

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

AFSCME LOCAL 512, AFL-CIO,

Charging Party,

v.

CITY OF PITTSBURG,

Respondent.

Case No. SF-CE-108-M

PERB Decision No. 1563-M

December 8, 2003

Appearances: Beeson, Tayer & Bodine by Sheila K. Sexton, Attorney, for AFSCME Local 512, AFL-CIO; Marc A. Fox, Director of Human Resources, for City of Pittsburg.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the AFSCME Local 512, AFL-CIO (AFSCME) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City of Pittsburg (City) violated the Meyers-Milias-Brown Act (MMBA)¹ when its City Council employed the services of a consultant to review and recommend what action should be taken in response to two grievances filed by AFSCME.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, AFSCME's appeal and the City's response. The

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

Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-108-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

August 14, 2003

Keith Uriarte, Organizing Director
AFSCME Local 512
2000 Embarcadero, Suite 110
Oakland, CA 94606—530

Re: AFSCME Local 512, AFL-CIO v. City of Pittsburg
Unfair Practice Charge No. SF-CE-108-M
DISMISSAL LETTER

Dear Mr. Uriarte:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 30, 2003. AFSCME Local 512, AFL-CIO alleges that the City of Pittsburg violated the Meyers-Milias-Brown Act (MMBA)¹ when its City Council employed the services of a consultant to assist in reviewing AFSCME's appeal of two grievances. The charge alleges that the City's action violates MMBA §3500, §3504 and §3505 and the MOU grievance articles, and constitutes a unilateral change to the MOUs.

I indicated to you in my attached letter dated July 24, 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 August 4, 2003, 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 July 24 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.

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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 _____
Jerilyn Gelt
Labor Relations Specialist

Attachment

cc: Marc A. Fox

Warning Letter

July 24, 2003

Keith Uriarte, Organizing Director
AFSCME Local 512
2000 Embarcadero, Suite 110
Oakland, CA 94606-5300

Re: AFSCME Local 512, AFL-CIO v. City of Pittsburg
Unfair Practice Charge No. SF-CE-108-M
WARNING LETTER

Dear Mr. Uriarte:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 30, 2003. AFSCME Local 512, AFL-CIO alleges that the City of Pittsburg violated the Meyers-Miliias-Brown Act (MMBA)¹ when its City Council employed the services of a consultant to assist in reviewing AFSCME's appeal of two grievances.² The charge alleges that the City's action violates MMBA §3500, §3504 and §3505 and the MOU grievance articles, and constitutes a unilateral change to the MOUs.

My investigation has revealed the following. On January 9, 2003, you wrote a letter to Marc Fox, Director of Human Resources for the City, responding to his phone message proposing that AFSCME agree to have a hearing officer review AFSCME's appeal. You stated that such an agreement would require modification of the MOUs, a procedure necessitating a reopening of negotiations and ratification of any agreement by both parties. You asked that the City submit a written proposal for your review. Apparently, no proposal was submitted.

On or about January 29, 2003, City Manager William Casey informed you in writing that the City Council had received notice from AFSCME that it had submitted two grievances to the City Council pursuant to Personnel Rule 17.5-City Council Review of City Manager Decision:

In the event the grievant disagrees with the decision of the City Manager or designee, the complainant shall have the opportunity to lodge a request for review by the City Council within seven (7) days of receipt of the City Manager's or designee's decision. The City Council shall conduct a review of the City Manager's decision with the authority to affirm, reverse, or modify the City manager's or designee's decision.

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 The two grievances arose under identical articles in MOUs covering two different bargaining units.

This rule is incorporated in the AFSCME MOUs as Step 4 of Section 16.2, Grievance Procedure.

In his letter, Mr. Casey stated that the City Council had appointed Don Becker of 2trees interactive “to conduct the review on their behalf and provide a recommendation as to whether to affirm, reverse, or modify the City Manager’s decision.” Mr. Casey also stated that the “City Council reserves as its sole right to affirm, reverse or modify the City Manager’s decision.”

On February 13, 2003, you responded to Mr. Casey’s letter in writing, asserting that the City Council’s appointment of Mr. Becker constituted a unilateral change to the MOUs, and that if this action was not rescinded, you would file unfair practice charges with PERB. On February 17, 2003, City Attorney Linda Daube responded to your letter, advising you that no unilateral change had occurred. She stated that Mr. Becker would be conducting a fact finding investigation that would be forwarded to the City Council for final determination.

On or about March 27, 2003, Mr. Becker sent you a letter asking for your assistance in his review by replying to four questions regarding the substance of the grievances. He stated that he was aware of your objection to his role in the process, and gave assurances that your participation would not be used by the City as evidence against you before PERB. He suggested that your response to his questions include a declaration that you are not waiving your right to assert that the City had committed an unfair by employing his services. He also stated that the City does not agree that it had done so.

On April 7, 2003, you replied to Mr. Becker by letter, stating simply that the City Council’s delegation of its review of the AFSCME grievances violated the MOU.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),³ 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.)⁴ Unilateral changes are considered “per se” violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of

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

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

Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In this case, you assert that the employer unilaterally changed the terms of the MOUs by contracting with an outside consultant to assist it in fulfilling its obligations under Step 4 of the grievance procedure. You state that, in all other portions of the contract, the words "or designee" are used when someone other than the stated employee may perform functions assigned to that employee. You argue that since these words do not appear in conjunction with the City Council in Step 4, the assistance of someone other than a City Council member is forbidden absent a negotiated change to the MOUs.

It appears that you have confused the right of the City Council to employ a professional consultant to assist with and provide input to a determination made by the City Council with the delegation of the City Council's decision making authority. There is no indication from the facts presented that anyone other than the City Council will determine the outcome of AFSCME's appeal. The fact that the City Council has employed a consultant is a matter of managerial prerogative that is not negotiable. Therefore, no unilateral change has taken place.

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 August 4, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist