STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN ADZA, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION #790, Respondent.	Case No. SF-CO-29-M PERB Decision No. 1632-M May 19, 2004

Appearance: Del Beccaro, Ratfield, Hornsby & Blake by Thomas G. F. Del Beccaro, Attorney, for John Adza.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by John Adza (Adza) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Service Employees International Union #790 violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1].

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

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

ORDER

The unfair practice charge in Case No. SF-CO-29-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

Dismissal Letter

September 17, 2003

Thomas Del Beccaro, Attorney
Del Beccaro, Ratfield, Hornsby & Blake
800 S. Broadway #301
Walnut Creek, CA 94596

Re: John Adza v. Service Employees International Union #790
Unfair Practice Charge No. SF-CO-29-M
DISMISSAL LETTER

Dear Mr. Del Beccaro:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 9, 2003. John Adza alleges that the Service Employees International Union #790 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated August 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 August 13, 2003, the charge would be dismissed. I later extended that deadline to August 27, 2003.

On August 21, 2003, I had a lengthy conversation with Charging Party and his representative. During this conversation, Charging Party's representative suggested that PERB's investigation should only include those facts provided by the Charging Party and could not include facts provided by the Respondent. I informed Charging Party and his representative that my investigation would include all of the facts available and my decision would be based upon all facts and not just those provided by the Charging Party. Charging Party's representative also indicated that as the Association had failed to contact Mr. Adza for a three month period, the Association's conduct automatically rose to the level of an MMBA violation. I again indicated to Charging Party and his representative that I would analyze the charge based upon all of the facts provided. Additionally, I asked Charging Party to explain how he had been harmed by the Association's failure to communicate with him while awaiting the selection of an arbitrator. Neither Charging Party nor his representative we able to explain how he had been harmed. Finally, Charging Party's representative indicated that one of the Association's

[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.

representatives had a conflict of interest with Mr. Adza, and thus the Association breached its duty of fair representation. I will address this allegation below.

The relevant facts are as follows.

On January 24, 2002, Watershed Keeper Kristina Wuslich made a complaint of sexual harassment against Mr. Adza. The complaint alleged that on December 17, 2001, Mr. Adza, Ms. Wuslich's supervisor, made repeated sexual advances towards Ms. Wuslich. Additionally, Ms. Wuslich claimed Mr. Adza restrained her from leaving the facility and kissed and fondled her. The incident ended when two fellow co-workers entered the facility.

On February 5, 2002, Ms. Wuslich, through her attorney Lynn Faris, made a seven page complaint of sexual harassment. On February 19, 2002, Mr. Adza was placed on Unpaid Administrative Leave pending the outcome of the investigation. SEIU was informed of this discipline.

On February 21, 2002, the City issued a 21 page report regarding Ms. Wuslich's complaint. The investigator interviewed 14 witnesses, including Mr. Adza and Ms. Wuslich. After an exhaustive investigation, the City found Ms. Wuslich's testimony, and that of most of the witnesses, as credible, and further indicated that Mr. Adza had directly violated an order to refrain from discussing this issue with any employees of the City.

On March 7, 2002, the City issued a Notice of Action to terminate Mr. Adza from his employment. An Employee Conference was scheduled for March 13, 2002, during which Mr. Adza and his representative could challenge the findings and the City's decision.

After postponing the meeting on two separate occasions, Mr. Adza and his SEIU representative, Ruben Garcia, met with the City, on March 28, 2002, to discuss Mr. Adza's termination. During this meeting, Mr. Adza and Mr. Garcia challenged the witnesses' credibility and argued that Ms. Wuslich's complaint was made in retaliation for some past marijuana discovery on Watershed property. More specifically, Mr. Adza asserted that Ms. Wuslich's complaint was in retaliation for the investigation of Ms. Wuslich's brother for growing marijuana on Watershed property. No other facts supporting this allegation are provided, and the City rejected this explanation after investigating the facts surrounding the marijuana discovery.

On April 17, 2002, the City issued its Notice of Dismissal to Mr. Adza. The Notice of Dismissal noted the numerous arguments Mr. Garcia made on Mr. Adza's behalf, and further explained why they were rejected. Moreover, the Notice indicated that Mr. Adza had violated investigative procedures by contacting several of the witnesses after being admonished otherwise. The Notice concluded by informing Charging Party of his appeal rights under the MOU.

On May 1, 2002, SEIU filed a grievance on Mr. Adza's behalf, asserting the City violated MOU provisions when it terminated Mr. Adza. The grievance was filed by SEIU Field

Representative Michael Haberberger. Mr. Adza asserts that Mr. Haberberger had a conflict of interest in this case and thus should not have filed the grievance. However, as explained during our conversation on August 21, 2003, the charge makes clear that Mr. Haberberger was not directly handling Charging Party's case and that such representation was provided by Mr. Garcia. Moreover, it is unclear what harm Charging Party allegedly suffered from the alleged conflict of interest.

On May 21, 2002, having received no response from the City, SEIU elevated the grievance to Step 3. The City rejected the grievance at Step 3, and on June 13, 2002, SEIU elevated the grievance to arbitration.

Charging Party alleges that during the months of June, July and August, 2002, he telephoned SEIU regarding his grievance but received no response. It appears that during these months, SEIU was awaiting the selection of an arbitrator from the arbitration panel. As such, the grievance sat in abeyance pending the selection of an arbitrator.

In September, 2002, SEIU representatives forwarded Mr. Adza's case file to SEIU's law firm for analysis. SEIU's attorney, Vincent Harrington, reviewed the case file, including the 40+ pages of witness testimony and payroll records, and found that the Union had a "less than 50-50 chance of prevailing in arbitration. On October 28, 2002, Mr. Harrington sent Mr. Adza and SEIU his written opinion of the case.

On September 23, 2002, SEIU held a Grievance Committee meeting to discuss Mr. Adza's request for arbitration. Mr. Adza failed to appear for this meeting. On October 10, 2002, SEIU representative, Patricia Jackson, sent a letter to Mr. Adza stating as follows:

> Your case was scheduled before the Grievance Committee on September 23, 2002, which you did not appear (sic). <u>It was my understanding that you were aware of the meeting, date and time.</u>
>
> All cases must be heard by the Grievance Committee members, who make the decision as to whether a case will or will not go to arbitration. Therefore, until the Grievance Committee hears your case, it will not be scheduled for arbitration.

The letter further informed Mr. Adza that the next Grievance Committee meeting would take place in November.

On October 16, 2002, Mr. Adza received a letter from Mr. Haberberger. This letter stated in relevant part as follows:

> This is further clarification in response to your letter of October 1, 2002 to Pat Jackson regarding your pending grievance. As you note, when we met several months ago, I disclosed to you my concerns regarding a possible conflict with me representing you

> in this matter. In light of those concerns, Ruben Garcia was designated to serve as your staff representative. I have confirmed this with Staff Director LaWanna Preston.
>
> Therefore, you should contact Ruben Garcia directly for representation from this office.

On October 31, 2002, Ms. Jackson sent Mr. Adza another letter, indicating the next Grievance Committee meetings would take place on November 14 and November 25, 2002. Mr. Adza was instructed to contact Ms. Jackson if he wished to have his grievance heard on either of these occasions. Mr. Adza did not contact Ms. Jackson and did not attend either meeting.

On November 26, 2002, Ms. Jackson sent Mr. Adza yet another letter regarding his grievance. Ms. Jackson reiterated that the grievance would not be scheduled for arbitration if Mr. Adza failed to have his grievance heard by the committee.

On January 10, 2003, Ms. Jackson sent a final letter to Mr. Adza stating that his grievance would be heard on February 3, 2003, and that this was his final opportunity to address the committee. Mr. Adza did not attend the February 3, 2003, meeting.

On March 24, 2003, SEIU sent Mr. Adza a letter indicating that it was closing his grievance file, as he had failed to comply with the grievance procedures.

Based on the above stated facts and those provided in the original charge, the charge still fails to state a prima facie violation of the MMBA, for the reasons provided below.

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389].) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]).

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without

a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

Charging Party makes numerous statements which he believes merit the issuance of a complaint. The first, as noted above, is that PERB must take all of Charging Party's facts into consideration and must ignore additional facts provided by the Respondent. Were PERB to take only Charging Party's facts into evidence herein, PERB would not be aware that SEIU provided any representation to Mr. Adza. The charge does not mention that Mr. Garcia attended the Skelly meeting with Mr. Adza, fails to note that SEIU filed a grievance over the termination, and further fails to note that Mr. Adza refused to attend the numerous grievance meetings held on his behalf. As indicated to Charging Party and his representative, PERB is charged with investigating unfair practice charges, and such investigation necessarily requires discussions with both the Respondent and the Charging Party. The warning letter provided Charging Party with an opportunity to correct any misstatement of facts, however Charging Party failed to do so in the amended charge or during our August 21, 2003, conversation. Nothing in the MMBA or PERB case law requires a Board Agent to ignore the facts provided by the Respondent, and to only consider the facts provided by the Charging Party. As such, this contention is without merit, and the allegation will be addressed looking at the totality of the facts provided.

Charging Party further states that SEIU denied him his right to independent representation. However, nowhere in the charge does Mr. Adza indicate he requested representation from anyone other that SEIU. As such, this allegation is without merit. Charging Party also asserts SEIU failed to give his sufficient notice of the grievance meetings. However, facts provided demonstrate that Mr. Adza had at least two weeks notice for each meeting, and in some instances had nearly a month's notice prior to the meetings. Moreover, when asked whether he had contacted SEIU at any point to reschedule a meeting, Mr. Adza indicated that he had not. As such, this allegation is also without merit.

The amended charge also alleges Mr. Haberberger's conflict of interest violated the duty of fair representation. However, Mr. Haberberger acknowledged the conflict of interest in March when Mr. Garcia was appointed Mr. Adza's representative. Moreover, Mr. Haberberger indicated to Charging Party that fairness required that Mr. Adza receive another representative. As such, it is unclear what harm came from Mr. Haberberger's conflict of interest. Facts provided demonstrate that Mr. Adza's grievance was pursued through the proper channels and was considered for binding arbitration. Nothing in the charge demonstrates the conflict of interest harmed Mr. Adza's grievance rights, and as such, this allegation must also be dismissed. (CSEA Chapter 616 (Tornetta) (1985) PERB Decision No. 508 (charging party must plead some harm or injury in order to state a prima facie case).)

As noted above, Charging Party points to the three months in which he was not in communication with SEIU as evidence that his rights were violated. Facts provided, however,

demonstrate that during that time period, the grievance was in abeyance pending the selection of an arbitrator. As such, Mr. Adza's rights were not harmed by SEIU's failure to communicate with him. Moreover, the failure to return phone calls is not sufficient to state a violation of the MMBA. (AFSMCE (Dehler) (1996) PERB Decision No. 1152-H.) As such, this allegation must also be dismissed.

Finally, Charging Party asserts that SEIU's failure to pursue the grievance to binding arbitration demonstrates a breach of the duty of fair representation. However, again considering all the facts available, this allegation is without merit. SEIU's attorney's provided a detailed explanation as to why they believed arbitration would fail. Moreover, SEIU gave Mr. Adza at least four (4) opportunities to appeal this decision, and Mr. Adza failed to attend any of the meetings or communicate in any other way with SEIU. As the union provided a reasonable explanation for its decision, SEIU did not violate the MMBA.

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.

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

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

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.)

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 _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Vincent Harrington

Warning Letter

August 6, 2003

Thomas Del Beccaro, Attorney
800 So. Broadway, Suite 301
Walnut Creek, CA 94596

Re: John Adza v. Service Employees International Union #790
Unfair Practice Charge No. SF-CO-29-M
WARNING LETTER

Dear Del Beccaro:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 9, 2003. John Adza alleges that the Service Employees International Union #790 violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation.

Investigation of the charge revealed the following. Mr. Adza was employed by the City and County of San Francisco as a Watershed Keeper Supervisor. As such, Mr. Adza is exclusively represented by SEIU. The City and SEIU are parties to a collective bargaining agreement that expired on June 30, 2003. Article II, Paragraph 64 provides the following regarding sexual harassment complaints:

> Discrimination complaints will be treated in strict confidence by both the Union and the City. Progressive disciplinary action shall be imposed by the City upon any employee found to have engaged in discriminatory conduct in violation of this section.

With regard to termination, Article IV, Paragraph 498, states:

> Skelly Rights
> An employee subject to discipline or discharge, shall be entitled, prior to the imposition of that discipline or discharge, to a hearing and to the following:
> a. A notice of proposed action; and
> b. The reasons for the proposed discipline, and

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c. A copy of the charges and the materials upon which the action is based, and
d. The right to respond, either orally or in writing, to the authority initially imposing the discipline.

On January 24, 2002, Watershed Keeper Kristina Wuslich made a complaint of sexual harassment against Mr. Adza. The complaint alleged that on December 17, 2001, Mr. Adza, Ms. Wuslich's supervisor, made repeated sexual advances towards Ms. Wuslich. Additionally, Ms. Wuslich claimed Mr. Adza restrained her from leaving the facility and kissed and fondled her. The incident ended when two fellow co-workers entered the facility.

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In September, 2002, SEIU representatives forwarded Mr. Adza's case file to SEIU's law firm for analysis. SEIU's attorney, Vincent Harrington, reviewed the case file, including the 40+ pages of witness testimony and payroll records, and found that the Union had a "less than 50-50 chance of prevailing in arbitration. On October 28, 2002, Mr. Harrington sent Mr. Adza and SEIU his written opinion of the case.

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>
> All cases must be heard by the Grievance Committee members, who make the decision as to whether a case will or will not go to arbitration. Therefore, until the Grievance Committee hears your case, it will not be scheduled for arbitration.

The letter further informed Mr. Adza that the next Grievance Committee meeting would take place in November. On October 31, 2002, Ms. Jackson sent Mr. Adza another letter, indicating the next Grievance Committee meetings would take place on November 14 and November 25, 2002. Mr. Adza was instructed to contact Ms. Jackson if he wished to have his grievance heard on either of these occasions. Mr. Adza did not contact Ms. Jackson and did not attend either meeting.

On November 26, 2002, Ms. Jackson sent Mr. Adza yet another letter regarding his grievance. Ms. Jackson reiterated that the grievance would not be scheduled for arbitration if Mr. Adza failed to have his grievance heard by the committee.

On January 10, 2003, Ms. Jackson sent a final letter to Mr. Adza stating that his grievance would be heard on February 3, 2003, and that this was his final opportunity to address the committee. Mr. Adza did not attend the February 3, 2003, meeting.

On March 24, 2003, SEIU sent Mr. Adza a letter indicating that it was closing his grievance file, as he had failed to comply with the grievance procedures.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the MMBA, for the reasons provided below.

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389].) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions

in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]).

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

Herein, facts provided demonstrate SEIU consistently represented Mr. Adza throughout the grievance process. Representatives were present at all relevant meetings and timely processed the grievance through the MOU provided procedures. Additionally, SEIU representatives sent numerous letters to Mr. Adza requesting he comply with the procedures by attending a Grievance Committee meeting. Mr. Adza failed to participate in those meetings and failed to contact the union regarding his grievance. As Mr. Adza has not supplied facts demonstrating the union acted arbitrarily or in bad faith, the charge fails to state a prima facie violation of the MMBA.

Additionally, it appears Mr. Adza is contending SEIU representative Michael Haberberger had a conflict of interest in this matter. However, as Mr. Haberberger stated in his October 16, 2002, letter to Mr. Adza, because of the potential conflict of interest, Mr. Garcia would be serving as Mr. Adza representative. As such, there appears to be no conflict of interest.

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 13, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney