

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

HEIKOTI A. TUPOU,

Charging Party,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,

Respondent.

Case No. SA-CO-11-M

PERB Decision No. 1536-M

June 23, 2003

Appearance: Heikoti A. Tupou, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Heikoti A. Tupou (Tupou) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the International Brotherhood of Electrical Workers, Local 1245 violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to properly represent Tupou in a disciplinary hearing. Although Tupou admits that the disciplinary hearing occurred in 1997, he did not file this charge until December 10, 2002. Accordingly, the Board agent dismissed the charge as untimely.

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

The Board has reviewed the entire record in this matter, including the unfair practice charge, the Board agent's warning and dismissal letters and Tupou's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CO-11-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

March 8, 2004

Heikoti A. Tupou
2357 Missouri Way
Elverta, CA 95626

Re: Heikoti A. Tupou v. International Brotherhood of Electrical Workers, Local 1245
Unfair Practice Charge No. SA-CO-11-M
DISMISSAL LETTER

Dear Mr. Tupou:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2002. In your charge, you allege that the International Brotherhood of Electrical Workers, Local 1245 violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to properly represent you.

I indicated to you in my attached letter dated March 6, 2003, 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 which 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 13, 2003, the charge would be dismissed.

On March 10 we discussed your charge and your right to appeal to the Board itself. This letter sets forth the procedure for an appeal.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my March 6 letter.

Right to Appeal

Pursuant to PERB Regulations,² you 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. (Regulation 32635(a).) Any document filed with the Board must contain the case

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

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

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 before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
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. (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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (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. (Regulation 32132.)

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March 14, 2003
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Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Tom Dalzell

Warning Letter

March 6, 2003

Heikoti A. Tupou
2357 Missouri Way
Elverta, CA 95626

Re: Heikoti A. Tupou v. International Brotherhood of Electrical Workers, Local 1245
Unfair Practice Charge No. SA-CO-11-M
WARNING LETTER

Dear Mr. Tupou:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2002. In your charge, you allege that the International Brotherhood of Electrical Workers, Local 1245 violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to properly represent you.

On December 18, 2002, we briefly discussed your charge by telephone. At that time, I explained that unfair practice claims may be barred by a statute of limitations. PERB agents are prohibited from issuing complaints, in MMBA cases, involving allegations occurring more than three years prior to the filing of the charge. This prohibition was later confirmed to you in a letter of January 7, 2003, from PERB General Counsel Robert Thompson.

Your charge states that you were a SMUD employee until 1997². The charge alleges that in 1997 SMUD and IBEW Local 1245 engaged in a cover up of criminal behavior including harassment and threats against you. Your charge also states that SMUD engaged in labor code violations and wrongfully discharged you from employment. In addition, you were discriminated against because you are Polynesian; the only Polynesian working at SMUD. While at SMUD, you performed your custodial duties under hostile conditions and in a work environment in which you were not adequately protected from risks of injury.

You were a member of IBEW Local 1245, paying full union dues, from 1992 through 1997. Your charge contends that the union did not properly represent you while you were employed at SMUD, nor have they helped you since that time. Because the union provided you with no assistance, you ask that PERB have your dues returned along with damages.

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

² SMUD records indicate that your employment was terminated in April 1998.

Since leaving your employment at SMUD, you have filed actions with the Department of Fair Employment and Housing, the Workers Compensation Appeals Board, the National Labor Relations Board and in state and federal courts. The union has been of no assistance to you in these matters.

You wrote to Governor Wilson in 1997 regarding your treatment at SMUD. More recently, in August 2002, you wrote to Governor Davis and were referred to PERB by his office.

Statutory Time Limitations

A union has a responsibility to fairly represent the interests of all bargaining unit employees during the time that an individual is an employee in the bargaining unit which the union represents. The duty of fair representation includes negotiations and grievance handling. San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe) (1985) PERB Decision No. 544

Accordingly, PERB has jurisdiction over allegations of a failure to properly represent you in grievances during your employment at SMUD, provided such a charge is timely filed. However, the facts of your unfair practice charge establish that you have not been employed in the bargaining unit represented by IBEW Local 1245 since at least April 1998.

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. 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.)³

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.)

Your unfair practice charge was filed on December 10, 2002. Only alleged violations which occurred after December 10, 1999 are within PERB's jurisdiction. Because union failure to properly represent you in under the grievance procedure occurred no later than spring 1998, such allegations cannot be the subject of a complaint.

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. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Duty of Fair Representation

As discussed above, an union has a responsibility to represent the interests of all bargaining unit employees during that time that an individual is an employee in the bargaining unit. The duty of fair representation includes negotiations and grievance handling. It does not extend to those matters beyond the collective bargaining relationship in which the union has an exclusive right to act. San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe) (1985) PERB Decision No. 544

Accordingly, PERB has held that a union has no duty to represent employees seeking enforcement of statutory rights before state agencies or the courts. California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S; American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S.

In sum, the actions you have pursued before state agencies and the courts are outside the union duty of fair representation which is enforced by PERB. The allegations described in your charge which implicate the duty of fair representation consist only of grievance representation. As discussed, such representation by Local 1245 occurred no later than April 1998. Because the alleged grievance representation violations in your charge occurred more than three years prior to the filing of your charge, they are barred by the statutory limitations period.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please 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 the 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 I do not receive an amended charge or withdrawal from you before March 13, 2003, I shall dismiss your charge.

As we discussed on February 25, you may appeal such dismissal to the PERB Board itself. There, your case and the materials which you have submitted will again receive a full review. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC