STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY FEDERATION OF TEACHERS, LOCAL 2357, CFT/AFT, AFL-CIO,	)	
Charging Party,	)	Case No. LA-CE-1478
v.	)	PERB Decision No. 350
POWAY UNIFIED SCHOOL DISTRICT,	)	October 12, 1983
Respondent.	)	

Appearances: James M. Gattey, Attorney for Poway Federation of Teachers, Local 2357, CFT/AFT, AFL-CIO; Clifford D. Weiler, Attorney (Brown and Conradi) for Poway Unified School District.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Poway Federation of Teachers, Local 2357, CFT/AFT, AFL-CIO (PFT or Federation) to the hearing officer's proposed decision finding that the Federation's unfair practice charge against the Poway Unified School District (District) was untimely filed in light of subsection 3541.5(a) of the Educational Employment Relations Act (EERA).[1]

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

Subsection 3541.5(a) provides:

> (a) Any employee, employee organization, or employer shall have the right to file an

Specifically, the hearing officer found that PFT's efforts to resolve a dispute concerning sick leave through the contractual grievance procedure did not toll the statutory time limits because it did not culminate in binding arbitration. He also found that the equitable tolling doctrine could not be invoked to toll the statute because the informal grievance discussions were aimed solely at the District's failure to

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> 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 machinery.

provide adequate notice of the change. Finding that the issue in the instant unfair practice charge concerned the underlying unilateral policy change itself, he concluded that PFT's settlement efforts to resolve the notice issue should not toll the statute of limitations regarding the charge.

In the instant case, PFT argues that subsection 3541.5(a)(2) should be read to toll the time limitation when a party seeks to utilize any grievance procedure, whether or not it culminates in binding arbitration. It also contests the factual conclusion that the subject matter of the grievance for which the District agreed to waive time limits was the lack of sufficient notification of the policy change rather than a dispute centered on the unilateral sick leave policy change itself. PFT argues that, with this factual error corrected, the statute of limitations should have been tolled from July 1981, when the District agreed to waive the grievance time limits, until September 1981, when PFT determined that it would pursue the matter as an unfair practice charge rather than as a grievance.

FACTS

The Board has carefully reviewed the factual record and finds that the hearing officer's findings of fact, as set forth in his proposed decision attached hereto, are free of prejudicial error. We thus adopt them as the findings of the Board itself.

DISCUSSION

In San Dieguito Union High School District (2/25/82) PERB Decision No. 194, the Board concluded that EERA's statutory tolling provision only applies where a collectively negotiated agreement provides for binding arbitration. Noting that the parties' contractual grievance procedure culminates with an appeal to the District board of education rather than with binding arbitration, the hearing officer correctly concluded that any efforts PFT undertook through the grievance procedure did not toll the statutory time limits.

The hearing officer's rejection of PFT's equitable tolling argument was likewise appropriate.[2]

The hearing officer's analysis rests on a bifurcation of issues and his finding that the grievance was limited to the

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[2]Borrowed from the decisions of the California courts (Elkins v. Derby (1974) 12 C.3d 410; Meyers v. County of Orange (1970) 6 Cal.App.3d 626), the equitable tolling doctrine tolls the statute of limitations where a party having two alternative methods of relief available for a single injury pursues one in good faith. The doctrine requires the satisfaction of two conditions. First, tolling must not frustrate the purpose of statutory limitation provisions which is to prevent surprises through the revival of old claims where evidence has been lost, memories faded and witnesses disappeared. The second requirement is that the tolling period reflect the time during which the injured party reasonably and in good faith pursued a legal remedy.

See State of California, Department of Water Resources and Department of Developmental Services (12/29/81) PERB Order No. Ad-122-S; State of California (Department of Health Services) (12/22/82) PERB Decision No. 269-S; and Victor Valley Joint Union High School District (12/29/82) PERB Decision No. 273.

inadequate notice issue. This conclusion is amply supported by the evidentiary record. Indeed, the agreement between Charles Ward, assistant superintendent of the District, and Donald Raczka, president of PFT, to waive the grievance time limits was reached for the purpose of providing Ward with the time to contact the school principals and to inquire as to the notice provided. Since this confined the District's evidentiary inquiry to the notice issue, we can reasonably conclude that the District would have been unfairly surprised by PFT's subsequent complaint that the District had failed to provide PFT with an opportunity to discuss the sick leave policy prior to unilaterally altering it.

ORDER

Based on the foregoing discussion, conclusions of law and the entire record in this matter, the unfair practice charge filed by the Poway Federation of Teachers against the Poway Unified School District is hereby DISMISSED.

Members Jaeger and Burt joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY FEDERATION OF TEACHERS, LOCAL 2357, CFT/AFT, AFL-CIO, Charging Party, v. POWAY UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1478 PROPOSED DECISION (11/8/82)

Appearances: Clifford D. Weiler (Brown and Conradi) for Poway Unified School District, and James M. Gattey for Poway Federation of Teachers, Local 2357, CFT/AFT, AFL-CIO.

Before: James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On November 16, 1981 the Poway Federation of Teachers, Local 2357, CFT/AFT, AFL-CIO (hereafter charging party or Federation) filed this unfair practice charge against the Poway Unified School District (hereafter District). The charge alleged violations of sections 3543.5(b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act).1

1The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified. Sections 3543.5(b) and (c) state:

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

An informal settlement conference was held with an agent of the Public Employment Relations Board (hereafter PERB or Board) on January 29, 1982. However, the matter remained unresolved. A pre-hearing conference was held on June 21, 1982, followed by a formal hearing on June 22 and 23, 1982. A transcript was prepared and briefs were filed. The case was then submitted for decision on August 23, 1982.

FINDINGS OF FACT

On December 8, 1980, a change in the sick leave policy was presented to the school board for information and input before adoption. The change was submitted by Charles Ward, assistant superintendent for personnel. A representative of the charging party, Donald Raczka, informed the school board that the policy would change the terms of the collective bargaining agreement and would therefore require agreement of the charging party. No action was taken by the school board at that time.

On January 20, 1981, representatives of the charging party met with Ward to discuss the changes. Several items of the proposed changes were discussed and mutually agreed upon. One item that was not agreed upon was EXTENDED SICK LEAVE. The proposed change added a requirement that to qualify for extended sick leave, the employees must supply a doctor's certificate of illness beginning the first day of extended sick leave.

On February 3, 1981, William Chiment, then president of the Federation, wrote to Assistant Superintendent Ward, asking for information on teachers affected. The letter also stated that he had discussed the matter with counsel and that, if the changes were adopted Chiment would communicate it to the unit members, advising them it may not be a reasonable regulation under the Education Code and may be inconsistent with the collective bargaining agreement. Chiment also stated he felt the appropriate time for such a determination would be when a conflict arose from the implementation of the policy.

On February 19, 1981, Ward wrote to Chiment, providing the requested information and indicating that he was not certain as to the meaning of some of Chiment's previous statements. Ward stated he would like to discuss the matter with Chiment and asked Chiment to call him to schedule a meeting. It is unclear whether such a meeting ever took place.

On March 9, 1981, the revised sick leave policy was once again submitted to the school board. The letter of transmittal to the school board noted that the charging party was not in total agreement with the policy as proposed. The charging party's letter of February 3 was also attached to the policy for the school board's review. In spite of the charging party's opposition, the school board did adopt the policy as recommended by Assistant Superintendent Ward.

A representative of the charging party was at the school board meeting and had noticed that the action took place. The charging party also regularly receives school board agendas and minutes which would have indicated the policy had been adopted.

During March 1981 the president of the Federation discussed the changed policy with several teachers within the District. At a union executive board meeting on April 6, 1981, the president advised the executive board that he had spoken with counsel and that the changes were probably an unfair labor practice.

On April 10, 1981, notice of the policy change was sent by District administration to all school principals to be posted on official bulletin boards. The notice was addressed to "all personnel" and included a statement that,

> THIS POLICY WILL BE IMPLEMENTED ON APRIL 20, 1981 (emphasis in original).

April 20, 1981, was also the first day a unit member was absent and thereafter did not receive full pay because of the policy change.

By either April 20 or 21, notice of the policy changes were posted on official bulletin boards throughout most of the District. There was testimony that at one school the posting may not have been conspicuous because of a messy bulletin board, and that some teachers were not aware of the changes. At a few locations the changes were also discussed in faculty meetings and/or noted in weekly staff bulletins.

On June 18, 1981, Raczka, who by that time had become president of the Federation, first learned that two unit members had not been paid for sick leave taken in May because they had not provided medical verification as required by the policy change.

The collective bargaining agreement calls for informal discussions with the immediate supervisor, if appropriate, as the first step of the grievance procedure. On July 13, 1981 Raczka met with Ward to discuss a potential grievance. At that meeting, Raczka indicated he felt the meeting would serve as the informal level (or first step) of the grievance procedure. He stated that the teachers who had been docked pay were unaware of the policy change. Raczka indicated that he had no problem with the change itself, but that the lack of notification to teachers was what bothered him. Both Raczka and Ward indicated surprise that the teachers in question had not been notified of the changes at teacher meetings. Ward indicated he wanted to check out the procedure used to notify teachers, but that he would need more time because the principals were on vacation. Ward agreed to waive any time lines for filing a grievance if Raczka would give him extra time to talk to the principals. From testimony of both Raczka and Ward, as well as notes taken by Raczka, it is clear that the subject matter of any potential grievance for which the District was waiving the time lines was the lack of uniform

notification to teachers, and not the underlying unilateral change in sickleave policy.

Following the July 13 meeting between Ward and Raczka, Raczka corresponded with charging party's counsel and was told that there was probably no violation of the collective bargaining agreement, but that the District's action in unilaterally modifying the policy constituted an unfair labor practice.

On September 9, 1981, Raczka again met with Ward and indicated he had sought advice from counsel and that charging party was now talking about an unfair labor practice, rather than a grievance. The record does not indicate any further meetings were held on this issue. No final grievance was ever filed. This unfair practice charge was filed on November 16, 1981.

ISSUE

Was this charge filed within the statute of limitations period provided for in the EERA?

ARGUMENTS OF THE PARTIES

Charging party argues that the District has violated the Act by adopting and implementing the new policy regarding extended sickleave without first giving charging party an opportunity to meet and negotiate. It further argues that informal grievance discussions should toll the statute of limitations.

The District puts forth no argument regarding the unilateral nature of the policy change. It restricts its arguments to the statute of limitations issue.

DISCUSSION AND CONCLUSIONS OF LAW

In order to find any violation, this charge must have been filed in a timely manner. Section 3541.5(a) provides that,

> 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. . . . 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.

The extended sickleave policy was changed by the District on March 9, 1981 and implemented on April 20, 1981. The charging party was present at the board meeting when the action was taken, and also received copies of the board agendas and minutes. Notice of implementation of the change was posted throughout most of the District on or before April 20, 1981. Although some individual teachers may not have seen the notice or been aware of the change for whatever reasons, there was no

doubt that charging party had notice of the change as of March 9, 1981, and of its implementation as of April 20, 1981.

The parties offered much argument about which of the two dates should be used to calculate the statute of limitations. However, using either the date of adoption or the date of implementation, over six months would have elapsed between the District's action and the filing of the unfair practice charge. However, the charge may still be considered timely filed if the alleged violation is a continuing one, or if the limitation period was tolled while the Federation was diligently and reasonably pursuing alternative procedures for obtaining relief.

In San Dieguito Union High School District (2/25/82) PERB Decision No. 194, the Board held that a similar factual situation was not a continuing violation. In that case the District allegedly implemented a new sign-out policy. The charging party asserted that because the sign-out policy continued in effect it should not be time-barred. This case is similar in that the policy has remained in place, affecting teachers on a daily basis, and has not been changed since its original adoption and implementation. Following San Dieguito, the facts in this case are also found not to be a continuing violation.

In San Dieguito, the Board also held the statute of limitations could be tolled under either of two circumstances.

The first is the statutory provisions of section 3541.5(a)(2), which provide for tolling during efforts of the parties to resolve their differences through a collective negotiated grievance procedure culminating in binding arbitration. The second possibility for tolling is the doctrine of equitable tolling established by the California courts in Elkins v. Derby (1974) 12 Cal.3d 410 [115 Cal.Rptr. 641] and Myers v. County of Orange (1970) 6 Cal.App.3d 626 [86 Cal.Rptr. 198]. This doctrine was adopted by the PERB in State of California, Department of Water Resources; State of California, Department of Developmental Services (12/29/81) PERB Order No. Ad-122-S. Essentially the doctrine holds that where a party has two alternative methods for obtaining relief for a single injury and pursues one in good faith, the statute of limitations is tolled for the second.

Charging party argues that efforts aimed at settling its potential grievance from July 13 through September 9 should toll the statute of limitations under either or both reasons.

The contract between the Federation and the District in this case provides an appeal to the District Board of Education as the final step of the grievance procedure, rather than binding arbitration. Therefore, the time during which the Federation sought relief through the grievance procedure is not statutorily tolled under section 3541.5(a)(2).

The statute of limitations should also not be tolled under the doctrine of equitable tolling. As stated in San Dieguito,

> Before this Board is willing to relieve a charging party from the effects of the statute of limitations, there should be indication in the record that the alternative chosen represented a practical effort to resolve this dispute expeditiously.

Even if the Federation's efforts were found to be the type envisioned by the courts and PERB, those efforts were aimed at an issue distinctly different from the issue in this unfair practice charge. The informal grievance discussions between Raczka and Ward were all aimed at remedying any failure in uniform notification of teachers. This is supported by testimony of both Ward and Raczka as well as notes of Raczka's. Furthermore, when Ward gave the Federation an extension of time to file a grievance, it was done so to enable Ward to contact principals about the posting of notices at various schools. If a grievance had been filed it would have been based upon the failure of principals to give adequate notice to teachers.

This unfair practice charge, on the other hand, is necessarily based upon the District's underlying unilateral action and not the method of notifying individual teachers. It is uncontested that the charging party had notice of the change at the time it was adopted and implemented. Settlement efforts regarding an issue distinctly different from the issue in this

unfair practice charge should not therefore toll the statute of limitations.

Because the charge is found to be untimely it is not necessary to discuss whether the District's actions would have violated sections 3543.5(b) and (c).

CONCLUSIONS

Because the charging party has not shown this case was filed within the statute of limitations provided in the EERA, the complaint shall be dismissed as untimely.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice charge filed by Poway Federation of Teachers, Local 2357, CFT/AFT, AFL-CIO against the Poway Unified School District and the related Public Employment Relations Board's complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 29, 1982, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public

Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on November 29, 1982, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: November 8, 1982

JAMES W. TAMM
Administrative Law Judge