

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

MARK SIROKY,

Charging Party,

v.

CITY OF FOLSOM,

Respondent.

Case No. SA-CE-33-M

PERB Decision No. 1531-M

June 20, 2003

Appearance: Mark Siroky, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mark Siroky (Siroky) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the City of Folsom (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to sign a settlement agreement based upon an arbitration decision that awarded Siroky \$5,000 for working out of class. Siroky did not identify any specific statutory section in the original charge; however, as he alleged that the City is refusing to sign this agreement because of his union activity, he appeared to be claiming a violation of MMBA sections 3502 and 3506.² He also alleged that the City refused to meet and confer in

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

²Section 3502 states:

Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the

good faith with his union representatives, an alleged violation of MMBA section 3505.³ The Board agent dismissed the charge for failure to state a prima facie case.

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

Section 3506 states:

Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

³Section 3505 states:

The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Upon review of the entire file, including the unfair practice charge, the amended charge, the Board agent's warning and dismissal letters, and Siroky's appeal, the Board affirms the Board agent's dismissal consistent with the discussion below.

BACKGROUND⁴

In September 1990, Siroky was hired by the City as a Junior Engineer. He was represented by the International Union of Operating Engineers, Local 39 (IUOE), which, in 1996, filed several grievances on his behalf. In 1998, these grievances were consolidated and brought before an arbitrator. One of the issues involved seeking compensation for working out of class. Before the arbitration hearing, on July 22, 1998, IUOE, on Siroky's behalf, negotiated a settlement agreement with the City, for which IUOE's attorney recited the terms before the arbitrator, a court reporter and the City, and for which a copy of the transcript is attached to the charge. The settlement included payment to Siroky of \$5,000 as unpaid wages in exchange for his agreement to resign voluntarily from the City by September 30, 1998 and to withdraw pending grievances and litigation against the City. In response to any inquiries about Siroky, the City also agreed to refer all such inquiries to the City's Personnel Director who would in turn only provide Siroky's date of hire, job classifications during his tenure and resignation date. The parties also agreed that a final settlement would be preconditioned on the agreement of individual defendants in civil litigation brought by Siroky, and that all parties would then execute a written agreement.⁵

⁴This section comprises the Board's findings regarding the allegations in the charge, as amended.

⁵There is nothing in the case file indicating that the parties ever reached a final agreement. The settlement transcript on p. 7 indicated that the settlement was conditioned on obtaining the signatures of and releases from all parties, including the City, IUOE, Siroky and

Siroky alleged that he fulfilled all of his obligations under the agreement of record and had signed three different versions of the settlement agreement, all of which the City had refused to sign.⁶ He also claimed that the City drafted a settlement agreement that substantially changed the terms from the agreement of record; and further, that the City demanded that he sign the City's version of the agreement before the City would pay Siroky the \$5,000 in unpaid wages.⁷ As a remedy, Siroky asked the Board to order the City to pay him the \$5,000 in compliance with the recorded settlement before the arbitrator.

In his amended charge, Siroky identified several former City employees who had grievances against the City but who had achieved resolution of their disputes; all of the named individuals were not members of a union. He also identified a provision in the memorandum

“individuals who are presently or who have in the past been named as individual defendants in the Siroky versus City of Folsom lawsuit. . . .”

⁶Neither the draft agreements nor their relevant provisions are alleged in the charge, as amended, or in the case file, except for a provision of the City's proposed draft excerpted in the warning letter.

⁷Siroky did not identify specific dates as to when much of the City's conduct occurred. Instead, the charge states as follows:

I have signed three different settlement agreements, all of which comply with the terms of the agreement of record. The City refuses to recognize any of these documents. In August 2001, the Union drafted a written settlement that EXACTLY follows the language of the settlement of record and presented it to the City. The City is still refusing to pay me.

The City drafted a settlement agreement and release of liability that SUBSTANTIALLY changes the terms of the settlement of record and is demanding, as a condition of the payment of my wages, that I sign THEIR document, their release of liability.

For the past 3 years I have worked endlessly to resolve this and get paid. [Emphasis in original.]

of understanding (MOU) between the City and IUOE for a grievance procedure that included mediation and arbitration. He alleged that there was a similar provision contained within the City's Personnel Rules and Regulations.⁸ According to Siroky, the City had refused mediation and arbitration over the content of the settlement agreement.

Siroky further claimed that after he joined IUOE, the City began harassing him via letters and filings.⁹ He also stated that Bob Bailey (Bailey), a mid-level City manager, told him that the City disliked IUOE and that employees would be better off without it. Siroky asserted that certain named rank and file employees heard Bailey make these statements.

Siroky contended that the City failed to offer any justification for its actions.

In his amended charge, Siroky also alleged that the City violated Section 3505 by failing to meet and confer in good faith with IUOE. In September/October 1999, the IUOE attorney requested a meeting to resolve these disputes with the City and in November 1999, requested that the disputes be submitted to an arbitrator. According to Siroky, the City's legal counsel refused both requests.

Siroky filed his charge on January 25, 2002 and the amended charge, on April 8, 2002.

In the dismissal, the Board agent held that Siroky failed to state a prima facie violation of MMBA. Although the Board agent found that Siroky met some of the factors for discrimination/retaliation, including, protected conduct, the City's awareness of the conduct, and the City's adverse action against Siroky, she concluded that Siroky had not alleged

⁸Neither the pertinent portions of the MOU nor the City's Personnel Rules and Regulations are alleged in the charge, as amended, or in the case file.

⁹None of these letters or filings, or excerpts therefrom, are alleged in the charge, as amended, or in the case file.

sufficient facts to establish a nexus between the protected conduct and the City's adverse action.

The Board agent also dismissed Siroky's allegation that the City failed to meet and confer with his union in violation of MMBA section 3505 since only employee organizations have standing to file such a charge.

DISCUSSION

This case is principally about the City's alleged refusal to honor a settlement agreement recorded before an arbitrator in July 1998. Since that time, Siroky alleged that he had made three unsuccessful attempts to obtain a written settlement from the City, the most recent of which occurred in August 2001. The City, according to Siroky, refused to sign these agreements and proffered its own version that contained substantial differences from the recorded settlement. Siroky contends that he and his union counsel have attempted to get the City to resolve the dispute, including attempts by IUOE counsel in November 1999 to submit the dispute to an arbitrator for a final and binding award, and in August 2001, to submit a draft agreement to the City for signature.

After review of the case file, the Board agrees that this case should be dismissed. However, regarding Siroky's allegation that the City refused to honor the settlement agreement, the Board declines to adopt the rationale provided in the Board agent's dismissal. The Board's disposition of this allegation is set forth below.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. (City of Anaheim (2003) PERB Order No. Ad-321; City of Huntington Park (2002) PERB Decision No. 1485.) The limitations period begins to run once

the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)¹⁰ The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

According to Siroky, the alleged unfair conduct, the City's refusal to sign a settlement agreement reflecting the settlement of record and the City's failure to pay Siroky the \$5,000 as its part of the settlement, occurred in 1998, the fall of 1999 and in August 2001. It is unclear why IUOE waited over a year from the date of the recorded settlement and approximately one year from the date that Siroky was required to resign to seek a written settlement from the City. Siroky failed to provide information as to when he first tried to obtain a written settlement either through his union or on his own, and as to why he resigned on the agreed-upon date despite the failure of the parties to execute a written settlement or the City's failure to pay Siroky \$5,000. Without access to the parties' grievance and arbitration process, it is unclear whether that process contained some remedy for the City's alleged failure to execute the agreement. In the recorded agreement, the arbitrator did not retain jurisdiction in the event the parties failed to execute an agreement. It appears to us that on September 30, 1998, the date he voluntarily resigned without having executed a written agreement, Siroky should have known of the City's intent to repudiate the settlement agreement.¹¹ Under this scenario, Siroky could

¹⁰When 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. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

¹¹Siroky did not identify in the charge when the City first repudiated the settlement agreement or when he first became aware of the City's intent.

have continued to attempt indefinitely to obtain a written settlement as a way to extend the limitations period. Siroky's charge was filed on January 25, 2002, more than three years after the arbitration settlement and Siroky's voluntary resignation without receipt of the agreed-upon sum. Consequently, the charge was not timely filed, and is thereby dismissed on this basis.

In Siroky's appeal, he reiterates the arguments in his charge, as amended, and raises some additional issues. One issue involved the lack of a legal discovery mechanism in order to obtain information from the City that would support the allegations in his charge. Siroky further complains that the Board agent utilized a "conclusive presumption" standard, instead of a "rebuttable presumption" standard in making her determination that he failed to allege a prima facie violation of MMBA. Yet, he acknowledges that the City refused to honor the settlement agreement as early as 1998. He has therefore failed to provide any facts or argument that would cure the untimeliness of the charge. Accordingly, it is unnecessary for the Board to evaluate the merits of this allegation.

Siroky reiterates his claim on appeal that the City refused to meet and confer with IUOE to resolve his dispute in violation of MMBA section 3505. We agree with the Board agent's determination that this allegation should be dismissed since only employee organizations have standing to allege a failure to bargain. (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667.)

ORDER

The unfair practice charge in Case No. SA-CE-33-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.