STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

San Dieguito Faculty Association Charging Party, v. San Dieguito Union High School District, Respondent.	)	Case No. LA-CE-479 PERB Decision No. 194 February 25, 1982

Appearances: Raymond L. Hansen and Charles R. Gustafson, Attorneys for San Dieguito Faculty Association.

Before Tovar, Jaeger and Moore, Members.

DECISION

The San Dieguito Faculty Association (hereafter Association or Charging Party) excepts to the hearing officer's dismissal of an unfair practice charge filed against the San Dieguito Union High School District (hereafter District). The hearing officer concluded that the charges were untimely filed, pursuant to section 3541.5 of the Educational Employment Relations Act (hereafter EERA), and he therefore dismissed the charges without leave to amend.1

1The EERA is codified at sections 3540 et seq. of the Government Code. Unless otherwise indicated, all citations are to the Government Code.

Based on an examination of the entire record, and in light of the exceptions filed, the hearing officer's proposed dismissal of the charges is affirmed, for the reasons discussed below.

FACTS

As stated by the hearing officer, the relevant facts are as follows:

The Association originally filed an unfair practice charge on May 23, 1979, alleging conduct in violation of subsections 3543.5(a), (b), and (c).[2] In summary the charges alleged:

1. During the 1977-78 school year the District unilaterally changed the terms and conditions of employment of certificated employees which had been established by past practice and incorporated into the 1977-80 negotiated contract. The unilateral change required employees to remain

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[2]Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

on campus during their preparation period unless given permission to leave campus or unless they utilized a sign-out sheet.

2. The Association had filed certain grievances in October and November 1977, pursuant to the grievance procedure in the contract which concluded with advisory arbitration. The grievance resulted in an advisory arbitration award, issued on May 22, 1978, which was favorable to Charging Party and which was denied in pertinent part by the District on June 22, 1978.

3. On September 28, 1978, the Association filed an additional grievance over the identical issue which was rejected by the District on October 26, 1978.

4. On January 8, 1979, The Association filed an action in the San Diego Superior Court seeking enforcement of the contract provision allegedly violated by the District. The Court on March 23, 1979 denied the petition on grounds raised by the District that the Charging Party had not exhausted its administrative remedy before the Public Employment Relations Board (hereafter PERB or Board).

In addition to specifically alleging a violation of the collective negotiating contract, the Association apparently alleges that the act of the District in unilaterally changing the contract violates subsections 3543.5(a) and (c), and that the refusal to abide by the arbitrator's decision and to process the grievance violates subsections 3543.5(a) and (b).

Following an informal conference, an amended charge was filed on July 25, 1979, alleging that the original charge was timely filed because the District's change in working conditions is a "continuing violation" each day the teachers are required to use sign-out sheets to leave campus during preparation periods.

The District filed an answer and motion to dismiss and later a supplemental motion to dismiss contending that the charge was barred by the statute of limitations.

DISCUSSION

Initially, we note that the charges allege conduct which could be a breach of the contract between the District and the Association. Subsection 3541.5(b) provides in pertinent part that the PERB

> shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice . . .

It is not necessary to determine whether the alleged charge would constitute an unfair practice independent of the alleged contract violation since the case is disposed of on other grounds.

The dismissal turns on the interpretation to be given to the limitations period on the filing of unfair practice charges contained in EERA subsection 3541.5(a). This subsection provides in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) . . . The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Because the Association's initial charge was filed on May 23, 1979, the statutory limitation period would have extended from that date to November 24, 1978. Because the unilateral action complained of by the Association was taken in the fall of 1977, the charge filed in May 1979 appears on its face to be untimely.

However, the charge may still be considered to be timely filed if the alleged violation is a continuing one, if the violation has been revived by subsequent unlawful conduct within the six-month period, or if the limitation period was tolled while the Association was diligently and reasonably pursuing alternative procedures for obtaining relief and other alternative remedies.

The Association contends that the District's implementation of its sign-out policy in 1977 created a continuing violation; there was a new violation each time a teacher was required to sign out. The Association asserts that, because the sign-out

policy continued in effect in 1979, the charge would not be barred by the six-month limitation period.

In deciding whether the alleged violation may be regarded as a continuing one, this Board may be guided by federal labor law decisions which interpret provisons of the National Labor Relations Act (hereafter NLRA) which are similar to provisions of the EERA. (Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.)

Section 10(b) of the NLRA provides for a six-month limitation period on the filing of unfair practice charges, and it is therefore appropriate to look to National Labor Relations Board (hereafter NLRB) cases for guidance in deciding whether an alleged EERA violation is a continuing one for section 3541.5 purposes.3

3Section 10(b) of the NLRA provides in pertinent part:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

The inquiry in these cases tends to focus on the employer's duty to bargain. As we have held in previous cases, a unilateral change regarding a negotiable matter is a violation of EERA subsection 3543.5(c) because it is a breach of the employer's obligation to negotiate in good faith with the exclusive representative. (See Pajaro Valley, supra; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) It is well established that the employer's duty to negotiate with the exclusive representative is ongoing, continuing throughout the collective negotiating relationship. The question presented here, however, is whether conduct violative of negotiating obligations retains its unlawful character as long as the employer's duty to negotiate continues, or whether other related conduct, such as reimplementation or subsequent refusals to negotiate, is necessary to revive the viability of the unfair practice.

The NLRB and federal courts have considered a variety of circumstances in determining whether the conduct was continuing for NLRA section 10(b) purposes.

> service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . .

In Local Lodge 1424, International Association of Machinists v. NLRB (1960) 362 US 411 [45 LRRM 3212], the Court held that conduct which gives rise to an unfair labor practice does not, by virtue of its continued enforcement within the period of limitations, constitute a continuing violation under the NLRA. In that particular case, the complaint involved an invalid recognition of a representative and a negotiated union security clause. The Court ruled that the clause was tainted solely by the original unlawful execution of the collective bargaining agreement and the enforcement of the otherwise valid clause was not in itself a violation of the NLRA.

The NLRB has also found that a unilateral change involving the employer's allocation of overtime did not constitute a continuing violation. Continental Oil Co. (1971) 194 NLRB 126 [78 LRRM 1626]. Involved was an application of the employer's method of allocating overtime which was not in conformity with the collective bargaining agreement. In a footnote, the NLRB commented that it could not be seriously suggested that the employer was required to bargain with the union each time it assigned overtime work.

The Association cites several cases in which an employer's unilateral change in the terms and conditions of employment was found to result in a continuing violation. The obligation to bargain collectively with the union was a continuing one, for example, where there were repeated refusals to bargain which

constituted independent violations.4 Similarly, in Beer Distributors (1972) 196 NLRB 165 [8 LRRM 1235] the NLRB has found monthly withholding of union dues from the union to be a continuing violation, since the failure of the employer to transmit the dues to the union was repeated each month upon receiving the union's request for the dues.

This is consistent with the finding that discriminatory refusals to hire are continuing acts. Each discriminatory act of refusing to hire is treated as a new and separate violation.5 In contrast, however, the NLRB has held that where an employer has refused to rehire a discriminatorily discharged employee, the failure to rehire was not regarded as continuing, and the section 10(b) statute of limitations was held to apply.

We find that the present case most closely resembles the line of cases in which the violation was not found to be a continuing one. In Continental Oil Co., supra, which involved the unilateral implementation of an overtime policy, the

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4NLRB v. White Construction & Engineering Co. (5th Cir. 1963) 204 F.2d 950 [32 LRRM 2198]; NLRB v. Basic Wire Products, Inc. (6th Cir. 1975) 516 F.2d 261 [89 LRRM 2257]; NLRB v. Strong (9th Cir. 1967) 386 F.2d 929 [65 LRRM 3012]; NLRB v. Louisiana Bunkers (5th Cir. 1969) 409 F.2d 1295 [70 LRRM 3363].

5NLRB v. Textile Machine Works, Inc. (3rd Cir. 1954) 214 F.2d 929 [34 LRRM 2535]; NLRB v. Carpenters Union (10th Cir. 1956) 232 F.2d 454 [37 LRRM 2712]; cert. denied 352 U.S. 839, 1 L.Ed.2d 56, 77 S.Ct. 60.

employer adopted its interpretation of the overtime policy in late 1964 or early 1965. (It was also announced in writing in April 1966 and again in June 1967.) The charge was filed on May 19, 1969. The NLRB specifically rejected the general counsel's contention that the continued application of the overtime policy removed the complaint from the six-month bar. It implied that a change in the overtime policy would have resulted in renewed unlawful conduct, but that during the six-month period, no change was alleged or proven. Similarly, in the case before us, no new changes in the sign-out policy were alleged during the six-month period preceding the charge.

We also do not find that, assuming the District's fall 1977 policy change was unlawful, any subsequent District conduct revived its unlawful character so as to bring it within the limitation period. It may be argued that, in the face of the employer's unilateral implementation of the sign-out policy, any subsequent employer refusal to negotiate prompted by an employee organization protest revives the employer's unlawful conduct. We conclude, however, that, even if the second grievance is seen as reviving the charge, the charge is untimely filed. The second grievance, which was not processed, was filed in September, 1978, also outside of the six-month period preceding the filing of the charge.

Finally, the Association urges that its charges were timely filed because the limitation period was tolled until the effort

to enforce the arbitrator's advisory award in Superior Court was completed in March 1979, only two months prior to the filing of the charge.

The statute of limitations period does not invariably run without interruption and terminate at the end of six months. The concept of "tolling" has been developed to suspend running of the statute. As a consequence, the aggrieved party is protected from the forfeiture of rights which would otherwise result from a strict application of the statute. Application of this concept to the facts of this case depends on whether either the statutory tolling provision contained in the EERA or the Board's general equity power is broad enough to render the Association's charge timely filed.

Subsection 3541.5(a)(2) is the statutory provision which provides in appropriate circumstances for tolling of the limitation period.[6] However, according to its terms, only

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[6]In full, subsection 3541.5(a)(2) states:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
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> . . . . . .
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> (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or

where a collectively negotiated agreement provides for binding arbitration will the statute of limitations be tolled during the efforts of the parties to resolve their differences through the grievance machinery.

The contract between the District and Association in this case provides merely for advisory arbitration. As a consequence, the period is not statutorily tolled during the time the Association sought relief through the grievance machinery.

The California courts have enunciated an equitable tolling doctrine. Elkins v. Derby (1974) 12 C.3d 410 [115 Cal.Rptr. 641]; Myers v. County of Orange (1970) 6 Cal.App.3d 626 [86 Cal.Rptr. 198]. PERB adopted this doctrine in State of California, Department of Water Resources; State of California, Department of Developmental Services (12/29/81) PERB Order No. Ad-122-S. Two criteria must be met. First, it is necessary that tolling in the particular instance not frustrate

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> binding arbitration. . . . If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery. (Emphasis added.)

achievement of the purpose underlying the statute of limitations:

> That purpose . . . is to [prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. (cases cited) Elkins v. Derby, supra, 12 C.3d at p. 417.

Second, if the notification purpose described in the quotation above is met, the responding party thereby not being prejudiced,

> [t]he running of the limitations period is tolled "[w]hen an injured person has several legal remedies and reasonably and in good faith, pursues one." Myers v. County of Orange (1970) 6 Cal.App.626, 634 [86 Cal.Rptr. 198]. . . (and other cases cited) Elkins v. Derby, supra, 12 C.3d at p. 414.

The notification purpose was met when the Association, in the fall of 1977, filed its first grievance concerning the District's alleged modification of the contract's preparation period policy: the District was thereby apprised within six months of the Association's claim. The Board, applying the equitable tolling doctrine, therefore could toll the limitations period during the Association's first effort to resolve the dispute through the grievance route. The limitations period, as a consequence, would not run until after it became clear that the possibility of a remedy via such an avenue was foreclosed. Here, the route proved unsuccessful on June 22, 1978 when the District's school board refused to accept the arbitrator's advisory award. The Association, however, failed to file its unfair practice charge with the

PERB within six months from that date. PERB did not receive the charge until May 23, 1979.

Nor did measures undertaken by the Association subsequent to its filing of the first grievance satisfy the second criterion. There is nothing in the record to justify, as reasonable and in good faith, the Association's filing of an identical grievance the following year. It was filed in September 1978, three months after the District rejected the first. Similarly, there is nothing in the record to justify a conclusion that the Association's court action, first pursued on January 8, 1979, represented a reasonable and good faith pursuit of an alternate remedy. Also, there is no explanation for the long period of time in which the Association sat on its rights before pursuing the judicial avenue of recovery and finally filed an unfair practice charge with the Board.[7] Before this Board is willing to relieve a charging party from the effects of the statute of limitation, there should be indication in the record that the alternative chosen represented a practical effort to resolve this dispute expeditiously.

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[7]In Myers, the court indicated its willingness to toll the statute of limitations during a court action, including time consumed in an appeal, if it is integral to a reasonable and good faith pursuit of an alternate remedy. Myers v. County of Orange, supra, 6 Cal.App.3d at p. 634.

Finally, we address the issue of whether the District should be estopped from asserting the EERA statute of limitations as a defense since the District had contended in Superior Court that the Association's complaint should have been before PERB. The equitable doctrine of estoppel has been applied to deprive a defendant of the statute of limitations defense because of his own objectionable conduct. However, estoppel is applied in situations where the claimant has relied, to his/her detriment, on the representations or conduct of the other party. Wood v. Blaney (1895) 107 Cal. 291; Carruth v. Fritch (1950) 36 Cal.2d 426, 433; Lerner v. Los Angeles City Board (1963) 59 Cal.2d 382, 396. (See generally Witkin, Summary of California Law, Equity p. 5351 and Witkin, California Procedure 2d, p. 1226-1227.)

In the present case, the Association has not alleged that it relied upon the position which the District made to the Superior Court, or indeed that the District made any representation at all to the Association. The District's legal arguments were addressed to the Superior Court. As such, these arguments were intended to persuade the Court to decide favorably to the District rather than to influence the Association's actions. It was the Court, not the District, which ruled that the complaint was not properly before it; the District's role in the matter was to advocate a legal argument before the Court. Under these circumstances, we do not find it

would be appropriate to prevent the District from raising section 3541.5 as a defense to the charges.

ORDER

Based upon the foregoing discussion, conclusions of law and the entire record in this matter, the charges filed by the San Dieguito Faculty Association against the San Dieguito Union High School District are hereby DISMISSED.

By: Irene Tovar, Member

John J. Jaeger, Member

Barbara D. Moore, Member