STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DIANNE HUNTSBERRY, Charging Party, v. ALAMEDA COUNTY PROBATION PEACE OFFICERS ASSOCIATION, Respondent.	Case No. SF-CO-55-M PERB Decision No. 1709-M November 16, 2004

Appearance: Dianne Huntsberry, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Dianne Huntsberry (Huntsberry) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Alameda County Probation Peace Officers Association violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching its duty of fair representation.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and Huntsberry'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]MMBA is codified at Government Code section 3500, et seq.

ORDER

The unfair practice charge in Case No. SF-CO-55-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA

NOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

August 4, 2004

Dianne Huntsberry

Re: Dianne Huntsberry v. Alameda County Probation Peace Officers Association
Unfair Practice Charge No. SF-CO-55-M
DISMISSAL LETTER

Dear Ms. Huntsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 2004. Dianne Huntsberry alleges that the Alameda County Probation Peace Officers Association violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent you during your Civil Service Commission and criminal hearings.

I indicated to you in my attached letter dated July 12, 2004, 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 July 19, 2004, the charge would be dismissed.

On July 19, 2004, you filed a first amended charge. The first amended charge corrects inaccuracies in my letter and reiterates your belief that the Association breached its duty of fair representation. The relevant facts are as follows.

Charging Party is employed by the County of Alameda, Department of Probation, as a Group Counselor 2. As such, you are exclusively represented by the Alameda County Probation Peace Officers Association. With regard to Civil Service Code violations, Section 20(B) of the parties' Agreement provides as follows:

> Exclusion of Civil Service Matters. The grievance procedure herein established shall have no application to matters over which the Civil Service Commission has jurisdiction pursuant to the County's charter or rules adopted thereunder.

[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.

On April 10, 2001, you were involved in an incident of child endangerment. More specifically, you witnessed a staged fight between two minors in County custody. This fight was staged by two of your fellow employees, who then made wagers on the outcome of the fight. The County contends that during this altercation you failed to assist the minors or call for help.

On April 26, 2001, the County instructed you to report for administrative interview regarding the above referenced incident. During this interview, you stated that you did not witness the incident nor did you witness your co-workers making any wagers during the fight. Subsequent witness statements indicated that you were standing within close proximity of the altercation and that you must have overheard your co-workers making bets on the outcome of the fight.

On June 14, 2001, the County placed you on administrative leave pending a complete investigation of the above incident. On or about July 12, 2001, the County's District Attorney filed criminal charges against you alleging two misdemeanor counts of child endangerment.

On July 18, 2002, the County issued you a notice of termination. The notice of termination indicated you were being terminated for multiple violations of the civil service code and the Probation Department juvenile hall manual. Additionally, the notice of termination indicated you had the right to appeal this decision to the County's Civil Service Commission. You appealed this decision to the Civil Service Commission, and that hearing was stayed pending the outcome of your criminal proceedings.

On November 12, 2002, an Alameda County jury convicted you of two misdemeanor counts of child endangerment. During your criminal hearing, you were represented by your own private attorney. Prior to the hearing, you had requested the union represent you during your criminal hearing. The union declined this request.

After your criminal conviction, you contacted Association representatives and asked for representation during the Civil Service hearing. On December 27, 2002, Association attorney, Christopher Miller, sent you a letter regarding your civil service appeal. In this letter, Mr. Miller advised you that success on appeal was extremely remote because of your criminal conviction. Mr. Miller indicated the same evidence presented at trial would be presented at your civil service hearing. Given that the burden of proof at the civil service hearing was lower than the burden of proof in a criminal trial, the County's Civil Service Commission would likely re-impose dismissal.

On January 14, 2003, you responded to Mr. Miller's letter. In this letter you allege Mr. Miller is refusing to assist you with your appeal. Additionally, you indicate Mr. Miller has failed to return your telephone calls. On January 20, 2003, senior attorney Kasey Clark responded to your January 14 letter. Mr. Clark indicated that as a result of your criminal conviction, it was his opinion that no hearing officer would order your reinstatement to the Probation Department. Mr. Clark further indicated you would be prohibited from litigating the issues on which were convicted, as they had been the subject of an earlier criminal conviction. Moreover, the cost of obtaining transcripts of your criminal case could exceed $20,000.

Lastly, Mr. Clark indicated that given the likelihood of failure on appeal, the Association had determined not to pursue the matter further.

On June 3, and June 5, 2003, you participated in a civil service hearing regarding your prior termination notice. At this hearing, you were represented by another private attorney. During this hearing, the County relied entirely on an argument of collateral estoppel. However, as the hearing officer noted, the County failed to provide a copy of the transcripts of your hearing and failed to provide sufficient evidence regarding the issues presented during your criminal trial. Given the County's failure to provide any of the pertinent information, the hearing officer rejected County's argument of collateral estoppel and ordered your reinstatement.

Based upon the facts provided in the original and amended charges, 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 contends the Association breached its duty of fair representation by failing to represent her at the civil service and criminal hearings. However, as noted below, the Association does not owe you a duty of fair representation in these forums. An exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Accordingly, the

duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as Department of Fair Employment and Housing or the State Personnel Board. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) Similarly, the Association does not owe you a duty of fair representation with regard to civil service procedures or in criminal matters. The union's duty of fair representation extends only to alleged contract violations covered by the MOU and subject to the parties grievance procedure. As Section 20 above notes, civil service matters are specifically excluded from the grievance procedure, and therefore outside of the Association's exclusive control.

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. (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

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

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: Will M. Yamada

STATE OF CALIFORNIA NOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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July 12, 2004

Dianne Huntsberry

Re: Dianne Huntsberry v. Alameda County Probation Peace Officers Association
Unfair Practice Charge No. SF-CO-55-M
WARNING LETTER

Dear Ms. Huntsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 2004. Dianne Huntsberry alleges that the Alameda County Probation Peace Officers Association violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent you during your Civil Service Commission hearing.

Investigation of the charge revealed the following. Charging Party is employed by the County of Alameda, Department of Probation, as a Group Counselor 2. As such, you are exclusively represented by the Alameda County Probation Peace Officers Association. With regard to Civil Service Code violations, Section 20(B) of the parties' Agreement provides as follows:

> Exclusion of Civil Service Matters. The grievance procedure herein established shall have no application to matters over which the Civil Service Commission has jurisdiction pursuant to the County's charter or rules adopted thereunder.

On April 10, 2001, you were involved in an incident of child endangerment. More specifically, you witnessed a staged fight between two minors in County custody. This fight was staged by two of your fellow employees, who then made wagers on the outcome of the fight. The County contends that during this altercation you failed to assist the minors or call for help.

On April 26, 2001, the County instructed you to report for administrative interview regarding the above referenced incident. During this interview, you stated that you did not witness the incident nor did you witness your co-workers making any wagers during the fight. Subsequent witness statements indicated that you were standing within close proximity of the altercation and that you must have overheard your co-workers making bets on the outcome of the fight.

[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.

On June 14, 2001, the County placed you on administrative leave pending a complete investigation of the above incident. On or about July 12, 2001, the County's District Attorney filed criminal charges against you alleging two misdemeanor counts of child endangerment.

On July 18, 2002, the County issued you a notice of termination. The notice of termination indicated you were being terminated for multiple violations of the civil service code and the Probation Department juvenile hall manual. Additionally, the notice of termination indicated you had the right to appeal this decision to the County's Civil Service Commission.

On November 12, 2002, an Alameda County jury convicted you of two misdemeanor counts of child endangerment. During your criminal hearing, you were represented by an attorney selected and paid for by the Association. On December 27, 2002, your attorney, Christopher Miller, sent you a letter regarding your civil service appeal. In this letter, Mr. Miller advised you that success on appeal was extremely remote because of your criminal conviction. Mr. Miller indicated the same evidence presented at trial would be presented at your civil service hearing. Given that the burden of proof at the civil service hearing was lower than the burden of proof in a criminal trial, the County's Civil Service Commission would likely re-impose dismissal.

On January 14, 2003, you responded to Mr. Miller's letter. In this letter you allege Mr. Miller is refusing to assist you with your appeal. Additionally, you indicate Mr. Miller has failed to return your telephone calls. On January 20, 2003, senior attorney Kasey Clark responded to your January 14 letter. Mr. Clark indicated that as a result of your criminal conviction, it was his opinion that no hearing officer would order your reinstatement to the Probation Department. Mr. Clark further indicated you would be prohibited from litigating the issues on which were convicted, as they had been the subject of an earlier criminal conviction. Moreover, the cost of obtaining transcripts of your criminal case could exceed $20,000. Lastly, Mr. Clark indicated that given the likelihood of failure on appeal, the Association had determined not to pursue the matter further.

On June 3, and June 5, 2003, you participated in a civil service hearing regarding your prior termination. During this hearing, the County relied entirely on an argument of collateral estoppel. However, as the hearing officer noted, the County failed to provide a copy of the transcripts of your hearing and failed to provide sufficient evidence regarding the issues presented during your criminal trial. Given the County's failure to provide any of the pertinent information, the hearing officer rejected County's argument of collateral estoppel and ordered your reinstatement.

Based on the above provided information, the charge is currently written fails to demonstrate 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 contends the Association breached its duty of fair representation by failing to represent her at the civil service hearing. However, as noted below, the Association does not owe you a duty of fair representation in this forum. An exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Accordingly, the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as Department of Fair Employment and Housing or the State Personnel Board. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) Similarly, the Association does not owe you a duty of fair representation with regard to civil service procedures. As Section 20 above notes, civil service matters are specifically excluded from the grievance procedure, and therefore outside of the Association's exclusive control.

Even assuming the Association owed you a duty of fair representation with regard to your civil service hearing, facts provided failed to demonstrate the Association breached its duty. The Association provided you with an explanation as to its refusal to pursue the matter and did so in a timely fashion. The duty of fair representation does not require the Association to pursue matters it feels will be unsuccessful at hearing. (United Teachers of Los Angeles (2001) PERB Decision No. 1453.) As such, the Association's conduct does not breach the duty of fair representation.

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 July 19, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR