STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FEDERATION OF INTERPRETERS, LOCAL 39521, Charging Party, v. LOS ANGELES SUPERIOR COURT, Respondent.	Case No. LA-CE-24-I PERB Decision No. 2112-I June 7, 2010

Appearances: Beeson, Tayer & Bodine by Sheila K. Sexton, Attorney, for California Federation of Interpreters, Local 39521; Wiley, Price & Radulovich by Joseph E. Wiley, Attorney, for Los Angeles Superior Court.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Federation of Interpreters, Local 39521 (CFI) of a Board agent's partial dismissal (attached) of its unfair practice charge. The charge alleged that the Los Angeles Superior Court (Court) violated the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act)[1] by making unilateral changes in policy and practice regarding filling assignments, reducing staffing and failing to give employees priority for assignments, imposing limitations on work hours for part-time and as-needed employees,[2] retaliating against certain employees for engaging in protected activity; and by failing to

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] CFI also alleged that these changes were made in retaliation for strike activity.

provide CFI with requested information that is necessary and relevant to the representation of its members.

The Board has reviewed the partial dismissal and the record in light of CFI's appeal,[3] the Court's response to the appeal, and the relevant law. Based on this review, the Board finds the Board agent's partial warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts them as the decision of the Board itself, supplemented by a brief discussion of CFI's appeal.

DISCUSSION

CFI is the exclusive representative of court interpreters employed by the Court. Between September 5 and October 16, 2007, CFI and its members engaged in a strike after the Court unilaterally implemented terms of a salary increase following unsuccessful re-opener negotiations. On October 15, 2007, CFI notified the Court that employees would be returning to work on October 17.

The unfair practice charge alleged, in part, that in response to the strike, the Court unilaterally changed the procedures for filling regular full-time assignments by ceasing to allow employees holding part-time ("C" status) and as-needed ("F" status) positions, to apply for vacant regular full-time assignments.[4] Additionally, the charge alleged that the Court eliminated at least nine regular assignments at various court locations, and unilaterally changed the criteria relative to filling daily as-needed assignments.[5]

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[3] CFI did not appeal the dismissal of the information request allegations.

[4] The terms "position" and "assignment" as they relate to this charge are not interchangeable. An employee is hired into a "position" as full-time ("A" status), part-time ("C" status), or as-needed ("F" status). The employee may then be given a work "assignment" at a particular court location for either an indefinite or a specified length of time.

[5] Daily assignments include coverage for temporary vacancies such as those due to illness or other leaves, and additional workload needs of the Court.

The Board agent's partial dismissal held that the charge failed to establish that the Court effected an unlawful unilateral change by discontinuing the use of part-time or as-needed status employees to fill regular full-time assignments. The partial dismissal also determined that the charge did not state facts to establish that the Court failed to meet its obligation to bargain decisions to reduce the number of regular and daily assignments. In addition, the Board agent concluded that certain decisions involving assignments and the delivery of court services were outside the scope of representation pursuant to Section 71816.[6] Finally, the Board agent also found the charge failed to establish a prima facie case that the alleged changes were made in retaliation for unit member's participation in strike activity.

On appeal, CFI argues the Board agent failed to correctly analyze the seniority provisions of Article 18 of the parties' memorandum of understanding (MOU)[7] for purposes of

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[6] Court Interpreter Act section 71816 states, in part:

> (a) The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment. However, the scope of representation may not include consideration of the merits, necessity, or *organization of any service or activity* provided by law or executive order.
>
> (b) In view of the unique and special responsibilities of the trial courts in the administration of justice, decisions regarding any of the following matters may not be included within the scope of representation:
>
> (1) The merits and *administration of the trial court system.*
>
> (5) *Delivery of court services.*

(Emphasis added.)

[7] Article 18, section 2, states, in relevant part:

> In the event that there is an opening for a regular assignment, which the Court determines there is a need to fill, such assignment shall be filled based upon seniority.

filling regular, full-time assignments, and points to other provisions of the MOU addressing layoffs and vacations that expressly limit the application of seniority to criteria other than court-wide seniority.[8] CFI contends that because Article 18 does not expressly limit the application of seniority to full-time status employees when filling regular, full-time assignments as it does in other provisions, that seniority must be applied court-wide, without regard to part-time or as-needed employment status.

However, the specified application of seniority to layoffs and vacation does not compel the result proffered by CFI with respect to assignments. The Board finds that the partial dismissal properly addresses the seniority provisions found in Article 18, and appropriately harmonizes those provisions with the Court's authority to determine the number of employees in any status pursuant to Article 16.[9]

Additionally, CFI asserts the Board agent ignored Section 71816(d), which states that while the Court has the right to determine assignments, "the process, procedures, and criteria for assignments" are within the scope of representation. CFI contends that the Court unilaterally changed the criteria for filling assignments and providing relief interpreters.

As amended, the charge alleged that the Court changed its practice by eliminating at least nine regular assignments and leaving vacancies in daily as-needed assignments "unfilled more frequently and on an ongoing basis." CFI alleged that these changes "must be considered

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[8] Article 32 (*Layoff and Reduction in Status*) provides that in the event of layoffs separate seniority lists will be used for part-time versus full-time employees. Article 27 (*Sick Leave and Vacation*) provides that vacation slots shall be selected by seniority within a courthouse location during a specified selection period, after which selection is on a first come first serve basis.

[9] Article 16 states, in relevant part, that:

> [T]he number of employees in any status under this Agreement is subject to the needs of the Court and may be changed at the discretion of the Court.

adverse actions against bargaining unit members who went on strike." However, as the Board agent concluded, the charge does not provide facts that show a change in criteria for filling assignments. Moreover, legal conclusions are insufficient to state a prima facie case. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S.)

Finally, on appeal, CFI maintained its claim that the Court's changes were made in retaliation for strike activity. However, CFI merely restates arguments made in the charge. These arguments were aptly addressed in the partial dismissal. The Board finds that the partial dismissal properly determined that the allegations of retaliation are conclusory statements that are insufficient to establish a prima facie case.[10]

Accordingly, the Board affirms the partial dismissal of the charge for failure to state a prima facie violation of the Court Interpreter Act.

ORDER

The partial dismissal of unfair practice charge in Case No. LA-CE-24-I is hereby AFFIRMED.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

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[10] In addition to the primary arguments on appeal, CFI contends the Board agent failed to address two allegations.

First, CFI alleged in the charge that the Court unilaterally changed its policy when it did not post vacant assignments between August 27, 2007 and January 2008. CFI's assertion is without merit as this allegation is clearly addressed in the partial warning and dismissal letters.

Second, the charge alleged that the Court contracted out unit work when it used non-certified independent contractors for specified periods after the strike. CFI acknowledged, however, that statutory provisions, court rules and the MOU allow the Court to hire independent contractors under certain conditions. The charge does not allege that the Court failed to meet the required criteria for such hiring. Rather, the amended charge states these facts are relevant in support of other allegations, including the Court's failure to fill vacant assignments or hire additional employee interpreters. We find these factual allegations were properly considered by the Board agent.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
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October 27, 2009

Mary Lou Aranguren, Local Representative
CWA Local 39521, Media Workers Guild
433 Natoma Street, Third Floor
San Francisco, CA 94103

Re: *California Federation of Interpreters, Local 39521 v. Los Angeles Superior Court*
Unfair Practice Charge No. LA-CE-24-I
PARTIAL DISMISSAL

Dear Ms. Aranguren:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 14, 2008. The California Federation of Interpreters, TNG-CWA Local 39521 (Union or Charging Party) alleges that the Los Angeles Superior Court (Court or Respondent) violated sections 71802, 71815, 71816(c) and (d), and 71822 of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act or Act)[1] by making unilateral changes in practice and policy in retaliation for the Union and its members engaging in a strike; by retaliating against employees for their exercise of protected rights by failing to give employees priority for assignments and reducing staffing; and by failing to provide the Union with requested information that is necessary and relevant to its representation of members.

In an amended charge filed on March 5, 2009, the Union further alleged that the Court had discriminated against an employee, Adela Herrera, based on Ms. Herrera's exercise of protected rights, in violation of Court Interpreter Act section 71822, and that the Court had implemented an additional unilateral change with respect to a limitation on the work hours of regular part-time and as-needed employees, in violation of Court Interpreter Act sections 71802, 71815, 71816, 71817, and 71818. The First Amended Charge also provided additional information in support of the allegations contained in the charge as originally filed.

Charging Party was informed in the attached Warning Letter dated June 16, 2009, that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to June 26,

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. The text of the Court Interpreter Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

2009, the allegations would be dismissed. The June 26 deadline was subsequently extended at your request. On July 27, 2009, Charging Party filed a Second Amended Charge.

Discussion

1. Alleged Unilateral Change concerning Filling Full-Time Positions

The analysis of this allegation in the Warning Letter began as follows:

> With this allegation, the Union contends that the Court ceased allowing "C" and "F" status employees to apply for vacant full-time assignments, thus also denying potential applicants the seniority rights accorded by the MOU in Article 18. [Footnote omitted.] The Court does not dispute that it determined to reduce or limit the number of ["A"[2]] status positions it would fill. However, the Court also cites to the [language] of the MOU at Article 16, stating that "the number of employees in any status under this Agreement is subject to the needs of the Court and may be changed at the discretion of the Court." The Court also notes that, even in Article 18, Section 2, the MOU conditions the right to be selected for an assignment based on seniority to those situations where "the Court determines there is a need to fill [the] assignment."

In the Second Amended Charge, the Union argues in pertinent part that the Court's "right to determine the number of positions in any status under Article 16 [footnote omitted] is thus explicitly restricted by the parties' agreement under Article 18, in so far as the Court determines there is a need to fill regular assignments, these shall be filled by seniority." (Emphasis in original.)

When interpreting collective bargaining agreements, including in unilateral change cases, the Board applies traditional rules of contract law, such as the provisions of Civil Code sections 1638 and 1641. (*King City Joint Union High School District* (2005) PERB Decision No. 1777; see also, *City of Riverside* (2009) PERB Decision No. 2027-M.) Each contract clause must be read in conjunction with phrases surrounding it and harmonized as a whole. (*Long Beach Community College District* (2003) PERB Decision No. 1568.) The Board's interpretation should harmonize any potential conflict between provisions of the agreement and give a "reasonable, lawful and effective meaning to all the terms," as provided in Civil Code section 1641. (*King City Joint Union High School District*, *supra*, PERB Decision No. 1777.) The interpretation given must avoid leaving any provision without meaning. (*City of Riverside*, *supra*, PERB Decision No. 2027-M.)

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[2] The earlier Warning Error incorrectly referenced "F" status rather than "A" status positions.

Applying these standards for contract interpretation to the present dispute, it is clear that the Union's argument cannot prevail. To accept the Union's premise, that positions or assignments to be filled must be filled by seniority without regard to status or the authority of the Court to limit the number of positions at any status level, would do more than "restrict" the Court's application of Article 16, as the Union argues. Instead, this reading of the two MOU articles would render Article 16's provisions meaningless. The Court would, in effect, be unable to limit the number of "A" status positions it would fill, contrary to the express language of Article 16, if the Union's interpretation were accepted. On the other hand, Article 18 continues to have meaning even if the Court's interpretation is accepted. While this interpretation results in the Court's ability to limit, for example, the number of "A" status positions and only consider lateral transfer applications, seniority is still controlling in the event of either lateral transfers or movement across status levels.

For these reasons, this unilateral change allegation fails to state a prima facie case and is dismissed.

2. Elimination of Regular Assignments

The Second Amended Charge includes the following paragraph specifically addressing this issue:

> Following the strike, in approximately January of 2008 the Court made changes to assignment rotations, eliminating a total of at least nine regular assignments at the following locations: Los Padrinos (1), Long Beach (1.5), El Monte (1), Compton (4), Pomona (.5), East LA (1). These regular assignments were in place for the life of the agreement and prior, and were based upon historical need prior to ratification. Elimination of these regular assignments from the rotations affected the employee's working conditions as described in more detail [in the Second Amended Charge].

3. Change in Practice, Procedure and Policy Concerning the Assignment of Relief and As-Needed Interpreters to Cover Daily Vacancies and Other Needs

In the section of the Second Amended Charge specifically addressing this allegation, the Union states that:

> Immediately following the strike, the Court's established criteria and practices related to filling daily assignment needs changed. The Court ceased providing sufficient relief and as-needed interpreters to adequately cover daily assignment needs that arise on an ongoing basis. These "daily assignment" needs (as distinguished from regular assignments) include temporary

> vacancies due to illness, vacation or other leaves, and additional workload needs such as trials that require back up for team interpreting and for witness interpreters. This was a change in a consistent past practice.

In the Second Amended Charge, in addition to naming various interpreters who could testify as to the adverse impact of the alleged change, the Union also acknowledges that "the number of regular assignments at each court, and other aspects of the assignment rotations at each location, are not addressed in the MOU and were left unspecified by the parties."[3]

The gravamen of the Union's argument, with respect to both numbered items 2 and 3, is that the Court was obligated to provide notice and an opportunity for the Union to request to meet and confer based on the language of MOU Article 13, Section 2:

> It is understood and agreed that the provisions of this Section are intended to apply only to matters that are not specifically covered in this Agreement.
>
> It is recognized that during the term of this Agreement it may be necessary for Court Management to make changes in policies, rules, procedures or practices affecting the employees in this Unit. Where management finds it necessary to make such changes it shall notify the Union, indicating the proposed change prior to its implementation. For purposes of administration of this Section 2, Government Codes 71816 through 71820, as amended from time to time, shall apply.

The Union, in essence, argues that these alleged changes are subject to the bargaining obligation under Article 13, Section 2, because the changes "are not made for legitimate business needs" and "must be considered adverse actions against bargaining unit employees who went on strike and against the Union."

However, as explained in the earlier Warning Letter, a charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) The conclusory assertion that the Court has made staffing decisions based on unlawful animus and not on legitimate business needs does not establish a prima facie violation with respect to either allegation 2 or 3, as captioned above.

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[3] In a footnote, the Union also acknowledges that in bargaining the Court stated it was possible that the numbers of positions could go up or down, based on the needs of the Court.

Further, the Second Amended Charge does not establish that the number of assignments to be filled is a matter within scope. The Court Interpreter Act, at section 71816, provides that:

> (a) The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment. However, the scope of representation may not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.
>
> (b) In view of the unique and special responsibilities of the trial courts in the administration of justice, decisions regarding any of the following matters may not be included within the scope of representation:
>
> (1) The merits and administration of the trial court system.
>
> (2) Coordination, consolidation, and merger of trial courts and support staff.
>
> (3) Automation, including, but not limited to, fax filing, electronic recording, and implementation of information systems.
>
> (4) Design, construction, and location of court facilities.
>
> (5) Delivery of court services.
>
> (6) Hours of operation of the trial courts and trial court system.

(Emphasis added.) The Board has previously held that an employer's determination as to staffing or service levels is not within the scope of representation. (See, e.g., *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H.) A matter outside scope does not become a mandatory subject of bargaining because the parties negotiate over it or even reach an agreement. (*El Centro Elementary School District* (2006) PERB Decision No. 1863.)

These two allegations must also be dismissed.

4. Information Requested about Regular Assignments at Court Locations, Vacancies and Openings, and Assignments filled before, during and after the strike

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to

determine relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

Notwithstanding the liberal standard, an employer can refuse to release information that is otherwise "relevant and necessary" if, for example, it will impose burdensome costs on the employer (*Los Rios Community College District* (1988) PERB Decision No. 670; *Tower Books* (1984) 273 NLRB 671) or the release will compromise employee privacy rights. (*Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 11 (*Modesto*).) However, the employer must affirmatively assert its concerns and then bargain in good faith to ameliorate those concerns. (See, e.g., *Modesto*, *supra*, PERB Decision No. 479, at p. 12 (employer bargained in good faith by offering to delete social security numbers from requested document).) The employer cannot simply ignore a union's request for information. However, there is no violation when an employer partially complies with the request for information and the union fails to communicate its dissatisfaction, or to reassert or clarify its request. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S; *Oakland Unified School District* (1983) PERB Decision No. 367.)

On or about December 17, 2007, with follow-up on February 14, 2008, and March 10, 2008, Charging Party made the following request for information that is relevant and necessary to Charging Party's discharge of its duty to represent employees:

> Please provide us with a list of vacant regular assignments in each court location, including the number of full and part-time positions that are vacant in each location and the length of time that each position has been vacant.
>
> Please also provide us with a list of regular assignments filled during the past year, since January 2007 and the name of the interpreters assigned to those positions.

On or about April 8, 2008, Respondent made a partial response to the information request, but the Union alleges that the Court never provided the information requested on regular assignment vacancies, posting and assignments filled.

The Union, although alleging it made follow-up requests following the initial request, does not allege that it reasserted its request or otherwise communicated its dissatisfaction with the Court's April 8, 2008 response following its receipt of the response. Thus, under the controlling case law, no violation can be found. (*State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 2013-S.)

5. Information Requested About the Reasons for Elimination of Regular Assignments

The Union also alleges that it "repeatedly" requested information related to the basis for the elimination of regular assignments. These requests were made on March 10, 2008, and on May 19 and 21, 2008. The Union further alleges that the Court provided no information in response to this request. However, the Union acknowledges that, on a date not specified, the Court's representative stated that the Court had no "written documents, reports, assignment data or analysis of interpreter case loads" that are relevant to the information request.

In the Second Amended Charge, the Union points to the Court's earlier response to the instant charge, where the Court referenced being engaged in a comprehensive study to determine staffing needs, with a projected end date of mid to late-2008. However, the charge does not include any facts to establish such a "comprehensive study" was completed or that the Court is in fact in possession of any "written documents, reports, assignment data or analysis of interpreter case loads" that would be responsive to the March 10, 2008 request.

The Board has long held that an employer need not comply with an information request if the requested information does not exist. (*Chula Vista City School District* (1990) PERB Decision No. 834; *Stockton Unified School District* (1980) PERB Decision No. 143.) Further, there is no obligation for an employer to provide detail regarding the thought process or rationale underlying its managerial decisions. (*Ventura County Community College District* (1999) PERB Decision No. 1340.) For the above reasons, this allegation fails to state a prima facie violation of the Court's duty to provide information.

Conclusion

Therefore, the allegations that the Court violated the Court Interpreter Act by unilaterally changing the policy concerning filling full-time positions; eliminating regular assignments; changing practice, procedure and policy concerning the assignment of relief and as-needed interpreters to cover daily vacancies and other needs; refusing to provide information requested about regular assignments at court locations, vacancies and openings, and assignments filled before, during and after the strike; and refusing to provide information requested about the reasons for elimination of regular assignments, fail to state a prima facie case and are hereby dismissed based on the facts and reasons set forth above as well as in the June 16, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[4] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of

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

this dismissal. (PERB Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

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

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (PERB Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Joseph E. Wiley

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
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June 16, 2009

Mary Lou Aranguren, Local Representative
CWA Local 39521, Media Workers Guild
433 Natoma Street, Third Floor
San Francisco, CA 94103

Re: *California Federation of Interpreters, TNG-CWA Local 39521 v. Los Angeles Superior Court*
Unfair Practice Charge No. LA-CE-24-I
PARTIAL WARNING LETTER

Dear Ms. Aranguren:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 14, 2008. The California Federation of Interpreters, TNG-CWA Local 39521 (Union or Charging Party) alleges that the Los Angeles Superior Court (Court or Respondent) violated sections 71802, 71815, 71816(c) and (d), and 71822 of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act or Act)[1] by making unilateral changes in practice and policy in retaliation for the Union and its members engaging in a strike; by retaliating against employees for their exercise of protected rights by failing to give employees priority for assignments and reducing staffing; and by failing to provide the Union with requested information that is necessary and relevant to its representation of members.

In an amended charge filed on March 5, 2009, the Union further alleged the Court had discriminated against an employee, Adela Herrera, based on Ms. Herrera's exercise of protected rights, in violation of Court Interpreter Act section 71822, and that the Court had implemented an additional unilateral change with respect to a limitation on the work hours of regular part-time and as-needed employees, in violation of Court Interpreter Act sections 71802, 71815, 71816, 71817, and 71818. The amended charge also provided additional information in support of the allegations contained in the charge as originally filed.

Background

The Union is the exclusive representative of court interpreters employed by the Superior Courts of California in the Counties of Los Angeles, San Luis Obispo, and Santa Barbara (Region 1). The Union and its members engaged in a six-week strike against the Los Angeles

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. The text of the Court Interpreter Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Superior Court from September 5, 2007 through October 16, 2007, after the Court unilaterally implemented terms of a salary increase following unsuccessful re-opener negotiations by the Union and the Court.

The memorandum of understanding (MOU or Agreement) negotiated by the Region 1 Court Interpreter Employment Relations Committee and the Union expired by its terms on June 30, 2008, and the parties are presently engaged in negotiations over a successor agreement.

1. Terms of the Memorandum of Understanding

In Article 16, Employment Status, the MOU states that an employee interpreter of any language holding a regular full-time or relief full-time position shall be an "A" status employee. A regular full-time position is one with five days and forty hours per week in a specific location. A relief full-time position works the same hours but is not guaranteed a specific location.

Article 16 further provides that an "employee interpreter of any language holding a regular a.m. only five day per week position or an employee interpreter who has a pre-booked position that is at least half time and less than full-time shall be a 'C' status employee." "C" status employees are required to accept any assignment given and are also not guaranteed a specific location.

The remaining employee interpreters, i.e., those not holding a full-time or regular part-time position, are designated as "F" status employees, and are also referred to as "as-needed" interpreters. Article 16 also states that "the number of employees in any status under this Agreement is subject to the needs of the Court and may be changed at the discretion of the Court."

In Article 18, Interpreter Assignments, the MOU provides as follows in Section 2:

> The Interpreter Assignment Office may assign an interpreter to a particular location for an unspecified period of service. Such an assignment is not an entitlement and is subject to change and/or redeployment as provided herein.
>
> Interpreters shall not contact, nor request any other person to contact on their behalf, any bench officer for the purpose of soliciting an assignment. No interpreter shall contact any bench officer on behalf of another interpreter for the purpose of soliciting an assignment.
>
> In the event that there is an opening for a regular assignment, which the Court determines there is a need to fill, such assignment shall be filled based upon seniority. Regular assignments held by employees prior to the implementation of

this Agreement shall not be changed due to the implementation of this Agreement.

In Article 40, Subcontracting, the MOU states that the Court "may subcontract unit work consistent with the rights and limitations set forth in Government Code Section 71802," and that the Court "will not use Section 71802(b) for the purpose of reducing costs or overtime."[2]

2. The Charge Allegations

A. Unilateral Changes and Staffing Reductions

The charge first alleges three violations that are characterized by the Union as involving "Unilateral Changes and Staffing Reductions."

- The Union contends that, without notice to the Union, the Court changed its policy and practice regarding filling full-time positions. This change concerns the Court allowing only lateral transfers of full-time interpreters into vacant full-time assignments rather than allowing "C" and "F" status employees to also apply with the assignment then filled on the basis of seniority pursuant to MOU Article 19.

- The Court allegedly reduced assignments by not posting or filling vacancies or assignments at several locations between September 2007 and January 2008, and the Court further also allegedly adopted a new policy of not hiring as-needed interpreters to serve when regularly scheduled interpreters were out on leave.

- The Court adopted a "pilot program" at the Compton branch location that put interpreters under the direction of local administrators at the branch rather than the Interpreter Services Division Manager. The "pilot program" also involved implementation of changes to the rotation system and the hiring of relief interpreters as described above. The Union contends, however, that the changes in Compton were more severe, resulting in unreasonable workloads and serious negative effects on morale, health and performance.

B. Employee Priority and Hiring Issues

The second grouping of allegations concerns "Employee Priority and Hiring Issues." First, the Union contends that it notified the Court on October 15, 2007 that strikers would return to

[2] In section 71802(a), the Court Interpreter Act states that, "On and after July 1, 2003, trial courts shall appoint trial court employees, rather than independent contractors, to perform spoken language interpretation of trial court proceedings. An interpreter may be an employee of the trial court or an employee of another trial court on cross-assignment." Section 71802(b) further provides, however, that notwithstanding subdivision (a), "a trial court may appoint an independent contractor to perform spoken language interpretation of trial court proceedings if one or more" specified circumstances exists.

work on October 17, 2007. However, even though "F" status interpreters began calling in to request assignments on October 16, 2007, the Court continued to use replacement contractors who had worked during the strike, including at least two non-certified interpreters, on the three days remaining in that week. The Court also used one "F" status employee who had worked during the strike, even though she had lower seniority than strikers who did not receive an assignment. Further, the Union contends that the Court is not accepting applications for employment to intermittent positions in accordance with the requirements of the Court Interpreter Act,[3] and is denying such employment for discriminatory reasons.

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[3] In section 71802(c)(2), the Court Interpreter Act provides that:

> Notwithstanding subdivisions (a) and (b), and unless otherwise provided in a memorandum of understanding or agreement with a recognized employee organization, a trial court may also appoint an independent contractor on a day-to-day basis to perform spoken language interpretation of trial court proceedings if all of the following circumstances exist:
>
> (2) The interpreter has not previously been appointed as an independent contractor by the same trial court on more than 100 court days or parts of court days during the same calendar year, except that the trial court may continue to appoint an independent contractor on a day-to-day basis to complete a single court proceeding, if the trial court determines that the use of the same interpreter to complete that proceeding is necessary to provide continuity. An interpreter who has been appointed by a trial court as an independent contractor pursuant to this subdivision on more than 45 court days or parts of court days during the same calendar year shall be entitled to apply for employment by that trial court as a court interpreter pro tempore and the trial court may not refuse to offer employment to the interpreter, except for cause. For purposes of this section, "for cause" means a fair and honest cause or reason regulated by good faith on the part of the party exercising the power.

(Emphasis added.) Court Interpreter Act section 71802(e) further provides:

> A trial court that has appointed independent contractors pursuant to paragraph (1) of subdivision (b) or to subdivision (c) for a language pair on more than 60 court days or parts of court days in the prior 180 days shall provide public notice that the court is accepting applications for the position of court interpreter pro tempore for that language pair and shall offer employment to qualified applicants.

More specifically, the Union alleges that Michele Stevens, Jenny Faure, and Paul Yi, even though eligible for employment under the 45-day rule of Court Interpreter Act section 71802(c)(2), were told that the Court is not hiring interpreters for intermittent employment. Also, Ruth Marcus was first denied employment under the 45-day rule, and even though the Court later agreed to hire Ms. Marcus after the Union filed a grievance, the verification of her employment start date had not been received as of March 14, 2008.[4]

The Union also offers several allegations in support of the claim that the "staffing reductions and hiring decisions" described above are discriminatory and retaliatory in nature. Those allegations are summarized as follows:

1. On October 15, 2007,[5] Presiding Judge J. Stephan Czuleger testified at a legislative hearing as follows: "In response to the strike, only last week I gave directions to administrative staff to begin planning for a reduced compliment [sic] of interpreters court wide permanently."

2. Michele Stevens, Jenny Faure, and Paul Yi, as well as Ruth Marcus, were asked to work during the six-week strike and each declined.

3. In early December 2007, the Court assigned a contract interpreter, Gerardo Martinez, a non-certified interpreter who had worked during the strike, to fill in as a relief interpreter at the same time that employee interpreters were not being offered relief assignments consistent with past practice.

4. Adela Herrera, an employee interpreter who participated in the strike, was told after the strike by a manager that she could not transfer from her "C" status part-time position to an open "A" status position.

5. Diana Barahona was a "C" status part-time employee prior to the strike and she worked throughout the six-week strike. After the strike, Ms. Barahona requested and was granted a full-time regular assignment in Compton at the same time that the Court was denying transfers to "C" and "F" status employees to "A" status positions. Ms. Barahona stated to a co-worker that she had spoken to the judges about getting her position,[6] that she believed she got the position because she worked during the strike, and that she was told she got the position

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[4] In its position statement, the Court asserts that Ms. Marcus has been working as an employee interpreter since February 2008.

[5] The charge actually shows this date as "October 15, 2008," but from the context it is apparent the quoted statement was made in 2007 and not on a date following when the charge was filed.

[6] The Union notes that such contacts are prohibited by the MOU at Article 18, Section 2.

because she was such a good worker. Ms. Barahona, in response to comments about the pilot program at Compton and concerns about understaffing, stated words to the effect that, "No, this comes from [administrator] Joe Padilla because he wants to teach the group a lesson."

6. Beatriz Loiederman, an independent contractor who worked during the strike, was hired into a full-time "A" status position effective November 28, 2007.

7. Sophia Stutz, an independent contractor who worked during the strike, was hired into an "F" status as-needed position effective December 31, 2007.

8. Silvia Barden, Union president and full-time "A" status interpreter on leave during the strike, was ordered to return to work after the strike and her union leave was terminated.[7]

9. The reduced staffing levels being implemented by the Court are having negative effects on court operations, including longer wait times.

10. The reduced staffing levels being implemented by the Court are having negative effects on employee interpreters, including increasing their health and safety risks. The Union cites as an example an employee for whom paramedics had to be summoned on December 6, 2007, after the employee had worked several hours without a break. Her blood pressure was elevated, and her claim of stress was supported by a subsequent Qualified Medical Evaluator's report regarding her workers' compensation claim.

C. Failure to Provide Information

The Union also alleges that the Court has failed to timely provide information that is necessary and relevant to the Union's investigation of the issues and concerns addressed in this unfair practice charges. The allegations described above have also been raised with the Court by the Union through the negotiated grievance procedure.

On October 29, 2007, the Union requested information regarding assignments prior to, during and immediately following the strike. The Union followed up on its request at a meeting on November 19, 2007 and by e-mail on December 17, 2007. The Union received "part of the information requested" on December 27, 2007, in 71 separate Excel spreadsheet files. The Union followed up with the Court on January 3, 25 and February 1, 2008 in an effort to ascertain what information, if any, was missing and to request information not yet provided.

Also, on December 17, 2007, the Union requested additional information regarding vacant full-time and part-time regular assignments, and about regular assignments filled during the prior year. By letter dated February 5, 2008, the Court asked for an explanation as to the relevance of the requested information. The Union responded to that letter by e-mail on February 14,

[7] This allegation is the subject of a complaint issued in Unfair Practice Case No. LA-CE-23-I, scheduled for hearing in June 2009.

2008 and renewed its request for assignment information as requested in October 2007. The Court responded on February 27, 2008, promising to provide the requested information. On March 10, 2008, "the Union submitted another information request to the Court, following up on the missing information and asking for more limited and specific information relevant to the pending grievances and unfair practice charges."

The charge alleges that, "To date, the Union has not received the requested information in a sufficiently complete form to evaluate the issues contained in this charge and in pending grievances filed after the strike."[8]

D. Retaliation against Adela Herrera

As discussed in the summary of the original charge's allegations, Ms. Herrera, a "C" status interpreter, sought appointment as a full-time interpreter in late 2007 but was told there were no openings. In the amended charge, the Union alleges that despite its response to Ms. Herrera's earlier request, the Court assigned Ms. Herrera to work a full-time schedule on an on-going basis. In August 2008, Ms. Herrera wrote to Interpreter Services Division Manager Michele Oken again requesting that she be classified as a full-time employee and receive the corresponding benefits.

The Union alleges that, on September 2, 2008, Ms. Herrera received a telephone call from her supervisor, Rita Woodfin. Ms. Woodfin allegedly said that if Ms. Herrera asserted she was entitled to full-time status based on the hours she had been working, her hours would be reduced to 20 per week. As a result, Ms. Herrera sent an e-mail message to Ms. Woodfin withdrawing her earlier assertion and request. The Union learned of the telephone call made by Ms. Woodfin on September 5, 2008.

Ms. Herrera continued to work a full-time schedule. In November 2008, Ms. Herrera submitted a request for time off on a day that she was scheduled to work. The request was initially denied but later granted after Ms. Herrera asserted she had a right to take the time off due to the extra hours she had been working.

However, on December 5, 2008, Ms. Woodfin contacted Ms. Herrera by telephone and informed her that she would not be paid for the date she was taking off, because it was not part of Ms. Herrera's normal part-time schedule and was thus an "optional" workday. Ms. Herrera stated that she had been able to use "accruals" for time off previously, but Ms. Woodfin replied that such a practice would not be continued. Ms. Woodfin then telephoned Ms. Herrera a second time later in the day and informed her that "C" status employees would no longer be permitted to work full-time and would be limited to 32 hours per week. Ms. Woodfin stated

[8] In its April 30, 2008 position statement, the Court asserts in part that it provided the requested information to the Union on April 8, 2008, without any subsequent request being made for additional or missing information.

during that conversation that the Court did not "want to give the impression of working as a full-time employee."

E. Unilateral Change regarding Limitation of Work Hours

The amended charge further alleges that Ms. Woodfin informed interpreters at the Children's Court on December 9, 2008, of the new policy limiting "C" status employees to 32 hours per week. The Union was not notified of this change in policy, nor was the issue raised in on-going successor contract negotiations.

F. Violation of Contracting Out Provisions

This allegation in the amended charge reads in its entirety as follows:

> The Court utilizes non-certified interpreters and independent contractors on a daily basis for Spanish-English interpretation (Ms. Herrera's language pair) demonstrating an ongoing business need for interpreters in Spanish/English. [Government Code section] 71802 and the contracting out provision of the MOU prohibit contracting out services when employees are available to work. Limiting hours worked by part time or as-needed employees under these circumstances violates the Government Code sections and the MOU provision on subcontracting which incorporates by reference the statutory provisions that establish employee priority for work assignments.

Discussion

The discussion that follows will not address two allegations contained in the charge as amended: (1) the alleged retaliation against Adela Herrera, and (2) an alleged unilateral change with respect to a limitation on work hours of "C" status employees. An analysis of the remaining allegations follows.

A. Unilateral Change Allegations

In determining whether a party has violated Government Code section 71818, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)[9] Unilateral changes are considered "per se" violations if

[9] When interpreting the Court Interpreter Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Gov. Code, § 71826(b); *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

certain criteria are met. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy or practice; (2) the change concerned a matter within the scope of representation; (3) the change was implemented without the employer fulfilling its duty to negotiate with the exclusive representative, including providing adequate notice; and (4) the action was not merely an isolated incident, but amounted to a change that had a generalized effect or continuing impact on bargaining unit employees. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M, citing *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; see also *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186.)

1. Alleged Unilateral Change concerning Filling Full-Time Positions

With this allegation, the Union contends that the Court ceased allowing "C" and "F" status employees to apply for vacant full-time assignments, thus also denying potential applicants the seniority rights accorded by the MOU in Article 18.[10] The Court does not dispute that it determined to reduce or limit the number of "F" status positions it would fill. However, the Court also cites to the above-quoted language of the MOU at Article 16, stating that "the number of employees in any status under this Agreement is subject to the needs of the Court and may be changed at the discretion of the Court." The Court also notes that, even in Article 18, Section 2, the MOU conditions the right to be selected for an assignment based on seniority to those situations where "the Court determines there is a need to fill [the] assignment."

Thus, the language of the MOU does not support finding that the Court's conduct effected any change in policy that would form the basis for finding a unilateral change violation. Nor does the Union provide evidence of an enforceable past practice that would lead to a different result. An employer's enforcement of or adherence to the express terms of a collective bargaining agreement cannot form the basis for finding a unilateral change violation. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314.) This allegation as currently written is subject to being dismissed. (*Grant Joint Union High School District*, *supra*, PERB Decision No. 196.)

[10] In its charge, at least at times, the Union cites to Article 19 rather than Article 18 in the statement of the charge, but a reading of the MOU's provisions suggests that it is Article 18 that is at issue.

2. Alleged Unilateral Change concerning Posting and Filling Vacancies and the Use of Relief Interpreters

The Court again does not deny that it determined not to fill certain vacancies, but points to the language of Article 18, Section 2 as authority for the Court to make that determination. As with the first unilateral change allegation, the charge fails to demonstrate that the Court's conduct changed any existing policy within the scope of representation, and the allegation as currently written must be dismissed.

With respect to the alleged change in policy as to the use of relief interpreters, the charge relies on conclusory statements that do not support the issuance of a complaint. PERB Regulation 32615(a)(5)[11] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

3. Unilateral Changes related to "Pilot Program" at Compton Branch Location

This allegation is similar to those made under numbers 1 and 2, above, but with the additional concern added that interpreters have been placed under the management of the local administrators of branch courts. This allegation also suffers from the deficiency discussed above with respect to the lack of specificity as to the requisite "who, what, when, where and how" of the unfair practice.

With respect to the alleged "pilot program" involving local control over interpreters, which the Court does not deny, the charge fails to establish that this change involves a matter within the scope of representation. The Court Interpreter Act, at section 71816, provides that:

> (a) The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment. However, the scope of representation may not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.
>
> (b) In view of the unique and special responsibilities of the trial courts in the administration of justice, decisions regarding any of

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

> the following matters may not be included within the scope of representation:
>
> (1) The merits and administration of the trial court system.
>
> (2) Coordination, consolidation, and merger of trial courts and support staff.
>
> (3) Automation, including, but not limited to, fax filing, electronic recording, and implementation of information systems.
>
> (4) Design, construction, and location of court facilities.
>
> (5) Delivery of court services.
>
> (6) Hours of operation of the trial courts and trial court system.

(Emphasis added.) The Union does not demonstrate in its charge that the pilot program concerned a negotiable decision, as the designation of how a program is administered would appear to concern the "organization" of a "service or activity," "administration" of the trial court, and the "delivery of court services." (See, e.g., *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) While Court Interpreter Act section 71816(c) does further provide that the effects of non-negotiable decisions are within the scope of representation, it is not clear that the Union made a demand to bargain over any specific effects. (*Ibid.*; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.)

B. Discrimination/Retaliation Against Strikers

The Union alleges that the Court, over a three-day period beginning October 16, 2007, continued to use replacement interpreters even though interpreters who had participated in the strike called to request assignments. It appears that the Union is alleging that the Court was thus unlawfully retaliating against certain unnamed individuals for their exercise of protected rights.

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 71822 and PERB Regulation 32608(a), the charging party must show that: (1) the employee exercised rights under the Court Interpreter Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell*, *supra*, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*, *supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

In this case, the Union relies merely on conclusory statements and does not allege the specific facts or even names of individuals to establish any of the above-summarized elements of a prima facie discrimination violation. Without specific information as to the "who, what, when, where and how" of the alleged unfair practices, it is not possible for the Union to establish any of the elements of the test for discrimination. For example, without knowing "who" was discriminated against, it is not possible to establish that the employee engaged in protected activity, that the Court had knowledge of the protected activity, that the employee suffered an adverse action, and that the Court was unlawfully motivated to deny an employment opportunity because of the unnamed employee's earlier protected activity. Thus, this allegation is also subject to dismissal. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.)

C. Failure to Hire Intermittent Interpreters under the "45-day Rule"

The Union alleges that the Court is violating the Court Interpreter Act at section 71802(c) and (e) by not offering employment to certified interpreters and instead continuing to use independent contractors. The Union names Michele Stevens, Jenny Faure, and Paul Yi as intermittent interpreters affected by this conduct but further alleges that there are additional, but unnamed, individuals affected as well. The Union also alleges the Court has violated this rule with respect to Ruth Marcus, even though the Court agreed to hire Ms. Marcus, because of delays in the process.

The Act states at section 71802(c)(2) that, "An interpreter who has been appointed by a trial court as an independent contractor pursuant to this subdivision on more than 45 court days or parts of court days during the same calendar year shall be entitled to apply for employment by that trial court as a court interpreter pro tempore and the trial court may not refuse to offer employment to the interpreter, except for cause." The allegation with regard to Ms. Stevens, Ms. Faure, and Mr. Yi fails to state a prima facie case as the charge contains insufficient information from which to conclude that these provisions are applicable to them. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.) Likewise, the allegation that this violation applies to other unnamed individuals is not specific enough to support finding a violation.

With respect to Ms. Marcus, the Union does not demonstrate in its charge that the Act, or other applicable authority, imposes timelines on the offer of employment under the "45-day rule" that the Court has violated.

D. Failure to Provide Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

Notwithstanding the liberal standard, an employer can refuse to release information that is otherwise "relevant and necessary" if, for example, it will impose burdensome costs on the employer (*Los Rios Community College District* (1988) PERB Decision No. 670; *Tower Books* (1984) 273 NLRB 671) or the release will compromise employee privacy rights. (*Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 11 (*Modesto*).) However, the employer must affirmatively assert its concerns and then bargain in good faith to ameliorate those concerns. (See, e.g., *Modesto*, *supra*, PERB Decision No. 479, at p. 12 (employer bargained in good faith by offering to delete social security numbers from requested document).) The employer cannot simply ignore a union's request for information. (*Chula Vista City School District* (1990) PERB Decision No. 834.)

Here, the Union has plead sufficient facts to establish that it requested necessary and relevant information from the Court. The Union also acknowledges the receipt of some information, and further alleges that the Union and the Court exchanged various communications regarding the information requested.

This portion of the charge concludes by stating that, "To date, the Union has not received the requested information in a sufficiently complete form to evaluate the issues contained in this charge and in pending grievances filed after the strike." However, an employer is not required "to furnish information in a form more organized than its own records." (*State of California (Department of Corrections)* (2000) PERB Decision No. 1388-S, citing *NLRB v. Tex-Tan, Inc.* (1963) 318 F.2d 472.) This allegation by the Union simply fails to provide sufficient facts with sufficient clarity to understand what information the Court failed to provide, or how the information provided failed to respond adequately to the Union's request.

E. Violation of Contracting Out Provisions

As noted above, this allegation in the amended charge reads in its entirety as follows:

> The Court utilizes non-certified interpreters and independent contractors on a daily basis for Spanish-English interpretation (Ms. Herrera's language pair) demonstrating an ongoing business need for interpreters in Spanish/English. [Government Code section] 71802 and the contracting out provision of the MOU prohibit contracting out services when employees are available to work. Limiting hours worked by part time or as-needed employees under these circumstances violates the Government Code sections and the MOU provision on subcontracting which incorporates by reference the statutory provisions that establish employee priority for work assignments.

This allegation clearly fails to meet the pleading requirements under PERB Regulation 32615(a)(5) requiring, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," including the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.)

Conclusion

For these reasons the allegations that the Court unlawfully implemented unilateral changes with respect to filling full-time positions, posting and filling vacancies, use of relief interpreters, and a "pilot program" in Compton; discriminated against striking interpreters with respect to their return to work; failed to offer employment to intermittent interpreters under the "45-day rule;" failed and/or refused to provide information; and violated contracting out

provisions, as presently written, do not state a prima facie case.[12] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before June 26, 2009,[13] PERB will dismiss these allegations from your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

[12] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[13] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)