OVERRULED IN PART by Grossmont Union High School District (2010) PERB Decision No. 2126

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. CITY OF PORTERVILLE, Respondent.	Case No. SA-CE-164-M PERB Decision No. 1905-M May 10, 2007

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for Operating Engineers Local 3; Liebert Cassidy Whitmore by Cynthia O'Neill, Attorney, for City of Porterville.

Before Shek, McKeag and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by the City of Porterville (City) to an administrative law judge's (ALJ) proposed decision. The ALJ found that that the City unlawfully interfered with the representational rights of Operating Engineers Local 3 (Local 3) by denying a representative access to City property on two alleged occasions. The ALJ held that the City's enforcement of its access rule against the representative: (1) interfered with employee rights embodied in the Meyers-Milias-Brown Act (MMBA),[1] and (2) denied to Local 3 rights guaranteed to them by Sections 3503 and 3506 of the MMBA, as well as PERB Regulation 32603(a) and (b).[2] The ALJ thereupon ordered the City to cease and desist from the interference with and denial of rights; to modify the implementation of its access rule to

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

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

provide Local 3 representatives access to City facilities in a manner that is in conformity with the proposed decision; and to post notice of the same.[3]

The Board has reviewed the entire record in this case, including but not limited to the complaint, the answer, the hearing transcript, the post-hearing briefs, the ALJ's proposed decision, the City's exceptions[4], and Local 3's response letter. Based upon that review, we reverse the ALJ's finding that the City unlawfully denied access to the union representative.

PROCEDURAL HISTORY

This action commenced on August 6, 2003, when Local 3 filed an unfair practice charge alleging, inter alia, that the City violated the MMBA by denying Local 3 access to its property based upon an administrative policy requiring the consent of the appropriate City department head for access to work locations. Local 3 alleged that this conduct constituted a violation of MMBA sections 3503, 3505, and 3506, and PERB Regulation 32603(a), (b) and (c). On October 17, 2003, Local 3 filed a first amended charge.

The Office of the General Counsel of the Board followed on November 7, 2003, by issuing a complaint against the City. The complaint alleged that the City violated the MMBA by: (1) refusing Local 3 access to its property on or about April 10, 2003; (2) refusing to provide a copy of an employee's "criminal offender record information" to Local 3; and (3) adopting a rule prohibiting access to its employees' representative without the consent of the

[3]In addition, the ALJ held that the City's adoption of the access policy was not a unilateral modification of a term or condition of employment at the time of enactment, under Section 3505 or PERB Regulation 32603(c). Furthermore, the ALJ found that the evidence did not support the remaining claim of denial of access to an employee's "criminal offender record information."

[4]The City requested oral argument in this matter. The Board has historically denied requests for oral argument where an adequate record has been prepared, and the parties had ample an opportunity to brief and did, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (Antelope Valley Health Care District (2006) PERB Decision No. 1816.) These criteria are met in this case. Thus, we deny the request for oral argument.

involved department head. The matter was not settled at the conclusion of an informal conference on February 25, 2004.

A hearing into these allegations was conducted before an ALJ on December 2, 2004, at the PERB office in Sacramento. With the filing of post-hearing briefs, the matter was submitted for decision on February 16, 2005. The ALJ issued the proposed decision on June 30, 2005, finding that the City had violated the MMBA by denying Local 3 access to City property, and dismissing the remaining allegations in the complaint.

FINDINGS OF FACT

The City is a public agency, within the meaning of MMBA section 3501(c). Local 3 is an employee organization as defined in Section 3501(a). Local 3 is affiliated with the Porterville City Employee Association (PCEA), which represents the City's miscellaneous bargaining unit. At all times relevant, PCEA's bargaining unit included approximately 113 employees, with approximately 75 of them working out of the corporate yard.

The City's Employer-Employee Relations Rules are embodied in Porterville City Council Resolution 9503. This resolution authorizes the creation of administrative policies to govern employer-employee relations. The relevant provision of the City's Administrative Policy No. IV-B-5(III)(a), "Access to Work Locations" (access policy), reads as follows:

> Reasonable access to employee work locations shall be granted officers of recognized employee organizations and their officially designated representatives for the purpose of processing grievances or contacting members of the organization concerning business within the scope of representation. Such officers or representatives shall not enter any work location without the consent of the department head. Access shall be restricted so as not to interfere with the normal operations of the department or with established safety or security requirements.

The City adopted this access policy in 1983.

The complaint, issued by the PERB General Counsel's Office on November 7, 2003, alleged only one instance in which the City refused to provide access to Local 3's business agent Douglas Gorman (Gorman) under the access policy. This incident allegedly occurred on or about April 10, 2003, when Gorman first visited the City corporation yard and attempted to introduce himself to the bargaining unit members. Gorman arrived at approximately 10 minutes before 1:00 p.m. After talking in the yard for a short time with Russ Bettencourt (Bettencourt),[5] an employee who was on his lunch break, Gorman walked with Bettencourt into the "shop or the office of the shop," which was an area "with tools and equipment in it." There, Bettencourt introduced his supervisor Thomas Webb (Webb) to Gorman. Webb was not designated as a City department head for the purposes of obtaining consent for site access under the access policy. Upon learning that Gorman was the unit representative, Webb ordered Gorman to leave the property, stating, "[Y]ou're holding my worker up from working." At approximately one or two minutes after 1:00 p.m., Gorman left the property. Bettencourt's lunch hour ended at 1:00 p.m.

On April 16, 2003, six days after this first incident, the City notified Gorman by letter of the terms of the access policy. At the hearing, Local 3 stipulated that Gorman did not seek consent from the department head for this visit under the provisions of the access rule.

During the December 2, 2004 hearing, Local 3 introduced evidence of another incident that was not alleged in the complaint, in which the City allegedly denied access to Gorman on January 7, 2004. This incident allegedly occurred when Gorman met with Robert Scott, an employee who was subject to termination, and PCEA's president Bryce Wood, in an employee

[5]The yard does not have any restricted access barriers, i.e., locked gates or guards, nor are there any "no trespassing" signs. Gorman parked behind a fence in a parking area that is not available to employees. Bettencourt gave him a brief tour of the area. Non-City employees that provide services to the City, e.g., uniform providers, equipment maintainers, and vending machine suppliers, have routine access to this area.

break room without obtaining the consent of the department head. While they were in this room, they made no attempt to exclude other employees from entering. Deputy City Manager Darrel L. Pyle (Pyle) came into the room within five to seven minutes after their initial entry, and informed Gorman that he could not be on City property. Despite Gorman's explanation of the reason for his presence, Pyle continually insisted that he could not be on City property.

During the hearing, Gorman responded to a question as to why a rule requiring prior permission for access would interfere with his ability to represent his members. He stated that it was sometimes important to be able to meet with an employee immediately after the occurrence of an incident. At times, Gorman stated, it was difficult to reach a supervisor in a timely manner to obtain prior permission to access the property. Finally, Gorman stated that an employee might be adversely affected by a supervisor's knowledge that the employee would be meeting with a union representative.

The record shows that the City provided Gorman with a list of telephone numbers for the department heads from whom he could request access. The City manager also provided his cellular telephone number to Gorman for after-hours access.

Local 3 has also represented the City's Police Officers' Association (POA) since 2001. Gorman testified at the hearing that he had experienced no access problems in his representation of the employees in these bargaining units. He further stated that when Local 3 began representing the POA, the POA president showed him around the police headquarters, and introduced him to Porterville Chief of Police Silver Rodriguez (Rodriguez). Since that time, he had visited the police department on representational issues on several occasions without incident. Gorman added that he had never requested advance permission to enter the police department.

Rodriguez testified at the hearing that he was unaware of Gorman having access to his subordinates without first calling and requesting permission. Rodriguez recalled Gorman coming into his office and being introduced to him, but there was no discussion of his coming to the police department any time he pleased. Rodriguez added that he was unaware of this access rule being a problem for his department.

DISCUSSION

The issue in this case is whether the City's application of its access policy on two alleged occasions interfered with any protected rights under the MMBA.

The City filed its statement of exceptions to the ALJ's proposed decision on July 21, 2005. The City's exceptions challenge the ALJ's conclusion that the City violated the MMBA by denying the union representative access to City property, and thereby interfering with employee rights. The City further excepts to the legal standard that the ALJ applied and his conclusion that the City violated MMBA sections 3503 and 3506 and PERB Regulation 32603(a) by interfering with the organization's rights. The City argues that the burden of proof lies with the charging party, and that Gorman never sought consent under the terms of the access policy.

The City further contends that PERB lacks jurisdiction to review the January 7, 2004 incident, because that incident was already the subject of a separate unfair practice charge in Case No. SA-CE-217-M, in which Local 3 claimed that the City improperly denied access to the union. The Board agent dismissed that charge, finding that Local 3 did not attempt to obtain the "consent of the department head." Local 3 did not appeal the dismissal in Case No. SA-CE-217-M.

Local 3 responded to the exceptions by letter dated August 2, 2005, stating that the union adopts as its position the ALJ's proposed decision. In this letter, Local 3 did not comment on the January 7, 2004 incident.

In reviewing exceptions to an ALJ's proposed decision, the Board reviews the record de novo, and is free to draw its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a.) The Board ordinarily gives deference to an ALJ's credibility determinations based upon considerations such as witness demeanor and appearance. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

A claim for interference with employee organization rights under the MMBA stems from Sections 3502, 3503, and 3506 of the MMBA, as well as PERB Regulation 32603(a) and (b) and the appellate court decision in Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797 [213 Cal.Rptr. 491] (Public Employees Association). Section 3502 of the MMBA provides, in part, that "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Section 3503 states, in part, that a "[r]ecognized employee organization shall have the right to represent their members in their employment relations with public agencies." Section 3506 provides that "[p]ublic agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Finally, PERB Regulation 32603 provides as follows:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights

> guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.
>
> (b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.
>
> (c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

The courts have extended the interference cause of action to employee organizations. (Public Employees Association, at p. 807.) The test for whether a respondent has interfered with the rights of employees or employee organizations under the MMBA does not require that an unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (Ibid.)

Under Public Employees Association, we find that Local 3 engaged in protected activity and exercised its representational rights when Gorman attempted to visit City property and meet with unit members. Additionally, we find that by denying access to Gorman, the City engaged in conduct that tends to interfere with, restrain or coerce employees in the exercise of those activities. The determinative factor is whether the City's conduct was justified by legitimate business reasons.

In finding that the City violated MMBA section 3506 by denying access to Gorman, the ALJ relied upon decisions under the Educational Employment Relations Act (EERA)[6] holding

[6]EERA is codified at Government Code section 3540, et seq.

that a policy requiring an employer's prior permission for access to non-work areas is an impermissible restriction. (See San Ramon Valley Unified School District (1982) PERB Decision No. 230 (San Ramon Valley); see also, Long Beach Unified School District (1980) PERB Decision No. 130.) The ALJ reasoned that cases decided under other collective bargaining statutes, such as EERA, might be used to interpret the MMBA. The ALJ cited the statement in Regents of the University of California, Lawrence Livermore National Laboratory (1982) PERB Decision No. 212-H, that "'the fact that a provision of general application contained in EERA or SEERA is not mirrored by a similar or identical provision in HEERA does not mean that the policy embodied by such provision is not applicable to HEERA.'" The ALJ also cited State of California (California Department of Corrections) (1980) PERB Decision No. 127-S, which held that despite the absence of an explicit statutory right of access in the Ralph C. Dills Act (Dills Act),[7] PERB has found that an identical right of access is implicit in that Act.

The City contends that the ALJ erred in applying these EERA decisions to the MMBA. The City argues that unlike the EERA, the MMBA does not contain a provision expressly guaranteeing unions access to employers' facilities, and that the MMBA specifically gives local agencies the authority to devise their own union access rules. Section 3507(a) of the MMBA allows public agencies to adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations. Section 3507(a)(6) expressly provides that such rules and regulations may include provisions for "[a]ccess of employee organization officers and representatives to work locations."

[7]The Dills Act is codified at Government Code section 3512, et seq.

To determine whether the alleged denials of access constituted unlawful interference, or more specifically, whether they were justified by legitimate business reasons, we discuss each incident where there was an alleged denial of access separately.

The April 10, 2003 Denial of Access Incident

In this incident, Local 3 alleges that the City denied Gorman access to City premises and employees when he visited the City corporation yard. Under Public Employees Association, the Board finds that the City's conduct in denying access during this incident was justified by legitimate business reasons.

The MMBA authorizes the City to adopt its own reasonable access rules. Section 3507(a)(6) specifically permits public agencies to adopt their own rules and regulations governing "[a]ccess of employee organizations officers and representatives to work locations." This provision gives the City a measure of discretion in drafting its own access policy.

Local 3 concedes that Gorman never sought to obtain the "consent of the department head" for his visit, as required by the City's access policy. The record indicates that Bettencourt's supervisor Webb was not designated as a department head and thus was not authorized to grant consent for Gorman's visit. This case contains no allegations that Gorman requested prior consent for his visit or that the City unreasonably denied such a request.

The facts in San Ramon Valley, are distinguishable from those in the present case. That decision held that it is unlawful for an employer to require prior consent for a union representative to access non-working areas, such as employee lounges. In this case, Gorman met with the supervisor in a work area, in the "shop or the office of the shop," which was an area "with tools and equipment in it," from which he was ultimately expelled. Thus, San Ramon Valley is distinguishable because Gorman was in a working area when he was ordered to leave City property. Additionally, when Webb ordered Gorman to leave the

property, the time was close to 1:00 p.m. When Gorman left at one or two minutes after 1:00 p.m., Bettencourt's lunch break had ended. Thus, the denial of access was justified by the long-standing rule that "work time is for work."

Therefore, the Board finds that there was no unlawful interference with regard to the first incident because, under the circumstances, the City's conduct was justified by legitimate business reasons.

The January 7, 2004 Denial of Access Incident

Although the January 7, 2004 denial of access incident was stated in Gorman's testimony, however, it was not alleged in the complaint.[8]

The doctrines of res judicata and collateral estoppel bar the usage of the January 7, 2004 denial of access as an independent basis for relief. Res judicata prevents re-litigation of the same cause of action previously adjudicated. The doctrine of collateral estoppel bars re-litigation of an issue where: (1) the issue is identical to one necessarily decided in a previous proceeding; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior proceeding. (State of California (Department of Industrial Relations) (1998) PERB Decision No. 1299-S; Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow) (1997) PERB Decision No. 1238; Antioch Unified School District (1986) PERB Decision No. 581.) First, applying these factors, the unfair practice charge in Case No. SA-CE-217-M and the City's exceptions in this case both concern the issue of whether the

[8]The Board may address "unalleged" violations that are raised in the hearing if the alleged violation is intimately related to the subject matter of the complaint, the conduct in question is part of the same course of conduct, the unalleged violation has been fully litigated, and the parties have had the opportunity to examine and be cross-examined. (Santa Clara Unified School District (1979) PERB Decision No. 104; Yolo County Superintendent of Schools (1990) PERB Decision No. 838.) However, the parties in this case did not brief the issue of whether this test has been met.

City unlawfully denied access to Gorman during the January 7, 2004 incident, based upon a policy requiring the consent of the department head. Second, Case No. SA-CE-217-M became final after the Board agent dismissed the charge, and Local 3 did not file an appeal. Third, Local 3 was the charging party in the prior unfair practice charge. Therefore, the doctrines of res judicata and collateral estoppel bar the use of the January 7, 2004 incident here.

As the City argued in its brief, PERB lacks jurisdiction over this access claim based upon the January 7, 2004 incident because a charging party may not attempt to amend a charge after it has been dismissed. (Marin County Law Library (2004) PERB Order No. Ad-338-M.) The January 7, 2004 incident therefore does not provide an adequate basis for an unfair practice charge alleging an access violation, due to the res judicata and collateral estoppel doctrines.

Finally, no exceptions were filed to the two other findings by the ALJ: (1) that the City's adoption of the access policy was not a unilateral modification of a term or condition of employment at the time of enactment; and (2) that the evidence did not support the remaining claim of denial of access to an employee's "criminal offender record information." As no exceptions were filed to these findings, we affirm the ALJ's decision on these issues but not the rationale. Thus, the ALJ's decision on these issues remains binding upon the parties, but shall have no precedential effect with respect to other cases. (PERB Regs. 32215 and 32300(c).)

Accordingly, the Board finds that Local 3 failed to sustain its burden of proof that the City's application of its access rule constituted an unlawful interference with employee or employee organization rights. Thus, the Board reverses the proposed decision on this issue, and dismisses the underlying unfair practice charge and complaint.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-164-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.