STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN JUAN CAPISTRANO MANAGEMENT & PROFESSIONAL EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SAN JUAN CAPISTRANO, Respondent.	Case No. LA-CE-643-M PERB Decision No. 2238-M February 24, 2012

Appearance: City Employees Associates by Jeffrey W. Natke, Labor Relations Representative, for San Juan Capistrano Management & Professional Employees Association.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Juan Capistrano Management & Professional Employees Association (Association) of a Board agent's dismissal (attached) of its unfair practice charge. The charge, filed October 19, 2010, alleged that the City of San Juan Capistrano (City) violated section 3505 of the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally using outside contracted labor to perform bargaining unit work.

In its amended charge, the Association alleged that: (1) the City committed a unilateral change by assigning temporary workers to perform the duties of vacant bargaining unit positions; (2) the City had not been complying with rule 8.06 of the City's Personnel Rules (Personnel Rules) because the City could not guarantee that it would fill the positions at issue with bargaining unit members represented by the Association within 12 months; (3) the City

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

declined to explain why provisional appointments of vacant bargaining unit positions were necessary; and (4) the City was considering reorganizing itself in an effort to avoid filing vacant unit member positions.

On February 4, 2011, the Board agent dismissed the charge. In the dismissal letter, the Board agent concluded that: (1) the Personnel Rules give the City the authority to fill vacant positions on a temporary basis under certain conditions; (2) the Personnel Rules do not require that the City fill vacant positions on a permanent basis; (3) the Personnel Rules do not require that the City inform the Association of the reasons why the City believed provisional labor was necessary; and (4) there is insufficient information in the charge regarding the nature of the City's proposal to reorganize to determine either that a policy within the scope of representation would be changed or whether the City intended to satisfy its duty to negotiate with the Association prior to altering any negotiable subjects.

We have reviewed the entire record in this matter. Based on this review and applying the relevant law, we find the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself, subject to the discussion below regarding the Association's appeal.

DISCUSSION

On appeal, the Association asserts several points of contention with the Board agent's dismissal. In its appeal, the Association contends that the City violated section 8.06 of the Personnel Rules by: (1) filling one vacant bargaining unit position with a contract employee

for 17 months, a period longer than the 12-month limit imposed by the Personnel Rules;[2] (2) failing to inform employees internally that there was a need to fill the positions; (3) failing to state why the positions needed to be filled on an interim basis while the City conducted its recruitment; (4) failing to initiate a recruitment process; (5) failing to show that there was an absence of persons available for appointment; (6) failing to show that time was of the essence; and (7) failing to compensate alleged contract employees within the approved salary range.

Jurisdiction

PERB has no jurisdiction to remedy a violation of a collective bargaining agreement[3] unless the violation also constitutes an unlawful unilateral change. (*Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*); see *County of Riverside* (2003) PERB Decision No. 1577-M (applying *Grant* under MMBA).)[4] While PERB has the authority to review an alleged violation of a local rule or regulation adopted by a public agency pursuant to MMBA section 3507 or 3507.5 (MMBA § 3509(b); *City of Commerce* (2008) PERB Decision No. 1937), there is no allegation that such a rule is implicated in this case. The only allegations presented in the charge are violations of the Personnel Rules. Therefore, we construe the charge as alleging an unlawful unilateral change in policy set forth in the Personnel Rules.

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[2] This allegation is presented for the first time on appeal. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b) [PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.]; see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.)

[3] In this case, there is an alleged violation of the Personnel Rules.

[4] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In its appeal, the Association does not contend that the City violated the MMBA by unilaterally using outside contracted labor to perform bargaining unit work.[5] Each of the contentions presented by the Association on appeal concerns application of, not a change in, the Personnel Rules. Thus, to the extent the charge alleged an isolated breach of the Personnel Rules, PERB has no jurisdiction over the charge. Under the Personnel Rules, violations are addressed as grievances. (Personnel Rule 12, pp. 45-48.) In the absence of any showing that the alleged Personnel Rule violations amounted to a change in policy having a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members (*Desert Sands Unified School District* (2010) PERB Decision No. 2092), the Board agent properly dismissed the allegation that the City violated the MMBA by breaching the Personnel Rules.

ORDER

The unfair practice charge in Case No. LA-CE-643-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

[5] In its amended charge, the Association noted that it would proceed with the charge as an isolated violation of the Personnel Rules rather than a unilateral change to section 8.06 of the Personnel Rules.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
700 N. Central Ave., Suite 200
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April 4, 2011

Jeffrey Natke, Labor Representative
City Employees Associates
2918 E. 7th Street
Long Beach, CA 90804

Re: *San Juan Capistrano Management and Professional Employees Association v. City of San Juan Capistrano*
Unfair Practice Charge No. LA-CE-643-M
DISMISSAL LETTER

Dear Mr. Natke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2010. San Juan Capistrano Management and Professional Employees Association (Union or Charging Party) alleges that the City of San Juan Capistrano (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally using outside contracted labor to perform bargaining unit work.

Charging Party was informed in the attached Warning Letter dated March 2, 2011, that the above-referenced 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 the charge to state a prima facie case or withdrew it prior to March 11, 2011, the charge would be dismissed. After requesting and receiving an extension of time, on April 1, 2011, the Union filed an amended charge.

In the amended charge, the Union continues to allege that the City committed a unilateral change by assigning temporary workers to perform the duties of vacant bargaining unit positions. As explained in the March 2, 2011 Warning Letter, City Personnel Rule 8.06 gives the City the authority to fill vacant positions on a temporary basis under certain conditions. The Warning Letter further explained that the Union did not establish that the City violated or acted in excess of its authority under this rule.

In the amended charge, the Union alleges that the City has not been complying with Rule 8.06 of the City's Personnel Rules because the City could not guarantee that it would fill the positions at issue with bargaining unit members represented by the Union within 12 months.

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

The Union also alleges that the City declined to explain why provisional appointments of vacant bargaining unit positions was necessary. These facts, even if true, do not demonstrate a violation of either the City's Personnel Rules or the MMBA. Nothing in Personnel Rule 8.06 requires the City to fill vacant positions on a permanent basis. Rather, the rule focuses on the amount of time provisional appointments may be used. The City's unwillingness to commit to permanently filling vacant unit positions does not necessarily mean that it will make provisional appointments in excess of its authority under City Personnel Rule 8.06. Therefore, this allegation does not support the issuance of a complaint.

Likewise, nothing in City Personnel Rule 8.06 requires the City to inform the Union of the reasons why the City believed provisional labor was necessary. Moreover, the Union has not alleged that it requested this information, or any other information necessary and relevant to the exercise of its duties as a bargaining representative, from the City. This claim is also insufficient to demonstrate a violation.

The Union also alleges that the City was considering reorganizing itself in an effort to avoid filling vacant unit member positions. This allegation also does not demonstrate a violation of the MMBA. The Union appears to contend that the City, by this statement, enacted a unilateral policy change. However, there is insufficient information to support this conclusion. As explained in the March 2, 2011 Warning Letter, unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or past practice; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy (i.e., having a generalized effect or continuing impact on terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)[2]

In this case, there is insufficient information regarding the nature of the City's proposal to reorganize to determine either that a policy within the scope of representation would be changed or whether the City intended satisfy its duty to negotiate with the Union prior to altering any negotiable subjects. In addition, there is insufficient information to conclude that a policy change occurred. PERB has found a unilateral change where the employer makes a firm decision to implement a change in policy that is within the scope of representation without subsequent wavering of that intent. (*State of California (Department of Transportation)* (1997) PERB Decision No. 1213-S.) Absent a definite decision to implement the change, even a threatened unilateral change is not sufficient to demonstrate a violation. (*State of California (Department of General Services)* (1993) PERB Decision No. 976-S.) In this case, the Union's

[2] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

allegation is not sufficiently specific to demonstrate a clear intent to implement a policy change. Accordingly, the Union does not demonstrate that a violation occurred.

For all these reasons, the Union has not established that the City violated the MMBA. Accordingly, the Union's unfair practice charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

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

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

party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

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

Sincerely,

WENDI L. ROSS
Interim General Counsel

By _____
Eric J. Cu
Regional Attorney

Attachment

cc: Barbara Raileanu

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

March 2, 2011

Ralph Royds, Labor Representative
City Employees Associates
2918 E. 7th St.
Long Beach, CA 90804

Re: *San Juan Capistrano Management and Professional Employees Association v. City of San Juan Capistrano*
Unfair Practice Charge No. LA-CE-643-M
WARNING LETTER

Dear Mr. Royds:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2010. San Juan Capistrano Management and Professional Employees Association (Union or Charging Party) alleges that the City of San Juan Capistrano (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act)[1] by unilaterally using outside contracted labor to perform bargaining unit work.

The Union is the exclusive representative of the Management and Professional bargaining unit at the City. The Union and the City were parties to a Memorandum of Understanding (MOU) that expired by its own terms on June 30, 2010. The parties are currently in negotiations for a successor MOU.

Since 1999, the City has maintained Personnel Rules concerning its employment practices. Personnel Rule 8.06 provides:

> The Personnel Officer may approve a temporary provisional appointment in the absence of persons available for appointment when time is of the essence for filling the vacancy. An appointment to fill a vacancy in this manner may require hiring a trainee, selecting a qualified individual presently not employed by the City, or appointing an existing full time employee in an acting status. A provisional appointment is made at the discretion of the Personnel Officer. The appointed individual shall be compensated within the approved salary range for the appointed position. A provisional appointment shall be less than 12 months

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

> duration, and generally shall only last of the duration of the recruitment process.

On May 19, 2010, the Union discovered for the first time that the City filled vacant bargaining unit positions with individuals not considered to be part of the Union's bargaining unit. The positions at issue were Senior Management Analyst, Water Resources Engineer, and Senior Financial Analyst. The Union requested that the City meet and confer over the issue. A meeting was scheduled for May 27, 2010.

On May 27, 2010, the City confirmed that temporary workers were performing bargaining unit work. The City stated that it did not intend to bargain over the matter with the Union.

Discussion:

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[2] 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.)[3] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or past practice; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy (i.e., having a generalized effect or continuing impact on terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

The Union specifically alleges the City used "contract labor to fill the [above-referenced] bargaining unit positions." PERB has found that "Contracting out is negotiable in either of two circumstances: (1) where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances; or (2) where the decision was motivated substantially by potential savings in labor costs." (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, citing *Lucia Mar Unified School District* (2001) PERB Decision No. 1440.) However, as an initial matter, it is unclear from the charge whether the City was in fact used independent contractors to perform unit work or whether the

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

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

City arguably transferred unit member work to temporary, non-bargaining unit positions.[4] Nevertheless, PERB will address the allegations pled in the charge.

It is undisputed in this case that the City's Personnel Rules, in effect since 1999, give the City the authority to make a "temporary provisional appointment" to fill vacant positions when there are no City employees available for the position and "time is of the essence for filling the vacancy." The City contends that it has been using this rule to make provisional appointments for vacant City positions since the rule was enacted. The City further asserts that it satisfied all of the elements specified in its personnel rules prior to making the provisional appointments at issue in this case. The Union alleges that that the City began using independent contractors to fill three vacant unit member positions. However, the Union does not establish that the City violated or acted in excess of the authority established in the City's Personnel Rules. Nor does the Union dispute that the City's Personnel Rules provide the City with the authority to make provisional appointments to bargaining unit positions. Accordingly, the Union does not establish that a violation occurred.

To the extent that the Union alleges that the policies regarding use of provisional labor in the City's Personnel Rules amount to a unilateral policy change, there is again insufficient information to establish a violation. In *Stockton Police Officer's Association v. City of Stockton* (1988) 206 Cal.App.3d 62, 66, the court found that an employee organization waived the right to request negotiations after an employer provided notice of a proposed change and waited three months prior to implementing the change. In this case, the Union appears to have been aware of the City's Personnel Rule allowing for provisional appointments for vacant unit positions since its inception in 1999. The Union requested negotiations over the matter on May 27, 2010, more than 10 years later. Under these circumstances, the Union does not establish that the City was required to negotiate with the Union. Therefore, the Union fails to establish a violation.[5]

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[4] PERB has held that the transfer of work from bargaining unit employees to those in a different or no bargaining unit is a subject within the scope of representation. (*Rialto Unified School District* (1982) PERB Decision No. 209.) However, not all transfers of bargaining unit work are negotiable. In *Eureka City Schools* (1985) PERB Decision No. 481, the Board held that a change in the distribution of duties between unit and non-unit employees, where there is an established practice of overlapping duties, does not always give rise to a duty to bargain. A duty to bargain may still be found where there are negotiable effects such as a reduction of hours in the bargaining unit positions or if unit employees cease to perform the overlapping work. (*Ibid.*; *Calistoga Joint Unified School District* (1989) PERB Decision No. 744.)

[5] To the extent that the Union alleges that the City enacted a unilateral change when it adopted its Personnel Rules in 1999, the Union does not establish that this allegation is timely. PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) "In the context of a unilateral change case, PERB held, the first implementation of the policy commences the six month period and subsequent occasions when employees are

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before March 11, 2011,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

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required to adhere to the policy, so long as it does not change, do not revive the violation." (*State of California (Department of Consumer Affairs)* (1994) PERB Decision No. 1066-S, citing *El Dorado Union High School District* (1984) PERB Decision No. 382.)

[6] 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.*)

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