STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LASSEN COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY, Employer, and CALIFORNIA UNITED HOMECARE WORKERS, Exclusive Representative.	Case No. SA-IM-153-M Administrative Appeal PERB Order No. Ad-426-M June 25, 2015

Appearances: Robert M. Burns, County Counsel, for Lassen County In-Home Supportive Services Public Authority; Weinberg, Roger & Rosenfeld by Robert Szykowny, Attorney, for California United Homecare Workers.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Lassen County In-Home Supportive Services Public Authority (Authority) from an administrative determination by the PERB Office of the General Counsel that the factfinding request filed with PERB on April 17, 2015,[1] by the California United Home Care Workers (Union) under the Meyers-Milias-Brown Act (MMBA)[2] was timely. The parties were ordered to proceed with selection of the factfinding panel, and both parties have complied with that order. Factfinding is currently scheduled for July. The Authority also requests that PERB stay all activity on this case until it can issue a decision on the merits of the appeal.

[1] Unless otherwise noted, all dates refer to 2015.

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

For the reasons described below, we hereby grant the appeal and reverse the Office of the General Counsel's administrative determination finding that the Union timely requested factfinding. The Union's request is therefore denied, and any factfinding dates currently scheduled are hereby vacated.

FACTUAL SUMMARY

The parties were attempting to negotiate an initial memorandum of understanding (MOU). On February 2, the Union's negotiator, Will Hirst (Hirst), notified his counterpart, Rick Haeg (Haeg), by e-mail that the Authority's last, best and final offer was rejected and requested that the parties proceed to mediation.

By mutual agreement, Haeg contacted the State Mediation and Conciliation Service (SMCS) on or about February 4. On February 5, Mediator Seymour Kramer (Kramer) notified the parties that he had been assigned to the mediation and solicited available dates from them. By February 6, the parties and Kramer had agreed that mediation would occur on March 26.

On March 13, Kramer notified the parties that he would not be able to participate in the mediation scheduled for March 26. He stated that he would attempt to find another mediator to meet with the parties at the appointed time, but that finding a replacement for the scheduled date might not be possible due to staffing issues. Kramer also requested that the parties circulate available dates between April 13 and May 15 in case he was not able to find a replacement.

Two days later, on March 15, Kramer e-mailed the parties that he was unable to find a replacement for March 26, and renewed his request that the parties send him a new set of available dates between April 13 and May 15, "so [he] can get this Mediation back on calendar." Mediation was re-scheduled for May 19.[3]

[3] The record does not indicate when this date was agreed to.

On April 17, the Union filed a request for factfinding with PERB, asserting that the parties have been unable to reach agreement on their initial MOU. The Authority opposed the request as untimely. According to the Authority, the mediator was appointed on February 5, and under both MMBA section 3505.4(a) and PERB Regulation 32802,[4] the request for factfinding should have been filed between March 5 and March 20.

ADMINISTRATIVE DETERMINATION

Both MMBA section 3505.4(a) and PERB Regulation 32802(a)(1) require that a request for factfinding by an exclusive representative be filed "not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator . . . ."

The Office of the General Counsel noted that this is a matter of first impression, as PERB has not provided guidance on the question of whether a mediator's appointment date is re-set under the MMBA when he or she is unable to keep a mutually agreed to mediation date.

The Office of the General Counsel determined that when Kramer informed the parties on March 13 that he would not be able to participate in the March 26 mediation, "the initial appointment date was effectively rescinded." According to the Office of the General Counsel, when Kramer sent the March 15 e-mail informing the parties he could not find a substitute and would have to conduct the mediation himself, but at a later date, a "new appointment date occurred." Thus, in light of the new March 15 appointment date, the Union's April 17 request was timely, as it fell within the 15-day window prescribed in MMBA section 3505.4(a). With the statutory requirements for factfinding met, the parties were ordered to select their factfinding panel member.

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

APPEAL

On appeal, the Authority disputes the Office of the General Counsel's determination that Kramer's March 13 communication effectively rescinded his appointment as mediator, and that he was re-appointed on March 15, when he informed the parties that a new mediation date would have to be chosen. According to the Authority, although Kramer discovered a conflict in his schedule after the parties agreed to the March 26 mediation date, he still intended to remain as mediator "as long as he was soliciting agreeable dates to do so." (Appeal, p. 3.)

UNION'S RESPONSE

The Union responded that impasse resolution procedures are intended to give the parties every opportunity to reach a settlement of their negotiations, and the Authority's position, which amounts to a "mere technicality" (Response to Appeal, p. 2), defeats the purpose of the statute. The language in MMBA section 3505.4(a) refers to the appointment of "a mediator." This suggests, according to the Union, that a specific mediator must be in place in order to trigger the factfinding request timeline that runs from the "appointment or selection" of a mediator. Thus, the Union argues that when Kramer informed the parties on March 13 that he could not mediate on March 26, he "effectively rescinded his initial appointment" (Response to Appeal, p. 3), and the window for requesting factfinding should be re-set as of March 15 when Kramer solicited a second round of mediation dates.

The Union also opposes the Authority's request for stay, arguing that the request fails to articulate any justification for the stay, especially in light of the fact that a factfinding panel has already been selected and July 7 has been set for the hearing.[5]

[5] The Authority filed a reply to the Union's response. Our regulations governing administrative appeals to the Board itself (PERB Reg. 32350) make no provision for a reply to a response. Without foreclosing our discretion in an appropriate future case to request and consider supplemental briefing, we decline to consider the Authority's reply to the Union's

DISCUSSION

Both MMBA section 3505.4(a) and PERB Regulation 32802 use clear, unambiguous language to prescribe the window period within which an exclusive representative may request factfinding. The triggering event in both is the "appointment or selection of a mediator," if, as in this case, the parties submitted their dispute to mediation.

The Board held in *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, in relevant part:

> When interpreting a statute, "we begin with its plain language, affording the words their ordinary and usual meaning" and "giv[ing] meaning to every word of the statute, if possible, [to] avoid a construction that makes any word surplusage" [citations omitted] or that "ascribes to the Legislature . . . the commission of a meaningless act." [Citations omitted.] Only where the plain meaning of the statute is unclear may we turn to other sources to discern legislative intent. . . .
>
> Additionally, because "statutes should be interpreted to promote, rather than defeat, the legislative purpose and policy" underlying the statutory scheme, "the legislative intent underlying a statutory scheme is of primary importance." [Citation omitted.] We may therefore consider the impact of an interpretation on public policy "for where uncertainty exists[,] consideration should be given to the consequences that will flow from a particular interpretation." [Citation omitted.] Although an interpretation consistent with the "plain meaning" of the statutory text is preferred, a literal interpretation or application of a statute which will nullify the legislative intent or lead to absurd or undesirable consequences constitutes an improper construction. [Citations omitted.]

As PERB noted in *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 6-7 (*Redondo Beach*): "By including a definite time limit on the ability of employee organizations to request factfinding, presumably the Legislature intended to ensure that the factfinding process occur in a timely manner. The responsibility to request factfinding in a timely manner is therefore the sole responsibility of the employee organization." The Board rejected the

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response brief. (See e.g., *County of Santa Clara* (2012) PERB Decision No. 2267-M, p. 2, fn. 3.)

union's argument that it should be relieved of the statutory timelines because the employer had not timely responded to the union's request to engage in voluntary mediation.

In the present case, Kramer was appointed on February 5. When he notified the parties on March 13 that he could not keep the previously scheduled date of March 26, Kramer did not explicitly or implicitly rescind his appointment. This is made clear by the fact that Kramer asked the parties to send him available mediation dates in case he was unable to find a replacement. Requesting additional dates from the parties is inconsistent with a rescission of the original appointment. Kramer's words indicate that he foresaw the distinct possibility that he would remain as mediator, and that there was no reason to withdraw his appointment at that time.

The Union had the option to request factfinding within the initial window period in order to avoid the risk of forfeiting its opportunity to do so. The original window for requesting factfinding was still open when Kramer notified the parties on March 13 that he could not meet with them on March 26. At that point, the Union had from March 5 until March 23 to request factfinding. However, it did not do so. In keeping with our decision in *Redondo Beach, supra,* PERB Order No. Ad-409-M, we conclude that it is up to the union to keep track of the statutory window period and to file its request for factfinding within that period, regardless of whether mediation dates are changed.

Request for Stay

We deny the Authority's request for a stay made pursuant to PERB Regulation 32370, since the request is moot in light of this decision. We also note that the Authority failed to comply with PERB Regulation 32370, because the request was not accompanied by a justification for the request.

ORDER

The Office of the General Counsel's administrative determination in Case No. SA-IM-153-M is hereby REVERSED. California United Homecare Workers' request for factfinding in hereby DENIED. Any currently-scheduled factfinding dates between the parties concerning the issues in this case are hereby VACATED. We also hereby DENY Lassen County In-Home Supportive Services Public Authority's request for stay of activity.

Chair Martinez, Members Huguenin and Banks joined in this Decision.