STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAK ONKVISIT, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN JOSE), Respondent.	Case No. SF-CE-841-H PERB Decision No. 2032-H May 29, 2009

Appearance: Sak Onkvisit, on his own behalf.

Before Neuwald, Wesley and Dowdin Calvillo, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Sak Onkvisit (Onkvisit) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Trustees of the California State University (San Jose) (CSU or University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against him for his failure to follow a directive. Onkvisit alleged that this conduct constituted a violation of HEERA section 3571.

We reviewed the entire record in this matter and based on the discussion below, hereby affirm the Board agent's dismissal.

BACKGROUND

CSU employed Onkvisit as a tenured faculty member in the marketing department in the College of Business at its San Jose State University campus. The California Faculty

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise noted, all statutory references are to the Government Code.

Association (CFA) exclusively represented the faculty members of CSU. As such, Onkvisit is represented by CFA. The University and CFA are parties to a collective bargaining agreement (Agreement) that expires on June 30, 2010.

In 2003, Onkvisit refused to allow a student the opportunity to make up an exam. The student missed the exam because of a motorcycle accident. Subsequently, Onkvisit failed the student for missing the exam. The Student Fairness Committee (SFC) determined that the student be given a make-up exam. Onkvisit rejected the SFC's non-binding recommendation. Associate Dean, Nancie Fimbel (Fimbel), informed Onkvisit that she offered the student an opportunity to take a make-up exam. She also informed Onkvisit that she would convene an ad hoc committee to determine the student's grade. She requested the student's grades from Onkvisit. Onkvisit refused to turn over the grades. Fimbel renewed her request and Onkvisit refused again.

On April 8, 2005, CSU issued a Notice of Pending Disciplinary Action pursuant to Article 19 of the Agreement recommending a demotion from full professor to associate professor. On April 15, 2005, pursuant to Article 19.7, a *Skelly*[2] hearing was held regarding the proposed discipline. On April 22, 2005, the *Skelly* reviewing officer upheld Onkvisit's demotion to associate professor. On April 29, 2005, pursuant to Article 19.9, the president affirmed Onkvisit's discipline. The discipline became effective 12 days after the president's decision. Onkvisit's private attorney appealed the demotion to the State Personnel Board (SPB) on May 5, 2005, in accordance with Article 19.10 subdivision (b).

On May 25, 2005, Onkvisit filed a grievance against CSU arguing that CSU violated several contract provisions. Specifically, the grievance alleged:

[2] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).

There is a clear and convincing evidence of SJSU's procedural errors as well as intentional abuses.

Sections 2.11 and 19.9

Dr. Veril Phillips (administrator/reviewing officer) and Dr. Carmen Sigler have violated Article 19 (Disciplinary Action Procedure) by proceeding with disciplinary action even though both of them have missed the required deadlines.

Dr. Selma Burkom (the CFA representative) and I met with Dr. Phillips on April 15, 2005. Based on Section 2.11 of Article 2 and Section 19.9 of Article 19, Dr. Phillips was required to submit his report within 5 days (i.e., no later than April 20, 2005), and Dr. Sigler was also required to give a final notification within 5 days after that (i.e., no later than April 25, 2005). They took actions on April 22, 2005 and April 29, 2005 respectively, thus missing the deadlines by 2 and 4 days.

Sections 19.8, 19.9, and 2.11

On April 28, 2005, the provost asked the CFA to extend the deadline—even though she had already missed that deadline (Sections 19.8 and 2.11). I refused. But SJSU and the CFA signed an extension anyway in violation of Section 19.9 which requires my consent.

Section 19.10

Section 19.10 (Disciplinary Action Appeal Process) allows a faculty member to select one of the two appeal options. However, SJSU requires the CFA's concurrence, thus depriving me of my right to pursue arbitration.

Section 19.3

Section 19.3 encourages informal resolution prior to the notice of pending disciplinary action. Dr. Burkom (the CFA representative) requested a meeting on approximately [April] 28, 2005 for this purpose. Yet when informed by Dr. Burkom at that meeting that, under protest, I would provide the grade information in question, the dean refused to engage in any attempt to resolve the matter. Instead, he told Dr. Burkom that my offer was too little and too late and that he wanted to make an example of me to teach the other faculty members a lesson.

Sections 19.3 and 19.4

The dean and associate dean abused Section 19.3 by implying that they were using Section 19.3 to order me to meet them so as to "discuss" the disciplinary action. Actually, they were trying to use that meeting as an opportunity to serve me with the notice of pending disciplinary action under Section 19.4. They even told Dr. Burkom on approximately February 28, 2005 that they would charge me with additional insubordination if I did not show up to accept the notice on March 3, 2005. Section 19.4 does not allow them to use entrapment and to force a faculty member to show up to accept the notice, especially under the false pretense of setting up a meeting for informal resolution.

Section 19.3 and 19.7

When Dr. Burkom and I met with Dr. Joan Merdinger and Dr. William Jiang of the Faculty Affairs office on March 3, 2005, my understanding was that the meeting was for an attempt at informal resolution (Section 19.3). Subsequently, the dean and provost were angry that the Faculty Affairs office did not use that opportunity to serve me with the notice.

Soon after that meeting, clear indication was given by SJSU that the notice would be promptly served. Instead, SJSU chose to delay the notice for almost 3 weeks strictly for the convenience of Dr. Phillips who was going to be out of town. That action was a misuse of Section 19.7 which allows me to have a meeting with Dr. Phillips within 10 days of the notice. As a result, that meeting was unjustifiably and unethically delayed for about a month.

Proposed Remedy:

Because of SJSU's violations of the CSU-CFA Agreement, the provost's disciplinary action must be declared null and void, and it must be rescinded. SJSU's documents related to the matter that were put in my Personnel Action file must be removed.

SJSU must be required to follow the CSU-CFA Agreement.

Requesting an Informal Conference

> Pursuant to Sections 10.4.b, I can request a postponement in processing the grievance for 25 days, and additional 25-day extensions "shall be liberally granted." Also pursuant to Section 10.27, "time limits shall be considered tolled where personnel are unavailable due to illness, vacations, or professional reasons." My employment contract does not require me to be on campus in the summer. In addition, I am one of the 3 faculty leaders who are taking a group of 30 SJSU students abroad on a faculty-led study-abroad program of SJSU. I am requesting an informal conference to take place after my return from abroad at the end of July.

On October 12, 2005, a Level I grievance meeting was held. On October 26, 2005, CSU issued a response denying the grievance on a number of grounds, including that CFA granted CSU an extension to respond to the disciplinary appeals.

Onkvisit appealed the grievance to Level II on November 1, 2005. On November 15, 2005, a Level II grievance meeting was held. CSU issued a response on November 28, 2005. The response paralleled the Level I response in noting that CFA agreed to extend the disciplinary deadlines and further that a two-day delay in issuing a response did not prejudice him in any way.

At Onkvisit's request, CFA appealed Onkvisit's grievance to binding arbitration to meet the procedural deadlines. CFA then reviewed the documents and, on April 17, 2006, informed Onkvisit that it would not arbitrate. Onkvisit filed an unfair practice charge on May 15, 2007. The Board agent issued a warning letter on September 12, 2007. Onkvisit did not file an amended charge or a request for withdrawal. Subsequently, on September 21, 2007, the Board agent dismissed the unfair practice charge as untimely.

ONKVISIT'S APPEAL

On appeal, Onkvisit argues that his appeal is timely. He requests the Board treat a demotion similar to a termination. Onkvisit further argues that the Board should apply the doctrine of equitable tolling as he is currently appealing his demotion before SPB.

DISCUSSION

HEERA section 3563.2 subdivision (a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

In this case, Onkvisit's demotion to associate professor became effective in May 2005. As such, Onkvisit had until November 2005 to file a charge. Onkvisit did not file his charge until May 2007, nearly two years later. Therefore, his charge is untimely unless the Board adopts the doctrine of equitable tolling, it is applicable here, and the six-month statute of limitations is still met after the application of the doctrine of equitable tolling.

The California Supreme Court recently addressed equitable tolling in *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88 (*McDonald*). Equitable tolling is a judicially created doctrine that operates independently of codified statutes of limitation. (*Id.* at p. 99.) The purpose of the doctrine is to allow a party who has several legal remedies to pursue one of them without forfeiting the other(s). (*Id.* at p. 100.) Under *McDonald*, equitable

tolling is allowed unless: (1) The statute clearly states that its list of tolling bases is exhaustive; or (2) "either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling." (*Id.* at p. 105.)

We examine HEERA section 3563.2 subdivision (a) to determine whether equitable tolling is permitted. In regards to the first prong, HEERA section 3563.2 subdivision (a) does not list any bases for tolling nor does it contain any language that explicitly prohibits tolling. Therefore, the statute does not "clearly state that its list of tolling bases is exhaustive." (See Code Civ. Proc., § 340.6 stating that in no event shall the prescriptive period be tolled except under those circumstances specified in the statute.)

We now turn to the second prong, "either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling." Unlike the six other public employment relation laws, HEERA does not include a provision for tolling the six-month limitation period while a party exhausts other remedies. Both the Ralph C. Dills Act (Dills Act)[3] and the Educational Employment Relations Act (EERA)[4] provide that "[t]he 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." (Dills Act, § 3514.5, subd. (a).) The Trial Court Employment Protection and Governance Act (Trial Court Act)[5] provides that "if the rules and regulations adopted by the trial court require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a trial court's remedy prior to filing an

[3] The Dills Act is codified at Government Code section 3512 et seq.

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

[5] The Trial Court Act is codified at Government Code section 71600 et seq.

unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Trial Court Act, § 71639.1, subd. (c).) The Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act)[6] similarly provides that "if the rules and regulations adopted by a regional court interpreter employment relations committee require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a regional court interpreter employment relations committee's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Court Interpreter Act, § 71825, subd. (c).)

Unfortunately, the legislative history as to why tolling is omitted in HEERA provides little, if any, guidance. There is just one report simply identifying that HEERA section 3563.2 subdivision (a) differs from EERA section 3541.5 subdivision (a)(2). There is no further explanation. While omitting the tolling provision would appear to indicate that the Legislature did not intend to have tolling, we find guidance from *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072 (*Coachella*). In *Coachella*, the Supreme Court addressed the issue as to whether the statute of limitations under the Meyers-Milias-Brown Act (MMBA)[7] was six months or three years because the statute was silent. The California Supreme Court held that the limitations period

[6] The Court Interpreter Act is codified at Government Code section 71800 et seq.

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

for making an MMBA unfair practice charge to PERB was six months and not three years. In reaching this conclusion, the Supreme Court noted:

> [A]nd perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided. [Citations omitted.] The MMBA, which we construe here, is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB. The PERB suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations laws within the PERB's jurisdiction—the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA—so as to justify a limitations period that is *six times longer* than the six months allowed under each of these other laws. The PERB suggests no rational ground upon which the Legislature could have decided to treat MMBA unfair practices charges so differently in regard to the limitations period. We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws in which all unfair practice charges filed with the PERB are subject to the same six-month limitations period.

Similarly here, we believe that it is reasonable to apply equitable tolling to have a coherent and harmonious system of public employment relations laws. HEERA, after all, was enacted for the "development of harmonious and cooperative labor relations between the public institutions of higher education and their employees." (HEERA, § 3560, subd. (a).) Further, as the Board found in *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach CCD II*) , "[t]he health and stability of a collective bargaining relationship is better maintained by allowing the parties to resolve a dispute through negotiated, albeit non-binding, dispute resolution procedures than through an adversarial proceeding before PERB" in tolling the statute of limitations under EERA in appropriate

circumstances.[8] As such, equitable tolling can easily be reconciled with HEERA's fundamental purpose of promoting harmonious labor relations. We, therefore, hold that HEERA allows the Board to equitably toll in appropriate circumstances.

In *Long Beach CCD II*, the Board set forth the limited circumstances in which equitable tolling will apply if: "the statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent." We adopt the same test in this case for determining whether the statute of limitations under HEERA will be tolled when the negotiated dispute resolution procedure ends in binding arbitration.

Onkvisit argues that the Board should toll the statute of limitations while he appeals his demotion before the SPB. In *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013, the Board found that a request for Dills Act section 3518 mediation did not toll the statute of limitations. The Board noted that a request for Dills Act section 3518 mediation with PERB did not put the other party on notice of a dispute that could result in an unfair practice charge. Similarly, a hearing before SPB does not put the other party on notice of a dispute that could result in an unfair practice charge. The discipline may not be in retaliation for protected conduct. Additionally, a hearing before the SPB, however, is not an appropriate circumstance where equitable tolling applies. A hearing before SPB is provided in

[8] We note that the issue before us today involves a negotiated dispute resolution procedure that ends in binding arbitration. We do not make a determination as to whether the statute of limitations would be tolled where a negotiated dispute resolution procedure does not end in binding arbitration.

section 89539 of the Education Code. While contained in the Agreement, it is not a negotiated procedure. Rather, it is simply a reference in the Agreement to a statutory procedure in another forum where the union does not have exclusive control. Consequently, SPB hearings do not meet the equitable tolling standard set forth in *Long Beach CCD*.

We do note, however, that the statute of limitations may be tolled as a result of Onkvisit filing a grievance. Onkvisit utilized the grievance procedure contained in the Agreement negotiated by the parties when he filed the grievance. However, the grievance procedure was not used to resolve the same dispute that is the subject of the unfair practice charge. The dispute in the unfair practice charge is retaliation, that CSU took adverse action against Onkvisit because of his protected activity. In contrast, the grievance dispute involved contract violations. Specifically, Onkvisit alleged that CSU failed to follow the timelines proscribed by the Agreement and, as a result, the demotion should be rescinded. As such, we find that the statute of limitations is not equitably tolled and dismiss Onkvisit's unfair practice charge because it is untimely.

Even if the doctrine of equitable tolling applied, Onkvisit's unfair practice charge would still be untimely. The statute of limitations began to run on April 8, 2005, when CSU issued Onkvisit a Notice of Pending Disciplinary Action. (*Yuba Community College District* (2007) PERB Decision No. 1936.) If equitable tolling had been applicable, the statute of limitations would have been tolled when the grievance was filed on May 5, 2005, until conclusion of the grievance procedure on April 17, 2006. Onkvisit did not file his unfair practice charge until nearly a year later on May 15, 2007, far exceeding the six-month statute of limitations. Thus, irregardless of whether equitable tolling applied, Onkvisit's charge would be dismissed as untimely.

ORDER

The unfair practice charge in Case No. SF-CE-841-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Wesley and Dowdin Calvillo joined in this Decision.