STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 21, AFL-CIO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT AND CITY AND COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-2282-E PERB Decision No. 1721 December 13, 2004

Appearances: Davis & Reno by Duane W. Reno, Attorney, for International Federation of Professional and Technical Engineers, Local 21, AFL-CIO; Martin R. Gran, Deputy City Attorney, for San Francisco Unified School District and City and County of San Francisco.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the International Federation of Professional and Technical Engineers, Local 21, AFL-CIO (Local 21) of a Board agent's dismissal of its unfair practice charge. The original and amended charge allege that the San Francisco Unified School District (District) and City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to implement salary increases pursuant to a City charter process.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, Local 21 's appeal and the

[1]The MMBA is codified at Government Code section 3500, et seq.

response of the District and City. As discussed below, the Board reverses the dismissal and remands this matter to the Office of the General Counsel for issuance of a complaint.

BACKGROUND

Overview

Local 21 is the exclusive representative of all 1650 class accountants employed by the City. Local 21 also is the exclusive representative of all 1650 class accountants employed by the District. Under Education Code section 45318, the District's classified employees have merit system rights under the civil service provisions of the City charter.

The charter governs the collective bargaining rights of City employees. Under the charter, wage increases may be submitted to arbitration once impasse is reached. Because the District's classified employees are also part of the City's merit system, Local 21 argues that the District is bound by any arbitration decision rendered with respect to 1650 class accountants, regardless of whether they work for the City or District.

Education Code section 45318

According to the City's response, in the 1930's public schools within the City and County of San Francisco were managed by a City department and non-teaching employees were employed under the City's civil service system. In 1945, confusion over the status of non-teaching employees prompted the Legislature to adopt the predecessor to Education Code section 45318. According to the City, San Francisco is the only city in California to which Education Code section 45318 applies. That section provides:

> In every school district coterminous with the boundaries of a city and county, except for those paraprofessionals excluded from the charter provisions by a resolution adopted by the governing board of that district pursuant to Section 45100, employees not employed in positions requiring certification qualifications shall be employed, if the city and county has a

> charter providing for a merit system of employment, pursuant to the provisions of that charter providing for that system and shall, in all respects, be subject to, and have all rights granted by, those provisions; provided, however, that the governing board of the school district shall have the right to fix the duties of all of its noncertificated employees.

Thus, under Education Code section 45318, it appears that the District's non-certificated employees, commonly referred to as "classified employees," are subject to the City charter's merit system provisions.

Proposition B

In 1991, the electorate adopted Proposition B, which amended the City charter to provide that the City may be allowed to bargain collectively over wages and benefits with City employee organizations electing to do so, instead of setting salaries each year by formula. Proposition B provides for, among under things, an arbitration panel to approve a contract if an impasse is reached. By its own provisions, Proposition B applies to "employees of San Francisco Unified School District... to the extent authorized by state law." Proposition B also provides that the City is the sole negotiator on behalf of all of its departments, boards and commissions.

Aftermath of Proposition B

From the outset after the passage of Proposition B, the District took the position that the City was not authorized to bargain on its behalf in negotiations with Local 21. Instead, the District insisted that it bargain directly with Local 21. Local 21 refused to negotiate with the District. Instead, it continued to negotiate with the City and asserted that any arbitration award rendered with the City would also be binding on the District.

Negotiations between Local 21 and the City reached an impasse sometime in 1993. An arbitration panel was then convened in April 1993. On May 25, 1993, an arbitration award

was rendered granting a wage increase. Local 21 argued that the wage increase was also binding on the District even though the District was not privy to negotiations or the arbitration proceeding. The District refused to grant the salary increases.

Court of Appeal Decision

Local 21 then sought a writ of mandate in Superior Court seeking to compel the District to accept the terms of the arbitration award. The Superior Court denied Local 21 's petition and held the District had an independent right to negotiate with Local 21 under the Educational Employment Relations Act (EERA).[2] Local 21 appealed the ruling to the Court of Appeal. In rendering its decision, the court noted that this case involved the "complex interrelationship among the California Constitution, the Education Code, the EERA and the charter." (International Federation of Prof. & Technical Engineers v. Bunch (1995) 40 Cal.App.4th 670, 675 [46 Cal.Rptr.2d 813] (IFPT.) In finding that PERB had initial jurisdiction to decide these complex questions, the court stated:

> We agree with the trial court that the issues presented in this case—especially the extent to which local regulation of employment matters as prescribed by the charter might be superseded by matters of statewide concern as set out in the EERA—is a matter properly decided, in the first instance, by PERB. [IFPT, at p. 676.]
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> . . . . . .
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> Exclusive initial jurisdiction over matters protected or prohibited by the EERA thereby exists in PERB, and the courts have only appellate, as opposed to original, jurisdiction to review PERB's decisions. This is so due to the integral association that PERB has with school employer-employee relations and the resulting inevitable familiarity with the specific and unique problems such as encountered by Local 21 and the District under the new charter amendments in this case. Given these factors, PERB is a necessary participant in these proceedings. [IFPT, at p. 677.]

[2]EERA is codified at Government Code section 3540, et seq.

The court's decision was issued on October 30, 1995. The California Supreme Court denied review on January 24, 1996.

Aftermath of Court Decision

Following the IFPT decision, Local 21 did not immediately file an unfair practice charge with PERB. Instead, Local 21 and the District engaged in collective bargaining and entered into several contracts over the years. Local 21 claims that it did not seek immediate relief because the District agreed to voluntarily provide the same wage increases as received by Local 21 members employed by the City.

On June 15, 2001, Local 21 wrote to the District requesting a seven percent wage increase and bargained with the District until filing this charge on August 15, 2002.

Local 21 's Unfair Practice Charge

Local 21 now makes the same arguments it made before the court in IFPT. Specifically, it contends that although the District is a separate legal entity from the City with regard to educational issues, the District is a department of the City with regard to the employment of classified employees. Accordingly, Local 21 argues that the District is required to participate in arbitration proceedings under Proposition B and/or that the District is bound by the arbitration award rendered between Local 21 and the City. In addition, Local 21 asserts that the compensation and benefits of the District's classified employees are established pursuant to the MMBA rather than the provisions of the EERA.

BOARD AGENT'S DISMISSAL

Jurisdiction

Local 21 argued that since the District was a department of the City, this dispute is covered by the MMBA. The Board agent found no factual support for this assertion, noting that the MMBA excludes school districts from coverage.

Timeliness

The Board agent then dismissed the remainder of the charge as untimely. The Board agent noted that in IFPT, the court held that PERB had initial jurisdiction over Local 21 's argument that the City was the appropriate bargaining agent for the District's classified employees. That decision was issued in 1996. The present charge was not filed until 2002. Accordingly, the Board agent found the charge untimely.

Laches

Finally, the Board agent held that even if timely, Local 21's charge should be dismissed based on the doctrine of laches. Laches is an equitable defense that requires both unreasonable delay and prejudice resulting from the delay. The party asserting and seeking to benefit from the laches bar bears the burden of proof on these factors. (Mt. San Antonio Community College Dist. v. Public Employment Relations Bd. (1989) 210 Cal.App.3d 178, 188 [258 Cal.Rptr. 302].) Here, the District first asserted its belief that it was the appropriate bargaining agent in 1993. The Court of Appeal determined PERB had initial exclusive jurisdiction over the parties' dispute in 1995 and yet Local 21 failed to file this charge until August 15, 2002. Had Local 21 brought this charge to PERB in 1995, then it's arguable that the District could have spent the past seven years participating in the City's bargaining process and providing input on City policy. Additionally, the arbitration process by which the City employees were

granted salary increases would have also included the District's finances. Here, Local 21 did not challenge the District's authority to bargain on its own behalf before PERB and instead bargained two memoranda of understanding with the District for the 1999-2002 school years on behalf of both the technical and protech units. Accordingly, the Board agent found Local 21 's failure to file this charge earlier prejudiced the District.

LOCAL 21'S APPEAL

Jurisdiction

On appeal, Local 21 asserts that the Board agent erred by finding that this matter is not covered by the MMBA. Local 21 points to MMBA section 3501(c), which states:

> Except as otherwise provided in this subdivision, 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California. [Emphasis added.]

Local 21 asserts that the MMBA only excludes school districts that have a merit system. According to Local 21, the District "does not have its own merit system because it is required by Education Code section 45318 to employ its classified employees through the City's merit system. It is therefore not excluded from coverage under the MMBA."

Timeliness

Local 21 also argues on appeal that the Board agent erred by finding its charge untimely. Local 21 notes that this current dispute does not relate to the round of bargaining at issue in the IFPT decision. To the contrary, Local 21 admits that it has bargained with the

District and entered into several contracts since that time. However, Local 21 insists that its waiver of its rights in those instances does not prevent it from asserting its rights here. (San Jacinto Unified School District (1994) PERB Decision No. 1078 (San Jacinto).) Citing to Johnson-Bateman Co. (1989) 295 NLRB 180 [131 LRRM 1393] (Johnson-Bateman). Local 21 argues that:

> [I]t is not true that a right once waived under the Act is lost forever.... Each time the bargainable incident occurs—each time new rules are issued—[the] union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent "close out." . . . [Johnson-Bateman at p. 188.]

Thus, Local 21 insists that its charge is timely.

Laches

Finally, Local 21 argues that the Board agent erred by relying on the doctrine of laches. The defense of laches requires prejudice, notes Local 21, and "prejudice will not be presumed; the employer has the burden of proving the existence of prejudice." (Conti v. Board of Civil Service Commissioners (1969) 1 Cal.3d 351, 369-70 [82 Cal.Rptr. 337].) Local 21 argues that the District cannot show prejudice since it has been aware of Local 21's position since the IFPT decision. Further, Local 21 argues that prejudice has not been actually shown by the District at this stage of the proceedings. Thus, Local 21 requests that the dismissal be reversed.

DISTRICT'S RESPONSE

The District urges that Board to sustain the dismissal. It argues that the charge is untimely. Specifically, Local 21 failed to pursue its claim after the IFPT decision and waited until now to file its charge. As Local 21 clearly knew of its remedy with PERB years ago, the District urges the Board to sustain the dismissal.

DISCUSSION

Jurisdiction

Local 21 raises an interesting argument on appeal. As set forth above, MMBA section 3501(c) provides, in part:

> As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California. [Emphasis added.]

In essence, Local 21 reads the phrase "having a merit system" as applying to all the clauses listed before it. In other words, Local 21 asserts that the MMBA does not apply to a school district having a merit system, a county board of education having a merit system, a county superintendent having a merit system, etc. Since the District does not have a merit system, Local 21 argues that the District itself is not excluded from coverage by the MMBA. This argument must be rejected.

It is a well-settled rule of statutory construction that the term "or" has a disjunctive meaning. (Houge v. Ford (1955) 44 Cal.2d 706, 712 [285 P.2d 257] (Houge); see also, In re Jesusa (2004) 32 Cal.4th 588 [10 Cal.Rptr.3d 205].) "In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.'" (Houge at p. 712.) It is also a well-settled rule of statutory construction that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. (White v. County of Sacramento (1982) 31 Cal.3d 676, 680 [183 Cal.Rptr. 520].) Thus, where there is a disjunctive "or" before a final clause with a qualifying phrase, the qualifying phrase should be interpreted as only applying to that final clause. (See, e.g., Furtado v. Sierra Community College (1998) 68 Cal.App.4th 876,

881 [80 Cal.Rptr.2d 5891; Fischer v. Los Angeles Unified School Dist. (1999) 70 Cal.App.4th 87 [82 Cal.Rptr.2d 452].) To extend the application of such a qualifying phrase back past the disjunctive "or" would violate accepted rules of statutory construction. (Hopkins v. Anderson (1933) 218 Cal. 62, 65 [21 P.2d 560]; County of Los Angeles v. Graves (1930) 210 Cal. 21, 26 [290 P. 444].)

Here, applying these rules of statutory construction to MMBA section 350l(c), the Board finds that the phrase "having a merit system" only applies to "a personnel commission in a school district." Accordingly, a "school district", whether or not it has a merit system as defined in MMBA section 3501 (c), is excluded from coverage by the MMBA. Thus, this charge must be analyzed under EERA.

Timeliness

Under EERA, the statute of limitations is six months. (EERA sec. 3541.5(a).) The Board agent found Local 21 's charge to be untimely. However, the Board notes that this dispute does not involve the round of bargaining that was at issue in the IFPT decision. The Board agrees that any charge relating to that round of bargaining is time-barred. Instead, this charge involves the latest round of bargaining in 2002. The Board agrees with Local 21 that even if it waived its rights with respect to previous rounds of bargaining, it has not waived its rights for all eternity.

This assumes, of course, that Local 21 has a right to avail itself of the rights provided by Proposition B. However, assuming that Proposition B allows the District's classified employees to use the arbitration procedures contained therein, the fact that Local 21 did not assert its rights once, does not prevent it from asserting its rights in the future. (See San Jacinto; Hacienda La Puente Unified School District (1997) PERB Decision No. 1187;

State of California (Employment Development Department) (1998) PERB Decision No. 1284-S.) Accordingly, the Board finds this charge timely for purposes of issuing a complaint.

Laches

Next, the Board also disagrees with the Board agent's finding of laches. The burden of the charging party at this stage of the proceedings is to establish a prima facie case. The charging party's prima facie case does not include rebutting the respondent's affirmative defense. (State of California (Department of Corrections) (2003) PERB Decision No. 1579-S.) As laches is an affirmative defense, whether the defense is established is an issue that should be deferred to the administrative law judge (ALJ). This is especially true since establishing the defense of laches requires a factual finding of prejudice.

Analysis of Merits

In the dismissal, the Board agent did not address the merits of the charge since its was found to be untimely and barred by the doctrine of laches. Having rejected those findings, the Board must now address whether Local 21 has stated a prima facie case. In essence, this case centers around the meaning and application of Proposition B. Local 21 argues that under Proposition B, the District is bound by the arbitration decision that issued between Local 21 and the City and/or that it may separately seek interest arbitration for its District bargaining unit.

When interpreting a local rule, PERB has recognized that:

> ... where the contract language or rule is unclear or ambiguous, the Board has held that the parties should be given an opportunity to offer evidence to support their differing interpretations at an evidentiary hearing. [County of San Joaquin (2003) PERB Decision No. 1570-M; see also, Fullerton Joint Union School District (2004) PERB Decision No. 1633.]

Here, the Board finds that Local 21 has, at a minimum, established some ambiguity as to the intent and meaning of Proposition B with respect to the role of the District in contract negotiations. Specifically, Proposition B states on its face that it applies to classified employees of the District "to the extent authorized by state law." It is unclear what this means. However, nothing in EERA prevents an employer and employee organization from agreeing to interest arbitration. Thus, there is a plausible argument that the District must submit disputes involving its classified employees to procedures provided by Proposition B. Whether this is in fact the case is an issue that the Board believes should first be addressed by an ALJ. Accordingly, the Board reverses the dismissal and remands this matter to the Office of the General Counsel.

In doing so, the Board notes that the complaint should issue under EERA, and not the MMBA. As the City is presumptively not a "public school employer" within the meaning of EERA, the complaint shall issue against the District only. However, Local 21 is free to move to amend the complaint to include the City as a joint employer. Whether such a motion should be granted is an issue the Board will defer to the ALJ.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. SF-CE-2282-E and REMANDS the case to the Office of the General Counsel consistent with this decision.

Chairman Duncan and Member Whitehead joined in this Decision.