STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS VICTOR VALLEY CHAPTER NO. 243, Charging Party, v. VICTOR VALLEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-1310 PERB Decision No. 273 December 29, 1982

Appearances; E. Luis Saenz, Attorney for California School Employees Association and its Victor Valley Chapter No. 243; Brian M. Libow, Attorney (Atkinson, Andelson, Loya, Ruud & Romo) for Victor Valley Joint Union High School District.

Before Jaeger, Morgenstern and Jensen, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by California School Employees Association and its Victor Valley Chapter No. 243 (CSEA or Association) of a hearing officer's dismissal of an unfair practice charge filed under the Educational Employment Relations Act (EERA or Act)1. The Association alleged a violation of subsections 3543.5 (b) and

[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

(c)2 of the Act. It charged that the Victor Valley Joint Union High School District (District) unilaterally changed working conditions within the scope of representation without meeting and negotiating with the exclusive representative. The hearing officer dismissed the charge without a hearing, deciding that it was not timely filed under the Act. He found that a grievance procedure which had not been negotiated between the parties did not toll the statute. We reverse the hearing officer's decision and remand the charge for a hearing on the merits.

PROCEDURAL HISTORY

On February 26, 1980, the District adopted a resolution reducing the hours of certain cafeteria service employees to become effective June 30, 1980. Alice Adams' hours were reduced from 6 to 4 per day. On June 12, 1980, Adams filed a grievance with the District. The nature of the grievance was

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2subsections 3543.5(b) and (c) provide:

> It shall be unlawful for a public school employer to:
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> . . . . . .
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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.
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> . . . . . .

that the reduction in hours was in violation of the layoff provisions of the District's personnel commission rules and regulations concerning seniority and bumping rights.

The grievance procedure was created by the District and was not a part of the contract between the parties. The procedure provided for the parties to select a referee to make a determination on the grievance if it could not be settled at a lower level. The referee's decision can be appealed to the District's personnel commission. On November 12, 1980, a hearing was conducted by the referee who subsequently found in favor of the District. Adams appealed the decision and, on December 3, 1980, the personnel commission upheld the District's decision to reduce Adams' hours.

CSEA participated at all steps of the grievance resolution procedure.

On February 10, 1981, CSEA filed an unfair practice charge, alleging a unilateral change of a subject within the scope of representation without affording the exclusive representative an opportunity to negotiate, charging a violation of subsections 3543.5(b) and (c) of the Act.

The District answered the charge and subsequently filed a Motion to Dismiss, based upon the failure of the Association to file the charge within the six-month statute of limitations set

forth in subsection 3541.5(a).[3] The hearing officer found in favor of the District and dismissed the charge without leave to amend on October 7, 1981. The Association filed this appeal.

3Subsection 3541.5(a) provides:

> 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) 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 binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. 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 procedure.

DISCUSSION

The issue raised is whether the statute of limitations was tolled while Adams and the Association pursued a resolution of the dispute through the District's grievance procedure. We hold that it was.

In State of California, Department of Water Resources et al. (12/29/81) PERB Order No. Ad. 122-S, the Board considered whether an appeal to the State Personnel Board, as a non-negotiated grievance procedure, tolled the statute of limitations as set forth in subsection 3514.5(a) of the State Employer-Employee Relations Act (SEERA). The Board found that, based upon the equitable tolling principles applied by the Supreme Court in Elkins v. Derby (1974) 12 Cal.3d 410 [115 Cal.Rptr. 641], a non-negotiated grievance procedure could toll the statute of limitations. A determination would be made on a case by case basis as to the applicability of the equitable tolling principle. The key issue is whether the defendant would be surprised or prejudiced by the tolling. The statute of limitation language under EERA is exactly parallel to the language in SEERA (see footnote 3), and the analysis of legal principles in Department of Water Resources, supra, applies as well to cases arising under EERA. We, therefore, adopt the same standard for equitable tolling in the present case.

The District cannot argue that it would be surprised or prejudiced by the tolling. The grievance and the unfair

practice charge arose from the same circumstance, the reduction in hours and wages of certain cafeteria employees. The issue was whether the District had followed its own guidelines concerning seniority and bumping rights. The evidence requirements for the defense of the grievance and unfair practice charge, while not identical, are similar. The filing of the grievance would put the District on notice of the dispute. It would have sufficient time to review its contractual obligations and is in a unique position to have access to information concerning its course of bargaining. The District's ability, therefore, to defend itself against the unfair practice charge would not be prejudiced.

The District's argument that the Association should have filed with the Board during the appeal process to the District's personnel commission has no merit. The same policy expressed in Department of Water Resources, supra, concerning the purpose of SEERA applies here. The purpose of the EERA as set forth in section 3540[4] encourages "the resolution of

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[4]Section 3540 provides in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and

employer-employee disputes through internal processes . . . ." Department of Water Resources, supra. The requirement that the Association or grievant must file with the Board during the grievance process to protect its right to Board procedures would discourage bilateral dispute resolution and encourage unnecessary litigation.

The District also argued that the grievance filed by one party, Adams, should not toll the statute of limitations allowing an unfair practice charge filed by another party. This contention has no merit. The exclusive representative is the aggrieved party in relation to the refusal to bargain charge and, therefore, an appropriate party to raise the unfair practice charge.

ORDER

Based upon the foregoing findings of fact and conclusions of law, we reverse the hearing officer and ORDER the case remanded to the Chief Administrative Law Judge for a hearing on the merits.

Members Jaeger and Jensen joined in this Decision.

> employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. . . .

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OP CALIFORNIA

C.S.E.A. AND ITS VICTOR VALLEY CHAPTER NO. 283, Charging Party, v. VICTOR VALLEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-1310 NOTICE OF DISMISSAL OF CHARGE WITHOUT LEAVE TO AMEND AND WITHDRAWAL OF COMPLAINT (10/7/31)

NOTICE IS HEREBY GIVEN that the above-captioned unfair practice charge is dismissed without leave to amend and the complaint previously issued pursuant thereto is withdrawn. The dismissal and withdrawal are based on the following grounds:

The unfair practice charge is based upon alleged actions of the Respondent which occurred beyond the six month statute of limitations set forth in the Educational Employment Relations Act (hereafter EERA)[1], see Government Code section 3541.5(a)(1).[2]

PROCEDURAL HISTORY

The California School Employees Association and its Victor Valley Chapter No. 283 (hereafter Charging Party) filed an unfair practice charge on February 10, 1981 alleging a

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[1] See Government Code section 3540 et seq.

[2] All statutory references are to the Government Code unless otherwise specified.

violation of section 3543.5(b) and (c). The first charge alleged that the Victor Valley Joint Union High School District (hereafter Respondent or District) failed to notify the chapter that a reduction of hours and salaries would take place on September 4, 1980 for specified employees and therefore the Charging Party was denied its opportunity to begin negotiations prior to the adoption of the reduction resolution.

On February 26, 1980, District Resolution 80-3 (which directed such reductions) was adopted to become effective June 30, 1980.

The second charge alleges that the District announced in advance that a unilateral action would be taken by reducing hours and salaries on February 26, 1980 and that such unilateral action constitutes a refusal to meet and negotiate in good faith with the exclusive representative.

The Charging Party additionally alleges that the grievants et. al. have been using the organizational appeal system since June 12, 1980 with a final decision rendered on or about December 3, 1980.

On March 11, 1981, the Respondent answered the charge with a general denial although the District did admit it announced in advance that it contemplated reducing the hours of certain classified employees. In addition, the District, in its answer, set forth four affirmative defenses as follows:

(1) Charging Party has failed to allege facts which constitute an unfair practice;

(2) Charging Party has waived its right to assert the commission of an unfair practice;

(3) Charging Party is estopped to assert commission of an unfair practice;

(4) Controlling facts upon which Charging Party bases its claim of unfair practice occurred in excess of six (6) months prior to the unfair practice charge filed herein.

On April 17, 1981, a Complaint and Notice of Hearing was issued.

On May 1, 1981, the District filed a Motion to Dismiss Unfair Practice Charge. On June 12, 1981, the Charging Party filed a brief in opposition to such motion.

This dismissal and withdrawal are in response to Respondent's motion.

FACTS

On February 26, 1980, the District's governing board adopted a resolution reducing the hours of certain cafeteria services effective June 30, 1980. Alice Adams was one of the two affected employees. She filed a written complaint pursuant to the District's personnel commission rules and regulations requesting a formal administrative review of the governing board's decision. As a part of that procedure, she requested and received a hearing before a mutually agreed upon hearing

officer. The hearing officer rendered written findings, conclusions and recommendations to the parties. The hearing officer's recommendations were appealed to the Board of Trustees. The Board is empowered to review all records and/or conduct its own investigation and render a decision. The decision of the Board of Trustees on an appeal is final and conclusive.

The District's Board of Trustees' Personnel Commission rendered its decision rejecting Alice Adams appeal on December 3, 1980.

On February 10, 1981, the instant unfair practice charge was filed.

This grievance/appeal procedure was created unilaterally by the District and was not the result of the meet and negotiate process; nor was it made a part of the contract between the parties.

DISCUSSION

Respondent bases its motion to dismiss on the contention that the complained of acts occurred more than six months prior to the date the unfair practice charge was filed. The subject resolution was enacted February 26, 1980 to be effective June 30, 1980.

The Charging Party contends that the six-month statute was tolled during the time the District's Personnel Commission's Merit System Administrative Appeal Process was processing the

grievance filed by individual District employee. The grievance was filed on June 12, 1980. The Commission issued its decision on December 3, 1980 denying the requested relief.

The Charging Party relies heavily on California Department of Water Resources (1980) 4 PERC 11177 and the rationale and cases cited therein. In that case, a Public Employment Relations Board (hereafter PERB) hearing officer faced a similar set of circumstances (although this case arose under the State Employer-Employee Relations Act, the parallel section 3514.5(a), is identical to 3541.5(a)) and set forth the following legal analysis:

> The DWR's motion to dismiss was partially based on failure to file the charge within the six-month limitation period. In response, Charging Party cites California precedent including Myers v. County of Orange (1970) 6 Cal.App.3d 626 and Elkins v. Derby (1974) 12 Cal.3d 410. These cases indicate that the statute of limitations will be tolled where there are alternative remedies if the defendant will not be prejudiced and specifically reject the rule that a statute of limitations is tolled only where the administrative remedy must be exhausted prior to filing or a legal action. Under Elkins, prejudice will not occur if it is shown that defendant could not reasonably claim surprise. Here, there is no claim to surprise or prejudice by DWR. Nor is it asserted that Armistead failed to act in good faith in pursuing his remedy before the State Personnel Board.
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> The judicial policy underlying the decisions which toll statutes of limitations during the pendency of interrelated administrative proceedings in cases where the latter may be dispositive of an essential element of a

> legal cause of action is founded on the need for harmony and the avoidance of chaos in the administration of justice. It avoids a multiplicity of actions in cases having common elements of law or fact or both. It does not pressure litigants concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue. It relieves litigants of the pressure to outrace each other in seeking an adjudication of one or the other of the legal proceedings in a forum where he may believe he has a greater chance of prevailing. The orderly administration of justice is best served by tolling the statute of limitations on independent actions at law until the final determination of the interrelated administrative proceeding. (Olson v. Sacramento (1974) 38 Cal.App.3d 958~~, 965~~ [113~~ Cal.Rptr~~. 664].)

Based on this California precedent, the hearing officer found that the charging party's pursuit of a parallel remedy before the State Personnel Board tolled the six-month statute of limitation contained in Government Code section 3514.5. DWR's motion to dismiss on that basis was denied.

The Respondent District, however, relies heavily on the Washington Unified School District (1980) 4 PERC 11108 case. In that case, another PERB hearing officer faced the same set of circumstances and set forth the following legal analysis:

> The six-month limitation in section 3541.5 is similar to and apparently modeled after section 10(b) [29 U.S.C. section 160(b)] of the National Labor Relations Act which establishes a six-month limitation for complaints issued by the general counsel. The provision of section 3541.5 which requires certain charges to be deferred to the contract grievance machinery apparently is a California codification of federal case

law. See generally, Spielberg Mfg. Co. (1955) 112 NLRB 1080 T36 LRRM 1152] and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].

A careful reading of section 3541.5 shows that its several parts operate together. The section first establishes a six-month time limitation to prevent the prosecution of stale claims. Next, the section requires that the grievance machinery of the contract be used prior to the processes of the PERB to resolve any dispute about conduct prohibited both by the contract and the EERA. Finally, the section provides that the six-month time limitation shall not run while a complaining party is exhausting the contractual grievance machinery.

The portion of section 3541.5 which provides for tolling the statute of limitations pertains to 'the time it took the charging party to exhaust the grievance machinery.' Although the words 'of the agreement' are not used in the clause which relates to tolling, it is apparent that the tolling protection exists only while the parties are attempting to exhaust contract grievance machinery. There is no requirement that unfair practice charges be deferred to any grievance processes except those which exist under an agreement between the parties. Accordingly, there is no reason to toll the statute of limitations for the use of any grievance machinery outside of the contract. The tolling provision is designed to protect the rights of aggrieved parties who are precluded from bringing an unfair practice charge until they have first exhausted the internal remedies of their contract.

In the present case, the collective agreement did not include a grievance procedure. The grievance procedure used was one created by the District. The procedure was called a Personnel Commission Administrative Appeal Procedure. Thus, if

C.S.E.A. believed that the District's conduct amounted to an unfair practice, it was not precluded by any existing collective agreement from filing a charge immediately. C.S.E.A. elected to use the District's Administrative Appeal procedures, but it was not required to do so by either section 3541.5 or the collective agreement. Because there was no bar to the immediate filing of an unfair practice charge, there was no justification for the tolling of the time limitation. Generally, tolling provisions exist only to protect the legal rights of a person who cannot bring an action either because of legal impairment or other justifiable cause.

In both Elkins, supra, and Myers, supra, there were no legislative directives as to what circumstances would warrant tolling. The decisions in these two cases manifest a judicial attempt to mitigate the harshness of the statute of limitations by satisfying what the courts believed was the reason for the limitation. In the present case, we have legislative direction, section 3541.5(a), as to the specific circumstances under which the six-month statute of limitations can be tolled. The statutory language is explicit. The facts of this case do not present a situation in which there is statutory authority to toll the six-month statute of limitations. There was no "grievance machinery of the agreement" covering "the matter at issue" during the period of time at issue and therefore there is no legislative justification for tolling.

The Charging Party failed to follow the legislative mandate of section 3541.5 at its peril.

There is an additional issue regarding the fact that the party to the grievance/appeal procedure was the individual employee and the Charging Party in this unfair practice charge is the exclusive representative. There is a serious question of whether a charging party can claim that a statute was tolled as a result of an action to which it was not a party. However, due to the above ruling, this question need not be addressed at this time.

CONCLUSION

For the above-cited reasons it is found that unfair practice charge LA-CE-1310 is dismissed for failure to be filed within the period of time prescribed by section 3541.5(a).

ORDER

Charging Party's unfair practice charge is hereby dismissed without leave to amend and the complaint previously issued pursuant thereto is withdrawn. Charging Party may obtain review of this dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (PERB Regulation 32630 (b)). Such appeal must be actually received by the executive assistant to the Board before the close of business (5:00 p.m.) on October 20, 1981 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, must be signed by the Charging Party

or its agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32630(d).) The appeal must be accompanied by proof of service upon all parties. California Administrative Code, title 8, part III, sections 32135, 32142 and 32630(b) as amended.

DATED: October 7, 1981

Hearing Officer