STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

RHODA M. LUBNAU, Charging Party, and SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-108 EERB Decision No. 36 October 28, 1977

Appearances: Rhoda M. Lubnau, representing herself.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

The charging party, an individual, filed an unfair practice charge with the Board alleging a violation of Government Code Section 3543.5(a) in that the principal and vice-principal at the school where she is employed evaluated her in an unlawful manner; that the principal unlawfully suspended her from classroom duties; that the vice-principal and the superintendent of the school district handled her grievance based on the unlawful evaluation in an unlawful manner. Because the charge did not state that any of the allegedly unlawful acts were motivated by or in any way connected with the charging party's exercise of rights protected by the Educational Employment Relations Act, the EERB hearing officer dismissed the charge for failure to state a prima facie case, but did so with leave to amend the charge "within fifteen (15) calendar days."

No amended charge was filed within the fifteen calendar days allowed by the hearing officer, or at any time. Thirty days after the charge was dismissed with leave to amend, the hearing officer dismissed the charge on the ground that no timely amendment was filed and no timely appeal of the dismissal with leave to amend was taken to the EERB itself. This notice of dismissal by the hearing officer indicated that the charging party might obtain a review of the dismissal by filing an appeal with the Board itself within ten calendar days after service of the notice of dismissal, as provided by EERB Rule 35007(b).[1]

Pursuant to EERB Rule 35007(b), charging party then filed a timely appeal with this Board. The appeal seeks reversal of the hearing officer's decision to dismiss the charge. It is argued that certain mitigating circumstances prevented charging party from filing a timely amended charge.

EERB Rule 35002(d)[2] provides:

> With the exception of the charge, upon timely application and a showing of good cause the Board may extend the required filing date.

Under that rule, except for an original unfair practice charge[3], a request for an extension of time must be filed before the required time period runs. That is the meaning of the words "timely application," as used in

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[1] 8 Cal. Admin. Code 35007(b), which provides:

> The charging party may obtain a review of the dismissal by filing an appeal to the Board itself within ten calendar days after service of notice of dismissal. The appeal shall be in writing, signed by the party or its agent and contain the facts and arguments upon which the appeal is based.

[2] 8 Cal. Admin. Code 35002(d).

[3] The EERB is without power to extend the time for filing an original unfair practice charge beyond the six-month limitation period provided by Gov. Code Sec. 3541.5(a).

EERB Rule 35002(d). Circumstances showing "good cause" for an extension of time may not be considered when the request for an extension of time is itself untimely. Here, there was no timely amended charge and no timely request for an extension of time to file an amended charge. Therefore, the hearing officer properly dismissed the charge.

ORDER

The hearing officer's dismissal of the unfair practice charge against Santa Ana Unified School District is sustained.

Reginald Alleyne, Chairman

Raymond J. Gonzales, Member, concurring in the order;

I would dismiss the charging party's appeal for reasons other than those expressed by my colleague, Chairman Alleyne. I would dismiss this appeal because the appellant failed to timely serve her appeal on the District as implicitly required by subdivision 35002(b) of the Board's regulations.[1]

[1] Cal. Admin. Code, tit. 8, Sec. 35002(b) provides:

> An unfair practice charge, an application for joinder and a petition to submit an informational brief shall be considered 'filed' by a party when actually received by the appropriate regional office. All other documents referred to in these rules and regulations shall be considered 'filed' by a party when actually received by the appropriate regional office accompanied by proof of service of the document on each party. [Emphasis added]

When the appellant submitted her appeal seeking the right to file a late amended charge, to which, incidentally, was attached the amended charge, she failed to accompany the appeal with proof of service as required by Section 35002(b). Despite the appellant's failure to comply with the regulation, she was nevertheless afforded the opportunity to subsequently submit a late proof of service. Upon submission of this proof of service, which came only after several requests by this office, it was evident the appellant had not served the District concurrently; rather, service on the District came more than two months later than the filing of the amended charge.

While I realize that my view of the Board's adopted rules and regulations relative to its procedural requirements may appear unduly harsh, I nevertheless feel it is imperative for this agency, particularly in its formative stage, to make it clear to the parties that their compliance with the rules and regulations is expected. Further, given the caseload volume which the Board must process, I do not think it is reasonable to expect the Board to take on the burden of partially preparing the parties' cases, specifically, editing their filings and then informing them as to what is necessary for a complete filing. It is the burden of the parties to see that all papers have been properly prepared.

The Board's rules and regulations speak for themselves. If they are "vague and confusing" as suggested by my colleague, Ms. Cossack, in Manteca Unified School District[2], then they should appropriately be amended. But I cannot adhere to what in effect amounts to amendment of the rules and regulations on a case-by-case basis. Either the Board intended what it

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[2]EERB Decision No. 21, August 5, 1977.

stated When it adopted the rules and regulations or it did not.

The foregoing is not to say that this agency should not be accessible to the parties regarding questions they may have concerning the Board's processes. Moreover, in the event that a party is mislead by the Board as to what is required under its rules and regulations, then equitable considerations would compel a different analysis. But the facts in this case simply do not warrant a result other than dismissal on the grounds stated above.

Raymond J. Gonzales, Member

Jerilou H. Cossack, Member, dissenting:

I dissent from the order and the respective opinions of my colleagues. Both opinions place unfounded reliance on technical interpretations of our rules and regulations to deny this individual an opportunity to have her charges considered on the merits.

On April 15, 1977, Mrs. Rhoda Lubnau filed an unfair practice charge consisting of 10 allegations of discriminatory conduct by the Santa Ana Unified School District against her.[1] On April 19, 1977, General Counsel dismissed

[1] The allegations include:

> ... the principal and vice-principal at the school where she is employed evaluated her in an unlawful manner; the principal unlawfully suspended her from classroom duties; the vice-principal and the superintendent of the school district handled her grievance based on the unlawful evaluation in an unlawful manner.

the charge with- leave to amend for failure to state a prima facie case. (Lubnau's original charge did not allege that the District's actions were in response to the exercise of any of her rights guaranteed under the Act.) On May 19, 1977, General Counsel dismissed the charge, as no amendment was received. On May 27, 1977, the EERB received Lubnau's appeal of the dismissal. It stated:

> "When I got your letter indicating I had leave to amend I gave it to a lawyer Friday April 29, 1977 to amend but he forgot to do it. I was out of town from May 1-5, 1977 due to the sudden death of ray father-in-law in Maryland. When I returned I called the lawyer and found out he was working on a large case and did not look at my material until after the time limit on the right to amend.
>
> I did not realize I had the right to appeal after the 15 days until I received your letter. So, I'm appealing now for the right to turn in an amended form and void the dismissal of my case No. LA-CE-108.
>
> I did not have the time to find another lawyer to help me or I've been busy protecting myself in various ways from the attacks of the Santa Ana Unified School District. Kindly understand my situation and that I'm just a layman."

Attached to the appeal was an amended charge alleging that the District's actions against her were motivated by her membership in and activity on behalf of the Federation of Associated and Classified Teachers, AFT Local No. 2189. Thus, the amended charge cures the defect cited by General Counsel and now states a prima facie charge. In fairness to Lubnau and the District, I believe her charge should be considered on its merits.

The majority, however, have mounted a number of formidable barriers in front of individuals seeking protection or vindication of their rights under this Act. First, the initial decision by the majority to restrict General Counsel to a neutral adjudicatory role effectively deprives individuals such as Lubnau of the needed assistance to file a proper charge. Second, my two colleagues

narrowly interpret our rules and regulations in a manner that forecloses Board consideration of an appeal of a merits except when every "i" and "t" have been meticulously dotted and crossed. In effect, my colleagues are shutting out individuals who cannot afford an attorney or a labor expert.

In the case at hand, the Chairman considers Lubnau's appeal of her dismissal as a request for a time extension to file an amended charge under Rule 35002(d)[2]. I agree that this is a correct reading of Lubnau's "appeal." However, the Chairman contends that Lubnau's request fails because it is not a "timely application." As a matter of law, he concludes that "timely application" means a request for a time extension must be made prior to the deadline from which the party is asking an extension. No where in the Act or in our rules and regulations is "timely application" so defined. Yet, the conclusion is arbitrarily adopted, Which conveniently preempts a consideration on the merits..

Rule 35002 (d) is intended to consider late appeals or late amendments when there has been a showing of "good cause." As I noted in my dissent in Manteca, EERB Decision No. 21, Rule 35002(d) gives the Board more flexibility than the courts where time limits are considered jurisdictional. The chairman's interpretation of "timely application" destroys that flexibility and the policy reasons for promulgating Rule 35002(d). In many, if not most, cases a party's "good cause" for requesting a time extension also would prevent the party from

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[2]Rule 35002(d) states:

> With the exception of the charge, upon timely application and a showing of good cause the Board may extend the required filing date.

communicating with this agency during the proper filing period. The individual may be seriously ill or out of town and, therefore, not even be notified of a dismissal and the need to respond within 15 days. As a matter of law, the Chairman would not even consider these situations because no prior request was received.

"Timely application" should be interpreted to effectuate the policy of the law which favors preserving an appeal on the merits. The Board should balance the interests of the charging party seeking the extension and the interest of the respondent who desires a final adjudication of the charges. In this case, the party requested a time extension to file an amended charge during the proper time period for an appeal. The amended charge was submitted less than one month after the due date. Thus, the case was still before the Board. In view of the seriousness of the charges and the little or no harm to the District to grant this extension, I would consider the request timely filed. I also consider Lubnau's reasons for a time extension to be "good cause." She claims that a death in her family and an attorney's delay in working on her case prevented a timely amendment.[3]

Board Member Gonzales relies on a different technicality to prevent a review on the merits. He claims Lubnau's request for a time extension was untimely because the District was not served at the same time Lubnau made her request. Our rules and regulations do not warrant this result.

I noted in ~~Manteca~~ that arguably the District is not a party to the unfair practice until served with the charge by General Counsel. Therefore, the individual charging party has no obligation under our rules to serve an appeal

[3]Although she claims she gave her case to an attorney, Lubnau continues to represent herself before the Board.

of a dismissal of a charge or a request to file a late amended charge. Little or no purpose exists for serving the District with a time extension to file an amended charge if the District has no knowledge of the original charge. In the case at hand, General Counsel did not serve the charge, nor the dismissal of the charge with leave to amend, nor the final dismissal. The District has not been a party to this case. Despite these facts and that Lubnau did indeed serve the District with her request for a time extension,[4] Mr. Gonzales reads our rules to preclude Lubnau from having her allegations considered by this Board.

As a proviso to his strict interpretation of our rules and regulations, Mr. Gonzales states, "[I]n the event that a party is misled by the Board as to what is required under its rules and regulations, then equitable considerations would compel a different analysis." He concludes, however, that no such situation exists in this case. Mr. Gonzales does not even mention that on August 17, 1977, the Executive Assistant to the Board wrote Lubnau, stating:

> "According to Board policy and rules, a copy of an appeal to the Dismissal of an Unfair Practice Charge must be served on the other party to the case.
>
> No proof of service was attached to the appeal you filed in the above-captioned case. On August 3, 1977, this office contacted you requesting said proof of service, but we have not yet received it.
>
> If you will furnish a copy of the proof of service to this office, this case can be submitted to the Board for consideration. It cannot be taken into consideration until the proof of service is received."

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[4]On August 23, 1977, the Board received proof of service on the District and a typed copy of Lubnau's request for a time extension. Thus, she did accompany her request with proof of service.

Lubnau then served the District, pursuant to the Board's request. I believe the Board indicated that if Lubnau served her request for a time extension, she would have her request considered on its merits. By not considering her request, the Board indeed has misled her.

The legislature, in enacting the Educational Employment Relations Act, took into account the need to protect individuals and to allow these individuals access to our Board to protect their rights. Government Code Section 3543 grants public school employees the right to join or participate in the activities of employee organizations of their own choosing. Government Code Section 3543.5(a) protects this right by making it unlawful for a public school employer to discriminate against, interfere with, restrain or coerce employees because of their exercise of this right. The majority's decision today is another blocking individuals alleging a violation of their right and seeking protection from this Board.

Jerilou H. Cossack, Member