

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

STATIONARY ENGINEERS LOCAL 39,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,

Charging Party,

v.

DIABLO WATER DISTRICT,

Respondent.

Case No. SF-CE-16-M

PERB Decision No. 1545-M

July 29, 2003

Appearance: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (IUOE) of a Board agent's dismissal (attached) of its unfair practice charge. The first amended charge alleged that the Diablo Water District (District) violated the Meyers-Milias-Brown Act (MMBA)¹ by refusing to meet and confer with IUOE regarding proposed changes in dress code and dual employment policies. This failure to meet and confer is alleged to violate MMBA sections 3502, 3503, 3504 and 3505.

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

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal letters, the District's response to the charge and IUOE's appeal. Based on the following discussion, the Board dismisses the unfair practice charge.

DISCUSSION

The facts alleged in the charge are that on October 5, 2001, IUOE submitted a showing of interest by employees of the District along with a demand for recognition by certified mail to the District.² At the time, the District did not have its own local rules or labor relations ordinance.

The District claims that since August 21, 2001, it has been soliciting input from employees regarding the District's desire to codify existing dress code standards and policies on after-hours employment.³ On October 15, the District General Manager, Mike Yeraka (Yeraka), sent proposed written policies on dress code and after-hours employment to IUOE and informed them that he was going to discuss the policies with employees on October 16.⁴ He also stated, "Please let me know if you would like to meet to discuss these written policies before or after the employee meeting. Any comments or suggestions you have for improving

² All dates occurred in 2001 unless otherwise specifically noted.

³ IUOE informed the Board agent that the original charge would be amended to allege an unlawful unilateral change. Although IUOE's amended charge makes a conclusory allegation that the written policies constituted a change in working conditions, it provides no specific facts. Accordingly, the amended charge fails to state a prima facie case. Moreover, the Board notes that IUOE has failed to raise this issue on appeal.

⁴ The Board views this contention of "direct dealing" as an unalleged violation in this charge. A prima facie case based on such an allegation requires that the employees involved in the conduct be represented by an exclusive representative. There is no exclusive representative present in this case and therefore there is no prima facie case based on this theory.

the written policies would be appreciated.” The District met separately with employees on October 16 and with IUOE representatives on October 17.

Yeraka telefaxed a letter to IUOE business representative, Kevin Barry (Barry), on November 2, stating:

In the afternoon of October 17, 2001, we met to discuss the policies. However, during that meeting I did not receive any suggestions from you for any changes or improvements in the language of the written policies.

By your October 12, 2001, letter I was under the impression that you wanted to meet and confer regarding this matter. To date, I have not received any input from you regarding these policies. Please provide me with any suggested changes or improvements to the policies, in written form, by November 16, 2001.

If I do not receive any comments from you by that date, I will assume that the written form of the policies is acceptable.

In a letter dated November 8⁵, Barry responded to the District’s attempts to solicit input from IUOE by stating, in pertinent part:

that at that meeting of October 17, 2001, I indicated that since Local 39 was not formally recognized, and was not in a formal meet and confer process, it would not be appropriate for Local 39 to act on these policy issues. [Emphasis added.]

Yeraka, by telefaxed letter of November 30, responded to Barry that a draft of the Employee Relations Regulation had been sent and that he looked forward to reviewing any suggested changes IUOE might have to the draft. Once the final regulation was adopted by the District’s board of directors, the process of determining whether IUOE would be formally recognized could begin and after that contract negotiations could be discussed. With regard to

⁵ The District claims that it did not receive a copy of the November 8 letter until it was telefaxed to the District on November 27. The Board notes that the District’s address listed on the November 8 letter contains the incorrect postal code.

the dress code and after-hours employment resolution, Yeraka extended the deadline for comments to December 12.

IUOE responded by filing this instant charge on December 4. On December 12, Yeraka telefaxed a letter to Barry stating:

As per our obligation to a non-exclusive representative, we would be willing to meet and confer with you on December 17th, 18th in the morning, 20th in the morning, 21st, 27th or the 28th. Please let me know if any of these dates and times will work for you.

The District at some unknown date, prior to February 8, 2002, adopted the dress code and dual employment policies.

In its appeal, IUOE only argues that the District was obligated to meet and confer over the proposed dress code and dual employment policies. Even assuming that IUOE had a right to meet and confer with the District, the Board finds that IUOE waived its right by failing to request to meet and confer. Failure to request to meet and confer is considered a waiver of its right to bargain. (Sylvan Union Elementary School District (1992) PERB Decision No. 919; Stockton Police Officers' Assn. v. City of Stockton (1988) 206 Cal.App.3d 62 [253 Cal.Rptr. 183].) A waiver must be clear and unmistakable and cover all aspects of the particular matter in question. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651 [224 Cal.Rptr. 688].) A waiver of the right to bargain will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) The evidence must indicate an intentional relinquishment of the union's rights. (Moreno Valley Unified School District (1995) PERB Decision No. 1106.)

In this matter, it is undisputed that the District provided notice of the proposed policies to IUOE. The District solicited input from IUOE and offered to meet to discuss the policies.

In response, IUOE refused to meet with the District. IUOE took the position that until it was formally granted status as a “recognized employee organization” it would not participate in the meet and confer process.

IUOE’s intent was clear and unmistakable. IUOE refused to meet with the District until the District granted IUOE status as a “recognized employee organization.” IUOE’s failure to take advantage of the District’s offer constitutes a waiver of its right and is fatal to its unfair practice charge. (Stockton Police Officers' Assn. v. City of Stockton (1988) 206 Cal.App.3d 62 [253 Cal.Rptr. 183].) Accordingly, the Board finds that IUOE waived its right to meet and confer with the District over the dress code and dual employment policies.

ORDER

The unfair practice charge in Case No. SF-CE-16-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

Dismissal Letter

March 19, 2002

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue
Oakland, CA 94612

Re: International Union of Operating Engineers, AFL-CIO v. Diablo Water District
Unfair Practice Charge No. SF-CE-16-M
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 4, 2001, and a First Amended Charge was filed on February 11, 2002. The International Union of Operating Engineers, AFL-CIO (Charging Party or Union) alleges that the Diablo Water District (Employer) violated the Meyers-Milias-Brown Act (MMBA)¹ by adopting changes to its dress code and dual employment policies in October 2001.

I indicated to you in my attached letter dated February 28, 2002, 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 11, 2002, the charge would be dismissed.

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 February 28, 2002 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 name and number, and the original and five (5) copies of all documents must be provided to the Board.

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.

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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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 _____
Les Chisholm
Regional Director

Attachment

cc: Mike Yeraka

Warning Letter

February 28, 2002

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue
Oakland, CA 94612

Re: International Union of Operating Engineers, AFL-CIO v. Diablo Water District
Unfair Practice Charge No. SF-CE-16-M
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 4, 2001, and a First Amended Charge was filed on February 11, 2002. The International Union of Operating Engineers, AFL-CIO (Charging Party or Union) alleges that the Diablo Water District (Employer) violated the Meyers-Milias-Brown Act (MMBA)¹ by adopting changes to its dress code and dual employment policies in October 2001.

As amended, the statement of the charge reads:

The Charging Party has submitted a showing of interest by employees of the Employer. The Employer does not have its own rules and regulations governing recognition. The Employer has refused to meet and confer with the charging party regarding wages, hours and working conditions until the Employer completes its process of adopting rules and regulations regarding recognition. The demand for recognition was made on or about October 5, 2001 by certified letter, but the Employer has consistently refused to meet and confer since that date.

Notwithstanding the fact that the Union notified the Diablo Water District on October 5, 2001, the Employer on or about November 2, 2001 failed to meet and confer with the Charging Party concerning working conditions involving the dress code and a dual employment resolution. Instead, on October 15, 2002 [sic] the Employer sent information to the Union for the Union to offer "suggestions for any changes or improvements". The Employer then met with the employees directly on October 16, 2001 over

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.

the changes in a dress code and dual employment resolution. Although the Employer met with the Union on the following day, October 17, 2001, the Employer was not seeking to negotiate or meet and confer but rather to listen to the Union's "input".

The Employer then adopted resolutions changing the dress code and a dual employment policy.

When we discussed this charge on January 22, 2002, you informed me that the Employer had acted to adopt an employee relations ordinance and the parties were scheduled to begin bargaining. At that time, you indicated the charge would be amended and that the focus of the amended charge would be on the alleged unilateral changes made by the Employer concerning dress code and dual employment policies. This intent was restated when we later discussed the charge on February 7, 2002.

However, the charge arguably asserts that the Employer violated the MMBA both by refusing to grant exclusive representative status to the Union prior to adoption of local rules for representation petitions and by refusing to negotiate with the Union over policies prior to recognition of the Union as the exclusive representative. Both theories of the case fail to state prima facie evidence of a violation of the MMBA under Covina-Azusa Fire Fighters Union, Local 2415, IAFF, AFL-CIO v. City of Azusa (1978) 81 Cal.App.3d 48 (City of Azusa).

In City of Azusa, the court ruled in pertinent part:

The union apparently makes the erroneous assumption that if it represents a majority of the employees in the unit, it must be considered the "exclusive bargaining representative" for all the employees in the unit. This assumption, presumably derived from practice under the National Labor Relations Act (N.L.R.A.), is not true under MMB. Unless and until the city adopts rules and regulations pursuant to Government Code section 3507, providing for exclusive recognition following an employee vote, it must recognize all employee organizations representing at least some employees and must meet and confer with each of them about wages, hours, and terms and conditions of employment (Gov. Code § 3505) and meet and consult with each of them about matters concerning the ground rules pertaining to employee representation relationships (Gov. Code § 3507), including, of course, the designation of appropriate employee units.

Thus, the Employer's refusal in this case to grant exclusive recognition to the Union until after it adopted local rules did not, under City of Azusa, violate the MMBA.² Further, the facts

² Notice is taken that the MMBA was recently amended, by the addition of a new subsection (c) to section 3507.1, to provide for exclusive recognition of employee organizations based on a card check. However, since the effective date of that amendment was January 1, 2002, and the events giving rise to the charge occurred in the Fall of 2001, the

alleged in the charge do not support a finding that the Employer violated its duty to meet and consult (as opposed to negotiate) with the Union over proposed changes in policies. According to the charge, the Employer gave notice to the Union of the changes being considered, offered to and did meet with the Union, and agreed to consider the Union's input. These facts do not support finding a violation of the MMBA under either City of Azusa or analogous Board precedent (see, e.g., Los Angeles Unified School District (1996) PERB Decision No. 1153 and The Regents of the University of California (1998) PERB Decision No. 1252-H).

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 Second 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 11, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director