**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| JEFFRY PETER LA MARCA,<br><br>Charging Party,<br><br>v.<br><br>CAPISTRANO UNIFIED EDUCATION ASSOCIATION,<br><br>Respondent. | Case No. LA-CO-827-E<br><br>PERB Decision No. 1457<br><br>August 20, 2001 |

Appearance: Jeffry Peter LaMarca, on his own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Jeffry Peter LaMarca (LaMarca) to a Board agent's dismissal of his unfair practice charge. The charge alleges that the Capistrano Unified Education Association (Association) violated section 3543.6 of the Educational Employment Relations Act (EERA)[1] with regard to its handling of union elections in which LaMarca was a candidate.

[1] ERRA is codified at Government Code section 3540 et seq. Section 3543.6 states:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) 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.

After considering the entire record, the Board hereby dismisses the unfair practice charge in accordance with the following discussion.

## BACKGROUND

In the fall of 1999, the Association began the process for electing officials to the California Teachers Association's State Council. LaMarca was a candidate for this position. According to the unfair practice charge, which LaMarca filed on April 7, 2000, the ballots were not sent to Association representatives until late September, shortly before the ballots were scheduled to be returned to the Association. The Association announced the winning candidate's names on October 4, 1999, and LaMarca alleges that several teachers were not permitted to vote, in addition to other alleged election irregularities. During the week of October 4, 1999, LaMarca complained to Association President Frank Weirath (Weirath) about the election procedures and Weirath ultimately agreed to hold a new election. That election took place between November 1, 1999 and November 15, 1999. LaMarca alleges that various election irregularities tainted the outcome of this election as well.

The Board agent dismissed the charge and LaMarca filed a timely appeal of the dismissal on August 31, 2000.

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(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

## DISCUSSION

### Timeliness

EERA section 3541.5(a)(1) provides that the Board shall not 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. It is the burden of the charging party to demonstrate that the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

The unfair practice charge was filed on April 7, 2000. Hence, only allegations of events that occurred on or after October 6, 1999 are timely. In the first paragraph of his charge, LaMarca states that:

> This current charge . . . is being filed against the [Association] and concerns their recent election for the [CTA] "State Council." These elections took place between September and November 1999. [Unfair practice charge, p. 3; emphasis added.]

The charge contains numerous allegations with regard to both elections, and also makes reference to events occurring between the two elections. The charge states that the results of the first election were announced on or about Monday, October 4, 1999, and states that "during the week of October 4, 1999," Weirath and LaMarca had telephone conversations on at least two separate days, the result of which was that Weirath agreed to hold a second election. As stated in the charge, that second election occurred in November 1999. The charge also provides details of the November election and raises objections to it.

Based on these facts, the Board concludes that the charge is timely filed with respect to allegations that relate to events occurring on or after October 6, 1999.

Elements of Prima Facie Case

Having determined that the charge is timely filed, the next issue is whether the charging party has stated a prima facie case of a violation of a statute under PERB's jurisdiction. In this case, LaMarca alleges that the Association violated the EERA by committing numerous election irregularities.

In cases involving internal union matters, to determine whether the charge states a prima facie case of a violation, the Board has developed an analytical approach that will be applied here. It is well established that the Board will not review internal union matters unless the activities involved in the charge have a substantial impact on the relationship between unit members and their employer. (See, e.g., California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S (CSEA (Garcia)), citing Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett); Board declined to review allegations relating to election irregularities where charging party put forth no facts to indicate that the union's alleged activities had a substantial impact on the charging party's relationship with the employer; hence, the union's conduct was not subject to the duty of fair representation. (CSEA (Garcia) at pp. 5-6.[2]) ) Also, in California State Employees Association (Hutchinson) (1999) PERB Decision No. 1369-S, the Board dismissed allegations that the union conducted elections outside the timeframe required by internal union bylaws, mailed election ballots in violation of internal union bylaws, improperly validated ballots in violation

[2] It should be noted that CSEA (Garcia) has been partially overruled on other grounds by a later decision reinforcing and clarifying the Kimmett "impact" rule. (CSEA (Hard, et al.) (1999) PERB Decision No. 1368-S at pp. 23-30; see also, CSEA (Gonzalez-Coke, et al.) (2000) PERB Decision No. 1411-S at pp. 22-23.)

of internal union bylaws, failed to properly distribute election results in violation of internal union bylaws and improperly installed union officers (id. at pp. 2-3).

The case at bar presents a similar situation. LaMarca's allegations relate to alleged improprieties in an election process designed to elect officials to the California Teachers Association's State Council. His charge essentially challenges the union's internal handling of the election procedures, including ballot distribution and notification of results. The charge does not provide facts to explain how these matters have an impact on employee-employer relations. The Board finds that LaMarca has failed to state a prima facie case of a violation under EERA and dismissal is appropriate.[3]

Member Whitehead's concurring opinion confuses LaMarca's failure to state a prima facie case with those cases in which PERB lacks jurisdiction. Despite that opinion's assertion that the Board lacks the "power to decide" this charge for lack of jurisdiction, it fails to provide a citation to any case in which the Kimmett "substantial impact" test is accorded jurisdictional status. Rather, the traditional analytical sequence when reviewing dismissals is that first the Board ascertains whether all jurisdictional prerequisites are met, such as timeliness. If so, the Board then proceeds to review the allegations in order to determine whether they state a prima facie case of a violation of the EERA. In cases involving internal union matters, it is at this secondary phase of the analysis that the Board utilizes the Kimmett limitation as a method of measuring whether a prima facie case has been stated. This is a distinct legal inquiry from the question of whether the Board has jurisdiction over a matter.

[3] In his appeal, LaMarca makes reference to remedies he wishes to pursue in other forums, and generally requests assistance in pursuing legal remedies. It should be noted that this Decision only addresses matters arising under the EERA. LaMarca must pursue any potential remedies that fall outside PERB's jurisdiction in the appropriate forums.

Member Whitehead's concurring opinion cites Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288-291 (Abelleira) as authority for its assertion that the timeliness inquiry "proceeds from" a determination that the Board has jurisdiction based upon power over a charge. The Abelleira citation is not helpful, as that decision does not hold that the two distinct inquiries should proceed in the sequence suggested by Member Whitehead. A simple example illustrates why the Board, as an appellate body, first ascertains whether the charge is timely filed, and only assesses whether a prima facie case has been established if it is determined that the charge is timely. Assume, for example, that a person files an unfair practice charge against his union asserting that he ran for union president in 1980 but lost due to alleged unlawful conduct of the union leadership. He asserts that had he won, as president of the union he would have been in a position to name the members of the bargaining team and the members of the union would have benefited during the next round of contract negotiations with the employer. Rather than simply dismissing the extremely stale charge for untimeliness, Member Whitehead's concurrence would send a message to the Board agents that they should ignore the timeliness question and first assess whether the charge states a prima facie case. On these facts, it is not readily apparent whether or not the charge allegations satisfy the Kimmett test. Thus, according to Member Whitehead's concurrence, Board agents would be required to embark on a time consuming, yet ultimately pointless, investigation of a charge which, on its face, is well outside the six month statute of limitations.

Because timeliness is jurisdictional, as Member Whitehead acknowledges, the Board agent would have reviewed the merits of a charge over which it was immediately apparent that it had no jurisdiction. This approach is not supported by appellate law precedent, and is not an efficient use of the Board's time and resources.

## ORDER

The unfair practice charge in Case No. LA-CO-827-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Baker's concurrence begins on page 8.

Member Whitehead's concurrence begins on page 9.

Baker, Member, concurring: I concur and join the lead opinion through page five, line nine and join in the Public Employment Relations Board's (PERB or Board) order dismissing the charge without leave to amend. I write separately to respond to Member Whitehead's concurrence.

What Member Whitehead would have the Board do is nothing less than evaluating the untimely portion of the charge to determine whether it states a prima facie violation of the Educational Employment Relations Act (EERA). As a portion of the charge is untimely and the Board is without jurisdiction to review this portion of the charge (EERA sec. 3541.5(a)(1)), the majority of the Board has declined to engage in the futile act of reviewing this portion of the charge to determine whether a prima facie case has been made.

I agree that PERB does not have the power to intervene in purely internal union affairs. (Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) What this means is that for a charge concerning only purely internal union affairs, the Board will not find a prima facie violation of EERA. If a charge concerning only purely internal affairs were timely, the Board would have jurisdiction to review the charge. Following review of the charge, the charge would be dismissed, just as any other charge failing to state a prima facie violation of EERA would be dismissed.

WHITEHEAD, Member, concurring: I agree with the majority's conclusion that the Public Employment Relations Board (PERB or Board) has no power to decide this matter. I write separately in that I find it unnecessary to rule on the timeliness of a charge over which we have no jurisdiction.

In Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett), while addressing the question of PERB's ability to scrutinize the internal structure of a recognized employee organization under the Educational Employment Relations Act (EERA),[1] the Board found "such intervention in union affairs to be beyond the legislative intent in enacting the EERA." (Id. at p. 16.)[2] The majority holds that Kimmett merely establishes an element of the prima facie case. The lead decision finds that "[t]his is a distinct legal inquiry from the question of whether the Board has jurisdiction over a matter."

I respectfully disagree with the majority's finding that the Board's conclusion in Kimmett does not rise to the level of a jurisdictional bar. It is fundamental that administrative agencies such as PERB "have only such powers as have been conferred on them, expressly or by implication, by constitution or statute." (Department of Parks and Recreation v. State Personnel Bd. (1991) 233 Cal.App.3d 813, 824 [284 Cal.Rptr. 839]; Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103 [77 Cal.Rptr. 224] (Fertig); see also, Abelleira v. District Court

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[1]EERA is codified in Government Code sections 3540 et seq.

[2]I note that, Kimmett notwithstanding, the Board has made it clear that there are certain union matters over which the Legislature has given it jurisdiction. (See e.g., California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280 [jurisdiction to review reasonableness of procedures for suspension of individuals from membership]; California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S [employee organization may not retaliate against an employee for filing unfair practice charges with PERB]; California State Employees Association (Hard, et al.) (1999) PERB Decision No. 1368-S (CSEA (Hard, et al.)) [Board retains authority to assess the reasonableness of a union's membership restrictions under Ralph C. Dills Act (Dills Act) section 3515.5 (the Dills Act is codified at Government Code section 3512 et seq.)].)

of Appeal (1941) 17 Cal.2d 280, 288-291 (Abelleira); Lake Elsinore School District (1987) PERB Decision No. 646.)

In Abelleira, our Supreme Court engaged in a lengthy discussion pertaining to the distinction between the many forms of jurisdiction. In doing so, it explained:

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. . . . [¶] But in its ordinary usage, the phrase 'lack of jurisdiction' is not limited to these fundamental situations. . . . [¶]. . .'The difficulty arises from the different shades of meaning which the word "jurisdiction" has.'
> (Id. at pp. 288-290; emphasis added; citations omitted.)

The majority has lost its way in the "shades of meaning" of the word jurisdiction. PERB only has the power conferred upon it by the Legislature. (Fertig.) If jurisdiction in its fundamental sense means the power to determine or hear a case, (Abelleira), and if the Legislature has not given PERB the power to intervene in purely internal union affairs, (Kimmett), then PERB does not have jurisdiction to intervene in purely internal union affairs. (Abelleira.) The logical progression to me appears clear.

The lead decision misses the mark in its observation that the concurrence "fails to provide a citation to any case in which the Kimmett 'substantial impact' test is accorded jurisdictional status." No such citation is necessary. Kimmett itself established this jurisdictional status. For example, since Kimmett the Board has made it clear that the limitation announced in that decision must be specifically pled and proven by a charging party in the appropriate case in order to have their claim reviewed by the Board. (California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S; California State Employees Association (Hutchinson, et al.) (1998) PERB Decision No. 1304-S; CSEA (Hard, et al.).) The Board has additionally found that the Kimmett limitation can be raised at any time,

even sua sponte by the Board for the first time on appeal. (California State Employees Association (Gonzalez-Coke, et al.) (2000) PERB Decision No. 1411-S.) Such requirements sound in the realm of jurisdiction over the subject matter. In my mind, such cases obviate the need for the Board to have formally bestowed upon Kimmett the jurisdictional status sought by the majority.

The principle of subject matter jurisdiction relates to a court's or agency's inherent authority to deal with the matter before it. (Abelleira.) In contrast, a court or agency acts in excess of its jurisdiction where, even though it has subject matter jurisdiction, it has no jurisdiction or power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. (Id.) It is this latter type of jurisdiction, pertaining to limitations periods, that the majority seeks to elevate above Kimmett.

Had the Board agent followed the correct jurisdictional progression, she presumably would have determined that the Board did not have the ability to decide this claim for lack of impact on the employer-employee relationship, and would have dismissed the matter on that ground. Instead, the Board agent dismissed on limitations grounds, which necessitated the Board's review and reversal of that finding, and a dismissal on the appropriate ground of no impact on the employer-employee relationship. The lead decision appears to have overlooked the fact that here, as in its hypothetical pertaining to a twenty year old union election, the procedures used proved to be "time consuming, yet ultimately pointless."

The question here is not whether we have the power to decide this case. It is whether we have the power to decide this type of case. I acknowledge those Board decisions which have found that the 180-day limitations period is itself jurisdictional. (California State University, San Diego (1989) PERB Decision No. 718-H; The Regents of the University of

California (1990) PERB Decision No. 826-H.) However, jurisdiction to decide a question based upon power over a charge differs in substance from jurisdiction to decide a question based upon the timely filing of the charge itself. The latter proceeds from the former. (Abelleira).

The Board of course has the ability to review the unfair practice charge in the first instance to determine its authority to decide the issue presented. In other words, it has the jurisdiction to determine whether it has the jurisdiction to act. (Board of Police Commissioners v. Superior Court (1985) 168 Cal.App.3d 420, 431 [214 Cal.Rptr. 493]; Public Employment Relations Bd. v. Superior Court (1993) 13 Cal.App.4th 1816, 1828 [17 Cal.Rptr.2d 323]; International Federation of Prof. & Technical Engineers v. Bunch (1995) 40 Cal.App.4th 670, 676 [46 Cal.Rptr.2d 813].) However, once we have found that the Board has no power over the subject matter, our analysis should end.

The Board's finding with respect to the limitations period is unnecessary to the resolution of this matter.