with its discussion of unlawful motive under one heading entitled "CSEA's Adverse Action Exception."

Here, the ALJ never reached the element of unlawful motive or nexus because he found the evidence insufficient to establish an adverse action. As to the adverse action element, the Board in *Hackett* rejected the employee organization's contention that "no harm was done to

Charging Parties." By contrast to the facts in *Hackett*, the facts here do not rise to the level of adversity sufficient to constitute adverse action under a reasonable person standard.

Gutierrez also relies on *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S (*Coelho*). In *Coelho*, however, the employee organization filed a written citizen's complaint against the charging party with his employer, signed by the employee organization's chief legal counsel. The complaint stated:

> "I am writing to file an official personnel complaint on the conduct of one of your wardens, Mr. Richard Coehlo [sic]. I realize that this is an unusual step for a labor union to take but I feel that I have no other choice as I am concerned for the safety of other staff members from CAUSE who are involved in matters also involving Mr. Coehlo [sic]."

The complaint alleged that the charging party lacked emotional control and was hostile toward the employee organization; and also expressed concern for the safety of employee organization staff members. The employer undertook an investigation that lasted two months. It involved formal interviews, including that of the bailiff of the justice court, and concluded in a lengthy written report.

In upholding the conclusion of the hearing officer that the charging party suffered an adverse action, the Board applied the same reasonable person standard as applied by the ALJ in this case. The Board in *Coelho* determined that based on the facts "in this case," the filing of the citizen's personnel complaint constituted an adverse action. As the Board emphasized in its use of that phrase, such determinations are to be made on a case-by-case basis based on the facts presented. As stated above, we agree with the ALJ that the facts here do not rise to the level of an adverse action sufficient to satisfy Gutierrez's burden.

Suspension

The ALJ concluded that it was not unreasonable for SEIU to suspend Gutierrez's membership for encouraging others to drop theirs. In reaching this conclusion, the ALJ relied

on the Board's decision in *California School Employees Association and its Shasta College Chapter #381 (Parisot)* (1983) PERB Decision No. 280 (*Parisot*), which states in pertinent part:

> A member has an inherent obligation to his organization to be loyal, and for him to engage in conduct, such as a decertification drive, which attempts to thwart the fundamental objectives of that organization is a breach of his duty.

Based on this rationale, the Board in *Parisot* found that it was reasonable for an employee organization to suspend a member for his decertification activities. Here, the ALJ concluded that although Gutierrez was not engaged in a decertification campaign, he engaged in conduct that nonetheless attempted to thwart the fundamental objectives of the employee organization in breach of Gutierrez's duty of loyalty.

Gutierrez argues that *Hackett* "affirmed the standard" set forth in *Parisot* that "dissident union members activities only become unprotected when undertaken in a decertification effort that is life threatening to the union." (Gutierrez's appeal, p. 4; emphasis in the original.) Gutierrez then asserts that the ALJ departed from this precedent in finding that SEIU acted reasonably in suspending Gutierrez's membership. Gutierrez's argument is misplaced for the following reasons.

Gutierrez misstates Board precedent. The facts before the Board in *Parisot* involved a decertification campaign. The Board held that by engaging in such a campaign, the dissident members were attempting to thwart the fundamental objectives of the employee organization. The Board held that therefore the employee organization's suspension of the dissidents' membership was reasonable. Contrary to Gutierrez's assertion, the Board did not hold that the only way an employee organization can establish that it has a right to take defensive action

against a member engaged in dissident activities is by proving that the member was engaged in a decertification effort.[10]

In *Hackett*, the Board drew a line between "life-threatening" activities for which a member may reasonably be suspended and other dissident activities that "merely challenge an incumbent union's leadership without threatening the existence of the union itself." In *Hackett*, the dissident members formed a dissident caucus, campaigned to reform the union election procedures and distributed literature criticizing the incumbent officers. Notwithstanding their dissident posture, they were *advocating for active union membership.* The Board held that these activities posed a threat to the leadership of the employee organization, but not to the employee organization itself. The Board found that therefore the employee organization did not act reasonably in suspending the dissidents' membership.

We agree with the ALJ that the facts here are more akin to the facts in *Parisot* than to the facts in *Hackett*. One of the fundamental objectives of an employee organization is to negotiate a labor agreement with the employer in its capacity as the exclusive representative of the bargaining unit. An employee organization needs the backing and support of its members in order to demonstrate strength at the bargaining table. More broadly, the survival of an employee organization ultimately depends, not solely on agency fees it receives for representation purposes, but on the loyalty and active participation of its *members.* An employee organization's strength lies in the value its membership offers; and, its strength matters not for the cause of solidifying the leadership's base but, rather, for the cause of advancing the interests of the rank and file in the workplace in an effective and strategic way.

[10] See also, *NLRB v. Allis Chalmers* (1967) 388 U.S. 175, 180-181 (*Allis-Chalmers*), in which the United States Supreme Court held that a union's right to protect itself against the erosion of its status as the exclusive representative is an integral component of national labor policy. It is appropriate to take guidance from cases interpreting the National Labor Relations Act. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Under the *Parisot* standard, Gutierrez was engaged in activities that attempted to "thwart the fundamental objectives" of SEIU. By encouraging members to drop their membership, SEIU was hurt financially and deprived of the support of its members at a critical time, the initiation of bargaining. These types of harm may not pose an imminent threat to the existence of SEIU as the exclusive representative of the bargaining unit, as is true of a successful decertification petition. The life-threatening standard, however, does not have a temporal component. A loss of membership is without a doubt a threat to the ultimate survival and effectiveness of an employee organization, even if the impact is not as decisive as the immediate removal of the employee organization as the exclusive representative. While employees in a bargaining unit are well within their rights to refrain from joining or participating in an employee organization, an employee organization is also within its rights to take defensive action through disciplinary proceedings against members who actively work to harm the employee organization's fiscal and other interests.

In contrast to *Hackett*, Gutierrez did not encourage members to be actively involved in the democratic process of the union. The dissidents in *Hackett* were loyal to the union, despite their lack of loyalty to the union's leadership. Whatever loyalty Gutierrez may have owed SEIU and its leadership in his role as steward, he at least owed SEIU a duty of loyalty as a member.[11] We agree with the ALJ that Gutierrez breached that duty. Gutierrez engaged in the type of conduct found by the Board in *Parisot* to thwart the fundamental objectives of SEIU. Under *Hackett*, Gutierrez's conduct did not merely challenge the union leadership but was a threat to SEIU itself.

[11] While unnecessary to the conclusions reached herein, it is noted that not only did Gutierrez owe SEIU a duty of loyalty as a member, but he also owed SEIU a duty of loyalty as a fiduciary by virtue of his leadership position as a steward. (See, e.g., *Stelling v. International Brotherhood of Electrical Workers* (9th Cir. 1978) 587 F.2d 1379, 1386-1387 [under the National Labor Relations Act, union officials including shop stewards have fiduciary obligations to unions to protect their fiscal interests as well as to protect other interests that do not have pecuniary ramifications].)

Last, while encouraging members to drop their membership, Gutierrez kept his. One distinction between an agency-shop fee payer and a full member is that a full member has the obligation to abide by union rules and discipline whereas agency-shop fee payers are under no such obligation. (*Communication Workers v. Beck* (1988) 487 U.S. 735.) Had Gutierrez taken the same action he was advocating that others take, Gutierrez could have engaged in the drop membership campaign free of disciplinary consequences. Gutierrez chose to retain his membership while engaging in activities that weakened SEIU as an employee organization and exclusive representative. SEIU acted reasonably in suspending Gutierrez's membership under the distinctions in Board precedent set forth above.

The dissent correctly identifies the self-preservation standard from *Parisot* relied on in *Hackett* as requiring an action that "threatens the very existence of the organization and is of sufficient seriousness to justify a self-protective response." Immediately following that text are citations to two decisions of the National Labor Relations Board (NLRB), a United States Supreme Court opinion and an opinion of the California Court of Appeal. The two NLRB decisions involved decertification petitions, but the other two cases did not.

In the California Court of Appeal decision, *Davis et al. v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada et al.* (1943) 60 Cal.App.2d 713 (*Davis*), the union had expelled members following a hearing on charges that they had joined and were promoting a rival organization opposed to the best interests of the union. The court found that their expulsion was consistent with the union's constitution and bylaws, concluding that "the interpretation adopted by the officers and executive board of the Alliance, and approved by the trial court, that [the international union's representative] had the right [to impose expulsion], is a reasonable one, and we decline to substitute a different interpretation." (*Davis, supra*, 60 Cal.App.2d 713, 721.) As the court

stated, "an organization has the natural right of self preservation, and may with propriety expel members who show their disloyalty by joining a rival organization." (*Id.* at p. 715,)

In the United States Supreme Court decision, *Allis-Chalmers, supra,* 388 U.S. 175, the union had imposed discipline in the form of fines on union members who had crossed picket lines to work during an authorized strike. The Supreme Court affirmed the NLRB's decision that the union did not violate the National Labor Relations Act. The Supreme Court majority opinion cited to and quoted from a Yale law review article as follows:

> A commentator has noted that 'the ballot in a free election is the individual union member's weapon for inducing performance in accordance with his desire.'

(*Allis-Chalmers, supra,* 388 U.S. 175, 191, fn. 27, quoting from Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System (1958) 67 Yale L.J. 1327, 1329.)

Based on the above, the Board in *Parisot* could not have intended to limit application of the self-preservation doctrine to circumstances in which a member has filed a petition for decertification, as the dissent appears to suggest. The dissent relies on the following statement in *Hackett* "They have solicited supporters for their campaign to change CSEA's election procedures and have encouraged sympathizers to join or remain members of CSEA to work for change within." Gutierrez, however, did just the opposite. He encouraged sympathizers, not to join or remain members of the union, but to *drop out*. The conduct of the charging parties in *Hackett* was consistent with the principle stated in *Allis-Chalmers* that "the ballot in a free election is the individual union member's weapon" for bringing about a desired change in a protected manner. We doubt that the charging parties in *Hackett* would approve of the conduct engaged in by Gutierrez.

As mentioned in the dissent, *Hackett* states that "the level of disloyalty required to remove protection from dissent must be such as to threaten the life of an employee

organization." The dissent argues that Gutierrez's drop membership campaign does not meet the *Hackett* "life-threatening" standard, without identifying what it is that gives a union its "life." An exclusive representative is more than a fee-based, service-provider. Without members, there would be no shop stewards or representation and participation on labor-management committees. Nor would there be representatives in the workplace to assist co-workers with grievances, monitor compliance with collective bargaining agreements, or attend investigatory interviews. The ability of a union to represent the rank and file, to speak for them effectively with one voice and to mobilize around important union initiatives is a product of organizational strength, more than it is purely an economic calculus. A healthy and vital employee organization, or any organization for that matter, builds its strength through, and relies for its ultimate survival and success on, an engaged, active and participative membership. A member choosing to retain membership while encouraging others to remove themselves from the "life" of the union may reasonably be held to account for the organizational injury he or she so inflicts.

We do not take issue with the testimony of Shawn Thompson, relied on by the dissent, which supports the conclusion that Gutierrez and his sympathizers were frustrated with the leadership of the union. As we already had acknowledged in the Background portion of this decision, the dissident members in this case were dissatisfied with the level of services they were receiving from the union and believed that a drop membership campaign would get the union's attention and that members would benefit from greater choices, i.e., the ability to choose not to be a member or pay dues. While we have no reason to dispute these assertions, the issue here turns not on their level of frustration, but on Gutierrez's response thereto.

Contrary to the inference in the dissent that, by this decision, we are adopting the position of the dissent in *Hackett*, we are compelled to reiterate that our opinion intends no such result. We agree with the majority in *Hackett* that because the charging parties' conduct

was a challenge to the leadership, and not to the union itself, the conduct of those members was protected against union discipline. We disagree, not with the majority in *Hackett*, but with the dissent in this case that Gutierrez's conduct should be accorded the same protected status as the conduct of the charging parties in *Hackett*. The testimony of Gutierrez relied on in the dissent demonstrates the contrast between the two cases. Gutierrez testified, "We're not against SEIU," as though SEIU is anything greater than the sum total of members like Gutierrez, and the collective power and influence they can bring to bear to promote and protect their interests in the workplace.

Unlike Gutierrez, the dissident members in *Hackett* did not view their union as something separate and apart from the value they brought to it as members. They recruited members to join the union and actively participated in the democratic processes of the union, advocating for "change within." Their stated objective was "to strengthen CSEA/SEIU Local 1000 from within by building a unified movement of rank and file state employees."

We also disagree with the dissent's view that Gutierrez's own proclamation of loyalty to the union is relevant to the issue whether SEIU was entitled to a self-protective response. We find disingenuous Gutierrez's proclamation of loyalty to the union in the face of his active campaign to convince members to quit the union. It is akin to renouncing one's citizenship as a way of expressing dissatisfaction with governmental leaders and mistaking that for loyalty.

Finally, in our view, the dissent's discussion of the duties owed to agency fee payers who choose not to become union members misses the point.[12] We find irrelevant the fact that an agency shop agreement may be rescinded by a majority vote of all the employees in the bargaining unit. A majority vote can also result in decertification. That a majority can assert

[12] We decline to comment on the recent United States Supreme Court decision in *Knox v. Service Employees International Union Local 1000* (June 21, 2012) 2012 U.S. LEXIS 4663 relied on by the dissent until such time as the issues decided therein are presented in a matter before the Board on appeal.

its power to accomplish these results does not immunize the conduct of members who campaign for such results from imposition of union discipline.

In sum, we agree with the ALJ that Gutierrez's conduct, in advocating that members quit the union, threatened the existence of the union and was of sufficient seriousness to justify a self-protective response by the union.

Transcript

At the outset of the proposed decision, the ALJ stated:

> At the conclusion of the hearing, the parties made oral arguments in lieu of written briefs. I told the parties that the case would be submitted for decision when I received a transcript of the hearing, but I have decided that a transcript is not necessary at this stage of the proceedings, and I deem the case to have been submitted for decision as of the day of hearing.

Gutierrez asserts that the ALJ's action in preparing the proposed decision without a transcript made it difficult to except to the ALJ's findings of fact.

By letter of June 26, 2009, which accompanied the proposed decision, the Chief ALJ provided the parties with the following information about their appeal rights:

> The proposed decision was issued without the preparation of a transcript of the formal hearing. If you want the transcript of the formal hearing to use in filing a statement of exceptions, then you may file a request for an extension of time with the Board itself within the time set forth above. The request for extension of time to file exceptions should state that you desire to have the transcript for reference in your exceptions.

Gutierrez requested an extension of time to file exceptions, but did not state in his request a desire to have the transcript for reference in his exceptions. Gutierrez had the opportunity to request a transcript, but did not. Therefore, we cannot credit Gutierrez's exception regarding the transcript.

ORDER

Based on the foregoing, the complaint and underlying unfair practice charge in Case No. LA-CO-77-M are hereby DISMISSED.

Member Huguenin joined in this Decision.

Member Dowdin Calvillo's concurrence and dissent begins on page 19.

DOWDIN CALVILLO, Member, concurring in part and dissenting.

I concur with the majority that the evidence did not establish the element of adverse action necessary to establish retaliation. I further concur with the majority that the exception concerning the preparation of the transcript is without merit. For the reasons that follow, however, I disagree with the majority's conclusion that Cuauhtemoc Wally Gutierrez (Gutierrez) engaged in conduct that was "life threatening" to Service Employees International Union, Local 221 (SEIU) such that it was reasonable for SEIU to suspend his membership.

Although Public Employment Relations Board (PERB or Board) typically does not interfere with the internal affairs between an employee organization and its members, PERB has long recognized that Meyers-Milias-Brown Act (MMBA) section 3503 confers upon the Board a separate and distinct grant of jurisdiction to determine whether an employee organization has exceeded its authority to dismiss or suspend its members. (*California State Employees Association (Hard, Hackett, Landingham, et al.)* (2002) PERB Decision No. 1479-S (*Landingham*); *California School Employees Association and its Shasta College Chapter #381 (Parisot)* (1983) PERB Decision No. 280 (*Parisot*).) The Board's authority to determine the reasonableness of a membership provision must include not just the reasonableness of the provision itself, but also the reasonableness of the provision as it was applied in the case pending before the Board. (*Landingham*.)

As noted by the majority, the Board draws a line between "life threatening" activities for which a member may reasonably be suspended and other dissident activities that merely "challenge an incumbent union's leadership without threatening the existence of the union itself." (*California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S (*Hackett*).) Thus, in *Parisot*, the Board found that a union could reasonably suspend

a member for engaging in decertification activities, finding that decertification "threatens the very existence of the organization and is of sufficient seriousness to justify a self-protective response." (*Parisot.*) "In essence, the Board has granted an exception to the rule that an employee organization may not retaliate against an employee for engaging in protected conduct. Where the very life of the organization is in jeopardy, the union may retaliate against the employee as an act of self-preservation." (*Hackett*, adopting administrative law judge's (ALJ) proposed dec. at p. 21.)

In *Hackett*, however, the Board held that various activities by its members aimed at challenging the leadership of the California State Employees Association (CSEA) during contract negotiations were protected and not life-threatening to the union. The members organized and actively participated in a dissident group in an effort to revise CSEA's election procedures, wrote and openly distributed a publication critical of CSEA's organizational structure and representational practices, and supported the election to CSEA offices of candidates sympathetic to their views. They also "solicited supporters for their campaign to change CSEA's election procedures and have encouraged sympathizers to join or remain members of CSEA to work for change within." (*Id.*, ALJ proposed dec. at p. 10.)

The Board in *Hackett* adopted the ALJ's proposed decision finding the employees' conduct protected in that case, under the standard set forth in *Parisot*. Emphasizing that the line between permissible and impermissible conduct established in *Parisot* involves a broader choice than the line between dissent and disloyalty, the Board held: "Thus, the level of disloyalty required to remove protection from dissent much be such as to threaten the life of an employee organization. This is more than internal union politics." Applying this standard, the Board upheld the ALJ's determination that, while the employees' conduct in attempting to take over

CSEA, but not destroy it, may have been threatening to some in the organization, it was not threatening to the organization itself, and that any disloyalty was not to CSEA but to those in charge of the union. (*Hackett.*)

The Board majority further rejected the argument by the dissent that the rule in *Parisot* should be expanded to include conduct that had a "serious destabilizing effect" on the union. According to the Board:

> The broad and subjective standard the dissent attributes to *Parisot* and other PERB decisions would severely limit a union member's right to differ, which is the sine qua non of democratic participation. The interpretation suggested by the dissent would confer upon a union's leadership extraordinary power to quell challenges and disagreeable opinions. Such power would effectively transform union leadership into a dictatorial or authoritarian regime.

(*Hackett* at pp. 6-7.)

Based on the foregoing standard, I would find that Gutierrez's campaign to change the membership status of his fellow bargaining unit members did not threaten the existence of SEIU. Gutierrez testified credibly and repeatedly that he was not against SEIU, but dissatisfied with the manner in which the leadership was representing the bargaining unit. According to Gutierrez, the quality of SEIU's member services decreased following the implementation of an agency shop for his bargaining unit, and he engaged in the campaign to help improve the quality of service provided by SEIU. For example, Gutierrez testified:

> We're not against SEIU. What we're against is them not paying, not representing the members the way we believe they should be representing us.
>
> . . . . . .
>
> We still want to be with SEIU. We just want them to clean up their act.

. . . . . .

[Question by SEIU counsel] But it's your feeling that once Mary Grillo left, that the leadership of the Union went downhill?

A Absolutely.

In a letter to SEIU President Sharon-Frances Moore dated May 22, 2008, Gutierrez and other members of the labor management team requested the removal of one member from the labor management team, stating that they believed she did not represent their view and concerns, and that the member was a detriment to continuing a good working relationship with management.

Bargaining unit and labor management team member Shawn Thompson also testified that the goal of the group led by Gutierrez was to improve service by SEIU:

> Basically, what we were trying to do, we were pretty frustrated at the level of representation we were getting from the Union, and we had spoke [sic] to them on several occasions for, probably it went over a year or so or better, trying to get some kind of, you know, proper representation, especially in the labor management, or even getting you know, someone from the Union to show up at the worksites. And we were just frustrated, and we thought, well, you know, what can we do to get their attention. And we thought that at that time the best action for us was to drop down to, you know, our full members to drop down to agency fee members. That seemed to get some attention. But, I mean, some of the attention that we were trying to garner.

The record makes it clear that, notwithstanding his dissatisfaction with the level of service provided by SEIU and its leadership, Gutierrez continued to support SEIU in all its activities and actively opposed a decertification effort. Thus, like the charging parties in *Hackett*, Gutierrez merely engaged in dissident conduct that challenged the union's leadership but did not threaten the existence of the union itself. As in *Hackett*, by opposing decertification, Gutierrez continued to remain, and to encourage employees to remain, loyal to SEIU itself but to

express their dissatisfaction with its leadership by becoming agency fee payers. I respectfully disagree with the majority that the fact that, in *Hackett*, the dissident employees remained union members while in this case Gutierrez encouraged employees to become agency fee payers, is a significant distinction. In both cases, the employees sought to challenge not the organization itself but its leadership. Therefore, I find this case falls well within the scope of conduct found protected under *Hackett*.

In reaching this conclusion, I do not mean to suggest that the a decertification effort is the only type of conduct that may qualify for the "self-preservation" protection for union retaliation. As noted by the majority, the courts have recognized other types of conduct as sufficiently threatening to the life of an employee organization to permit the organization to take disciplinary action. (See, e.g., *Davis et al. v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada et al.* (1943) 60 Cal.App.2d 713 [joining and promoting rival organization]; *NLRB v. Allis-Chalmers* (1967) 388 U.S. 175 [crossing picket line to work during a strike].) I simply find that the activity in this case – encouraging bargaining members to exercise their right to become agency fee payers – did not rise to the level of disloyalty that threatened the life of the employee organization so as to remove it from the protection of dissident activity under the MMBA.

In reaching this conclusion, I also consider the nature of agency fee payer status. Agency fees are a "form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" (*Knox v. Service Employees International Union Local 1000* (June 21, 2012) 2012 U.S. LEXIS 4663 (*Knox*), quoting *Ellis* v. *Railway Clerks* (1984) 466 U. S. 435, 455.) As noted by the court in *Knox*, the First Amendment "does not permit a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the

union money to be used for political, ideological, and other purposes not germane to collective bargaining." (*Knox*, slip op. at p. 2, citing *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 305.) Accordingly, the primary purpose of permitting unions to collect fees from nonmembers is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." (*Knox*, slip op. at p. 10, *citing Davenport v. Washington Ed. Assn.* (2007) 551 U. S. 177, 181.)

Agency fees are specifically designed to ensure that non-members pay their fair share of a union's expenditures associated with its performance of representational duties, while ensuring that they not be required to support activities that are beyond the association's representational obligations. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587-588.) Consequently, Gutierrez's campaign to change the membership status of his fellow bargaining unit members did not, by definition, threaten the existence of the union, but instead enabled it to continue to perform its representational duties. Thus, while his campaign activities may have been disconcerting to SEIU, they did not jeopardize its very existence. (*Hackett.*)

In my view, the majority adopts an excessively expansive view of conduct deemed life-threatening to the union. Unions exist not for their own sake but to provide representation to the entire bargaining unit, whether the individual members of the bargaining unit choose to become members of the union or not. Union membership is not the same as exclusive representation. Employees cannot be compelled to join a union and non-members can be required to pay only those sums fairly attributable to the cost of representation of the bargaining unit, and not for the support of ideological causes not germane to its duties as collective bargaining agent. (*Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209; *Chicago Teachers Union v. Hudson* (1986)

475 U.S. 292.) Moreover, as demonstrated in this case, an agency shop agreement may be rescinded by a majority vote of all the employees in the bargaining unit. (MMBA, § 3502.5(d).)

Nothing in Gutierrez's conduct interfered with SEIU's ability to engage in representational activities on behalf of the bargaining unit as its exclusive representative. Any harm to SEIU's fiscal or other interests was to its interest in collecting dues and fees for activities outside the scope of its representational duties. I respectfully disagree with the majority's argument that union membership is required for an employee organization to be effective at the bargaining table or to advance the interests of the bargaining unit. I therefore conclude that Gutierrez did not engage in conduct that was life-threatening to SEIU and that, therefore, SEIU did not act reasonably in suspending his membership.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CUAUHTEMOC WALLY GUTIERREZ, Charging Party, v. SEIU LOCAL 221, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-77-M PROPOSED DECISION (6/26/2009)

Appearances: Cuauhtemoc "Wally" Gutierrez on his own behalf; Fern M. Steiner, Attorney, for SEIU Local 221.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges his union retaliated against him and unreasonably suspended his membership, in violation of the Meyers-Milias-Brown Act (MMBA).[1] The union denies any violation.

Cuauhtemoc "Wally" Gutierrez (Gutierrez) filed an unfair practice charge against SEIU Local 221 (SEIU) on August 18, 2008; he filed amended charges on September 8, 2008, September 19, 2008, and October 8, 2008. The General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against SEIU on December 8, 2008; SEIU filed an answer on December 26, 2008.

PERB held an informal settlement conference on January 26, 2009, but the case was not settled, so PERB held a formal hearing on June 10, 2009. At the conclusion of the hearing, the parties made oral arguments in lieu of written briefs. I told the parties that the case would be submitted for decision when I received a transcript of the hearing, but I have decided that a

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

transcript is not necessary at this stage of the proceedings, and I deem the case to have been submitted for decision as of the day of hearing.

FINDINGS OF FACT

Gutierrez is a public employee within the meaning of MMBA section 3501(d). SEIU is an exclusive representative within the meaning of PERB Regulation 32016(b).[2]

Gutierrez is an employee of the County of San Diego (County). Until recently he was an SEIU member, an SEIU steward, and a member of an SEIU labor management team. Gutierrez and others have been dissatisfied with SEIU's representation of their unit. In June 2008, in an attempt to get more attention from SEIU, Gutierrez and others distributed a form to fellow employees to change their SEIU membership "from Full Member to Agency Shop/Fair Share Member." As a result, some 97 SEIU members dropped full membership, and SEIU stopped receiving their dues. Gutierrez himself did not drop full membership.

Kathy Griffee (Griffee), an SEIU executive board member, became aware of these activities, and on July 2, 2008, she filed charges against Gutierrez with the SEIU secretary, stating in part:

> Mr. Gutierrez has abused the Office of Steward to encourage union members to drop full membership by presenting false and misleading information. As of the date of this letter, Mr. Gutierrez has not dropped his membership and has full rights as a Union member even while he is encouraging fellow members to drop. In conversations with [SEIU Controller] Mr. Marks, Mr. Gutierrez denied trying to decertify the Union; however, his actions demonstrate the opposite intent.

Griffee therefore charged Gutierrez with:

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

> (1) Gross disloyalty unbecoming a member and (2) Advocating or engaging in dual unionism or secession.[3]

Griffee testified that she did not discuss these charges with other members of the executive board.

On July 15, 2008, SEIU President Sharon-Frances Moore (Moore) received four calls from SEIU members stating that Gutierrez had been performing union duties on County time. Moore called Susan Brazeau (Brazeau), the County's labor relations manager. Brazeau testified that Moore was concerned that Gutierrez had been at various facilities to meet with SEIU members. According to Brazeau, Moore wanted to make sure of three things: (1) that Gutierrez was "taking appropriate time;" (2) that Gutierrez was "not at locations when he shouldn't be;" and (3) that the County held Gutierrez "accountable for [his] whereabouts."

Brazeau was concerned about the possibility that Gutierrez had engaged in union activity on County time, so she investigated, in part by calling Gutierrez himself. The next morning Gutierrez appeared at Brazeau's office with proof that he had been on jury duty on July 15, 2008. Brazeau testified she called and left Moore a message; Moore testified she did not remember such a message. In any case, Moore also found out that Gutierrez had actually been on jury duty, and the matter was dropped.

Meanwhile, Gutierrez and others were still dissatisfied with SEIU's representation, and to get more attention they circulated a petition for an election to rescind SEIU's agency shop provision, under PERB Regulation 61600. Upon obtaining the requisite employee signatures, they filed the petition with PERB on July 24, 2008.

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[3] Griffee misquoted SEIU bylaws, which authorize charges for "[g]ross disloyalty or conduct unbecoming a member." (Emphasis added.) Gutierrez seems to find the misquotation significant; I do not.

Later, on August 13, 2008, the SEIU secretary informed Gutierrez of Griffee's charges against him, that the executive board had appointed a trial body, and that a hearing was scheduled for August 27, 2008. It appears from the SEIU bylaws that the executive board was required to appoint a trial body to consider Griffee's charges so long as those charges were specific and timely.

Meanwhile, PERB accepted the agency shop rescission petition and announced that an election would be held.

A hearing on Griffee's charges was held as scheduled on August 27, 2008. As the SEIU bylaws permit, neither Griffee nor Gutierrez were represented by attorneys. Both were limited to four witnesses; in fact, each side called three.

At the beginning of the SEIU hearing, Griffee admitted that her charges against Gutierrez were wrong in one respect: she had learned that he was not trying to decertify SEIU. The evidence at the hearing was at best inconclusive with regard to another part of her charges: that Gutierrez had presented "false and misleading information." The evidence was conclusive, however, that Gutierrez had encouraged other union members to drop full membership. Gutierrez admitted as much, stating in part:

> We changed our membership from full members to agency fee. And did we do it to put pressure on the union? Absolutely. If you look on the website, that's clear what we said we were going to do. Now, if I'm going to be thrown out for that, then I need to be thrown out for that, because that's what we did.

On September 5, 2008, the trial body responded by sustaining the charge of "[g]ross disloyalty unbecoming a member" while dismissing the charge of "[a]dvocating or engaging in dual unionism or secession." As discipline, the trial body imposed a two-year suspension of Gutierrez's membership in SEIU, to be effective on September 8, 2008.

At the SEIU hearing, Gutierrez himself brought up the agency shop rescission petition, but there is no evidence that the trial body considered the matter, which was outside the scope of Griffee's charges. The petition did result in an election, and on November 7, 2008, PERB certified that the agency shop provision was rescinded.

Meanwhile, sometime in September 2008, Gutierrez filed an appeal of the trial body's decision with the SEIU International Executive Board. Also, on October 8, 2008, Gutierrez filed his third and final amended unfair practice charge. The PERB complaint, which issued on December 8, 2008, contains no allegations with a date later than September 8, 2008, when the suspension of Gutierrez's SEIU membership was to be effective.[4] Because neither the final charge nor the complaint was amended, events after September 8, 2008, are outside the scope of this case.

ISSUES

1. Did SEIU retaliate against Gutierrez?
2. Did SEIU unreasonably suspend Gutierrez's membership?

CONCLUSIONS OF LAW

Retaliation

The PERB complaint alleges in part:

> 3. In or about June 2008, Charging Party [Gutierrez] exercised rights guaranteed by the Meyers-Milias-Brown Act by gathering support for a petition to rescind the agency fee provision (Rescission Petition) contained in the Memorandum of Agreement in place between Respondent [SEIU] and Charging Party's employer, the County of San Diego.
>
> 4. On or about July 15, 2008, Respondent, acting through its representative Sharon[-Frances], contacted an agent for the County of San Diego and informed the agent that Charging Party

[4] In fact, Gutierrez's suspension was held in abeyance pending his (unsuccessful) appeal.

> had been soliciting support for the Rescission Petition and had mistreated Respondent's staff during a meeting that day.
>
> 5. Respondent took the actions described in paragraph 4 because of the employee's activities described in paragraph 3, and thus violated Government Code section 3506 and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32604(b).

As indicated by the previous Statement of Facts, many of these specific allegations are untrue or unproven. Gutierrez did not gather support for the agency shop rescission position in June 2008, and Moore did not so inform Brazeau on July 15, 2008.[5] Also, there is no evidence that Moore said Gutierrez had mistreated staff.

Rather than dismiss these allegations, however, I shall deem them amended to conform to the facts as shown by the evidence and as litigated by the parties. Those facts include (1) Gutierrez's encouragement of other SEIU members to drop full membership in June 2008 and (2) Moore's call to Brazeau about Gutierrez's whereabouts on July 15, 2008. The question is whether those facts indicate that SEIU retaliated against Gutierrez for protected activities.

The leading PERB case on union retaliation is *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S (*Coelho*). That case arose under Government Code section 3519.5 of the Ralph C. Dills Act (Dills Act),[6] which is parallel to MMBA section 3506. In *Coelho*, PERB stated in part:

> Dills Act section 3519.5(b) prohibits discrimination or retaliation by an employee organization against an employee for engaging in conduct protected by the Dills Act. In *Novato* [*Novato Unified School District* (1982) PERB Decision No. 210], the Board described the test it applies in determining whether an employer unlawfully discriminated or retaliated against an employee because of the exercise of rights protected by the Educational Employment

[5] It appears from the evidence that the rescission petition was circulated on or about July 23, 2008.

[6] The Dills Act is codified at Government Code section 3512 et seq.

> Relations Act. In *State of California (Department of Developmental Services)* (1982) PERB Decision No. 228-S, the Board applied the test for resolving allegations of discrimination and retaliation set out in *Novato* to charges filed under the Dills Act. The Board has also held that the standard applied to cases involving employer misconduct is appropriate in cases involving employee organization misconduct. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.)
>
> In order to establish a violation of section 3519.5(b) under *Novato* the charging party bears the burden of showing that: 1) he engaged in protected activity; 2) the respondent knew of the activity; 3) the respondent took action adverse to his interest; and 4) there was an unlawful motivation for the respondent's action. Once this is established, the burden shifts to the respondent to demonstrate that it would have taken the same action regardless of the protected conduct.

The first question, therefore, is whether Gutierrez engaged in protected activity. I conclude that he did.

MMBA section 3502 protects both the right to join and participate in a union and the right to refuse to join or participate in a union.[7] If encouraging union membership is protected, as it surely is, then encouraging the termination of full union membership is also protected. This is the protected activity in which Gutierrez engaged in June 2008 and about which SEIU surely knew by July 15, 2008.

The next question is whether SEIU took adverse action against Gutierrez on July 15, 2008, when Moore called Brazeau. In *Coelho*, PERB stated in part:

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[7] MMBA section 3502 states in full:

> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

> Coelho [the employee] must also demonstrate that the respondent [union] took adverse action against him. The test which must be satisfied is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (*Palo Verde Unified School District* (1988) PERB Decision No. 689; *Newark Unified School District* (1991) PERB Decision No. 864.) In this case, CAUSE [the union] filed a citizen's complaint against Coelho, which CAUSE knew would prompt an investigation by his employer. Such an action could cause a reasonable person to be concerned about the potential adverse effect of the complaint and ensuing investigation on his employment relationship. The fact that the complaint and investigation did not result in action being taken against Coelho by his employer does not eliminate the adverse nature of CAUSE'S conduct. Accordingly, in this case, CAUSE'S filing of the complaint constituted an action adverse to Coelho's interests.

In *Coelho*, the union had filed a formal written "citizen's complaint" against the employee, alleging the employee's "lack of emotional control" and "hostile attitude," and emphasizing a concern for the safety of others. As the union knew it would, the complaint led to an internal investigation by the employer, during which the union refused to represent the employee. The investigation took three months and included formal interviews and a lengthy written report before the employee was exonerated.

In contrast, in the present case all that happened to Gutierrez (or seemed likely to happen) was that he got a phone call from Brazeau about his whereabouts on July 15, 2008. Gutierrez knew he had been on jury duty, and he knew he could prove it. It is not clear that Brazeau asked for proof, but Gutierrez provided it, and Brazeau dropped the matter, as did Moore. I cannot conclude under *Coelho* that "a reasonable person under the same circumstances [as Gutierrez] would consider the action to have an adverse impact on the employee's employment."[8]

[8] Gutierrez testified that SEIU wanted him "followed," but the direct testimony of Brazeau and Moore (the only participants in the conversation in question) did not support Gutierrez's speculative hearsay testimony on this point. Brazeau did say that Moore wanted

If Gutierrez alleged that Brazeau's phone call to him constituted adverse action by the County, PERB would certainly dismiss the allegation. In *Rio School District* (2008) PERB Decision No. 1986, an employer issued a letter to an employee asserting in part that she had disclosed "confidential and privileged information" and requiring her to "sign a statement of confidentiality in any future employee situations." PERB nonetheless found no adverse action, because the letter did not actually mention disciplinary consequences. In *County of San Diego* (2009) PERB Decision No. 2005-M, an employer sent a non-confidential letter to the union president asserting that "members of the management feel threatened [by an employee's behavior]" and suspending meetings that the employee normally attended. PERB nonetheless found no adverse action against the employee, because adverse impact on his employment was speculative. If the employer's derogatory letters in these two cases were not adverse, then surely Brazeau's informal phone inquiry was not adverse.

If, as I conclude, Brazeau's phone call was not adverse, then I see no reason to conclude that Moore's call, which led to Brazeau's call (and nothing else), was adverse. I therefore conclude that Moore's call did not rise to the level of adverse action against Gutierrez and thus cannot constitute unlawful retaliation against Gutierrez.

Suspension of Membership

PERB also alleges in part:

> 6. On or about July 24, 2008, Charging Party filed an agency fee rescission petition (Case No. LA-OS-218-M) with PERB.
>
> 7. On or about July 24, 2008, Respondent brought charges against Charging Party under Respondent's constitution and by-laws.

Gutierrez held "accountable for [his[whereabouts," but there was no evidence that Gutierrez was not normally accountable to the County for his whereabouts when on County time or in County facilities, just like any other employee.

8. On or about August 27, 2008, Respondent held a hearing regarding the charges described in Paragraph 7.

9. On or about September 8, 2008, Respondent suspended Charging Party's membership with Respondent for two years.

10. By the acts and conduct described in paragraph 9, Respondent interfered with employee rights guaranteed by the Meyers-Milias-Brown Act in violation of Government Code sections 3503 and 3506 and thus committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32604(b).

Although some of these allegations are admitted or proven, others are untrue or unproven. It is admitted that Gutierrez filed a rescission petition on July 24, 2008, and that SEIU held a hearing on August 27, 2008. It is untrue, however, that SEIU brought charges against Gutierrez on July 24, 2008.

As the evidence showed, it was Griffee who filed charges against Gutierrez, and this took place on July 2, 2008. Griffee testified that she did not discuss these charges with other members of the executive board, and I have no reason to disbelieve her. What SEIU did do was inform Gutierrez of Griffee's charges, appoint a trial body, and schedule a hearing. SEIU's secretary sent Gutierrez a letter to that effect on August 13, 2008; there was no evidence at hearing that SEIU took any action on July 24, 2008, as alleged in the complaint. More importantly, there was no evidence that SEIU had any choice under its bylaws about appointing a trial body, so long as Griffee's charges were specific and timely.[9]

The implication of the allegations in the complaint seems to be that the trial board imposed the two-year suspension on Gutierrez because of the rescission petition. The evidence at hearing did not support this implication. The rescission petition was outside the scope of

[9] Also, it is not technically true that SEIU suspended Gutierrez's membership on September 8, 2008. The suspension that was to be effective on that date was held in abeyance pending Gutierrez's (unsuccessful) appeal.

Griffee's charges, which were filed on July 2, 2008, before any apparent activity on the rescission petition. Although Gutierrez himself brought up the rescission petition at the SEIU hearing, there is no evidence that the trial body considered the issue.

Gutierrez's failure of proof on this issue does not end the matter, however, because the PERB complaint cites MMBA section 3503, which states in full:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.

(Emphasis added.) PERB has long treated such language as giving PERB jurisdiction to determine whether an employee organization has exceeded its authority to dismiss or suspend its members. (California *School Employees Association and its Shasta College Chapter #381 (Parisot)* (1983) PERB Decision No. 280 (*Parisot*).

In his closing argument, Gutierrez argued in part that his suspension was unreasonable because he was "singled out." It is true that other employees were also involved in encouraging SEIU members to drop full membership. The fact is, however, that Griffee filed her charges against Gutierrez alone. For the reasons already mentioned, I do not attribute Griffee's actions to SEIU. I also see no reason why SEIU would have an obligation (or even a right) to expand Griffee's charges to include other employees.

Gutierrez also argued that the SEIU hearing was unfair in that he was limited to four witnesses, as was Griffee. In the context of this case, that limitation does not seem unfair or unreasonable. In fact, each side called three witnesses, and it is not apparent what significant additional testimony other witnesses could have offered. This is especially true given that

Gutierrez admitted the essential charge against him: that he encouraged other SEIU members to drop full membership.

The significant question in this case is whether SEIU could reasonably suspend Gutierrez's membership for encouraging others to drop theirs. In *Parisot*, PERB found it reasonable for a union to suspend a member for decertification activities. (*Parisot*, *supra*, PERB Decision No. 280.) PERB stated in part:

> A member has an inherent obligation to his organization to be loyal, and for him to engage in conduct, such as a decertification drive, which attempts to thwart the fundamental objectives of that organization is a breach of his duty.

PERB did not require the union to have a specific disciplinary policy covering a member's participation in a decertification effort.

In *California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S (*Hackett*), PERB drew a line between activities that are "life threatening" to a union, for which a member may reasonably be suspended, and other dissident activities that merely "challenge an incumbent union's leadership without threatening the existence of the union itself," for which a member may not reasonably be suspended. From *Parisot*, it was clear that decertification activities fell on the "life threatening" side of the line. (*Parisot*, *supra*, PERB Decision No. 280.) In *Hackett*, various other dissident activities were found to be on the other side of the line.

The question then is whether or not Gutierrez's activities in encouraging other SEIU members to drop full membership fell on the "life threatening" side of the line. I conclude that they did. The heart of a union is its membership, indeed, a union ultimately is its membership. A loyal union member encourages others to join, not to leave. Even the dissidents in *Hackett* still advocated active union membership by all workers covered by the union's contracts. (*Hackett*, *supra*, PERB Decision No. 1126-S.)

A campaign against union membership can be at least as destructive as a decertification campaign. A decertified union, although it loses its status, is still alive and may have a future. A union without members is dead and without a future.

Whatever his intentions, Gutierrez's activities attacked SEIU at its heart: its membership. In the terms used in *Parisot*, his conduct "attempt[ed] to thwart the fundamental objectives" of SEIU.[10] (*Parisot*, *supra*, PERB Decision No. 280.) In the terms used in *Hackett*, his conduct was "life threatening" to SEIU. (*Hackett*, *supra*, PERB Decision No. 1126-S.) Gutierrez had a legal right under MMBA to do what he did, but he did not have the right to insist that SEIU still consider him a loyal member in good standing. I conclude that SEIU's two-year suspension of Gutierrez's membership was a reasonable response to Gutierrez's efforts to have others drop their membership.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CO-77-M, *Cuauhtemoc Wally Gutierrez v. SEIU Local 221*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

[10] According to SEIU's bylaws, among SEIU's objects and purposes are "organizing and uniting in this International Union all working men and women eligible for membership herein."

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Thomas J. Allen
Administrative Law Judge