STATE OF CALIFORNIA

DECISION OF

THE EDUCATIONAL EMPLOYMENT RELATIONS BOARD

JOHN CHRISTOPHER OLSEN, Charging Party vs. MANTECA UNIFIED SCHOOL DISTRICT, Respondent	Case No. S-CE-13 EERB Decision No. 21

ORDER OF DISMISSAL

The Educational Employment Relations Board hereby dismisses the above-captioned appeal from the General Counsel's dismissal of unfair practice charge because the appellant failed to serve the respondent with a copy of the appeal as is required by 8 California Administrative Code Sections 35002(b) and 35007(b).

Educational Employment Relations Board
by

STEPHEN BARBER
Executive Assistant to the Board
8/5/77

Raymond J. Gonzales, Member, concurring:

In addition to dismissing this case, I would vacate the opinion and order in Mountain View School District[1] because in that case, also, the appellant (charging party) failed to serve the respondent district with a copy of the appeal of the General Counsel's dismissal of the charge. In that case the Board noted the failure of service and attempted to remedy it by dismissing the case with leave to amend and

[1] EERB Decision No. 17, May 17, 1977.

requiring the charging party to serve the respondent with the original charge, all amendments, and all other documents filed in connection with the case, if the charging party chose to amend the charge. I no longer believe that this procedure affords due process to the respondent. As a party to the case, the respondent must have notice of the appeal and an opportunity to respond thereto. The party has the right to urge that the charge be dismissed without leave to amend. Walker v. Hutchison (1956) 352 U.S. 112, 1L. Ed.2d 178, 77 S.Ct. 200. The respondent in fountain View was therefore prejudiced by the Board's remand of the case to the General Counsel.

I now find that failure to serve a copy of an appeal on a respondent in accordance with 8 California Administrative Code Sections 35002 (b) and 35007 (b)[2] results in the inability of the Board itself to hear an appeal because it lacks jurisdiction of the matter. Fraser v. Superior Court (1953) 115 Cal.App.2d 693.

It is true in the present case that the Board did not inform the charging party that he must serve a copy of any appeal on the respondent. However, every person using the processes of the Board is presumed to know the law, including the statutes and rules of the Board. Macfarlane v. Dept. Alcoholic Bev. Control (1958) 51 Cal. 2d 84.

While the Board generally lacks the authority to vacate a final opinion and order since no statute authorizes it to do so, it has such power in fountain View because it acted outside its jurisdiction, so that opinion and order are null and void. Aylward v. State Board Etc. Examiners (1948) 31 Cal.2d 833; Ferdig v. State Personnel Board (1969) 71 Cal.2d 96; 59 Op. Atty. Gen. 123 (1976).

Raymond J. Gonzales, Member

Jerilou H. Cossack, Member, dissenting:

I dissent from the order and disagree sharply with the concurring opinion. I would dismiss this appeal with leave to amend to allow Mr. Olsen to properly serve the school district. I would extend the ten day limit to appeal a dismissal by General Counsel to enable this Board to determine this charge on the merits. The

[2] 8 Cal. Admin. Code Sec. 35002(b): An unfair practice charge, an application for joinder and a petition to submit an informational brief shall be considered "filed" by a party when actually received by the appropriate regional office. All other documents referred to in these rules and regulations shall be considered "filed" by a party when actually received by the appropriate regional office accompanied by proof of service of the document on each party.

8 Cal. Admin. Code Sec. 35007(b): The charging party may obtain review of the dismissal by filing an appeal to the Board itself within ten calendar days after service of notice of dismissal. The appeal shall be in writing, signed by the party or its agent and contain the facts and arguments upon which the appeal is based.

majority's decision, based on a technicality, deprives this individual from seeking such an adjudication. The equities of this case are such that I cannot join the majority's narrow adherence to our vague and confusing rules and regulations.

John C. Olsen, an individual charging party and psychologist employed by the Manteca Unified School District (District), filed an unfair practice charge on October 28, 1976. The charge alleges that the District and its superintendent violated subsections (a), (c) and (d) of Section 3543.5 of the Government Code.[1] At the same time, Mr. Olsen requested a Board agent to assist him with his case, as provided by EERB Rule 35006.[2] A Board agent assisted Mr. Olsen, until the time General Counsel dismissed the charge. Mr. Olsen's charge was never served on the

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[1]Gov. Code Secs. 3543.5 (a), (c) & (d) state:

> 3543.5. It shall be unlawful for a public school employer to:
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> (a) 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.
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> *****
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[2]Cal. Admin. Code, Title 8, Sec. 35006 states:

> 35006. Board Assistance. If the charging party is unable to retain counsel or demonstrates extenuating circumstances, as determined by the Board, a Board agent may be assigned to assist such party to draft the charge or gather evidence.

All further regulatory references are to this Title.

District because on November 29, 1976, the General Counsel dismissed, with leave to amend, all five of the allegations contained in the charge. The General Counsel, in his letter of dismissal, described some of the requirements to appeal but made no mention that an appeal must be served on the District, despite the fact that the original charge was never served. General Counsel wrote:

> If the charging party chooses not to amend the charge, it may obtain review of the dismissal by filing an appeal to the Board itself within ten calendar days after service of the Notice of Dismissal. Such appeal must be in writing, signed by the party or its agent, and contain the facts and arguments upon which the appeal is based. EERB Rule 35007(b).

The Board's agent, who provided assistance to Mr. Olsen, also did not notify Olsen of the need to serve an appeal of an unfair practice charge. On December 9, 1976, the EERB received Mr. Olsen's appeal. Mr. Olsen did not serve his appeal on the District. For lack of service the majority now dismisses his appeal for "jurisdictional" reasons. Although not explicitly outlined in the order or the concurring opinion, Mr. Olsen will now be barred from seeking any adjudication on his charges because no leave to amend was granted.

The concurring opinion argues that the EERB's Rules and Regulations and due process require service on the District. While I agree that our rules, although confusing and vague, may require service, due process does not mandate notice in this instance.

The type of notice and procedures required by the state and federal constitutions depends on the party's right at issue. In Hannah v. Larche, 363 U.S. 420 (1960), the U.S. Supreme Court approved procedures of the Federal Commission on Civil Rights which denied witnesses before it the right to know the nature of the charges being investigated, the identity of the party filing the charge and the right to cross-examine other witnesses. The Court said:

> Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceedings, and the possible burden on that proceeding, are all considerations which must be taken into account. 363 U.S. at 442.

Consistent with that view, the Court said administrative agencies conducting general fact finding investigations need not give notice to parties that may be adversely affected by the investigation. Similarly, in Dami v. Department of Alcoholic

Beverage Control, 176 Cal.App.2d 144, 151 (1959), a California appellate court commented on due process in administrative hearings:

> Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.

The concurring opinion contends that because the District was denied the opportunity to answer the appeal, due process has been offended.[3] However, an appeal of a dismissal by General Counsel, prior to hearing, is not a final determination of the charge. A Board decision on this type of appeal is merely a preliminary administrative action to determine whether a hearing should be held. While due process should be practiced to its fullest extent, in the circumstances of this case, due process does not necessitate notice.[4]

The sole authority cited by the concurring opinion for the proposition that due process is offended by lack of service on this administrative appeal is Walker v. Hutchinson, 352 U.S. 112 (1956). That case is inapposite. The issue there did not concern an appeal of an administrative dismissal. The issue was whether a city could condemn someone's land without giving adequate notice. I fail to see a comparison between a final decision to condemn someone's land and an administrative decision to hold a hearing with all due process rights. Further, I found no support in Walker, as the concurring opinion indicates, for the principle that a party has a "right to urge that the charge be dismissed with leave to amend."

In a round about manner, our rules and regulations do require service on the District. Nowhere do the rules explicitly state this requirement. Rule 35007(b), the only section referred to by the General Counsel in his dismissal, gives the following instruction to a party appealing a dismissal:

> 35007(b) The charging party may obtain review of the dismissal by filing an appeal to the Board itself within ten calendar days *after* service of notice of dismissal....

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[3] An argument can be made that the District is not even a party to this appeal because the General Counsel never served the charge. Therefore, Mr. Olsen might have no obligation to serve this appeal on the District.

[4] I am not advocating lack of notice. On the contrary, I favor dismissing the claim to allow the proper service in conformance with our rules, which will afford the District full opportunity to present its views.

> The appeal shall be in writing, signed by the party or its agent and contain the facts and arguments upon which the appeal is based.

The search must not end here, however. To learn that "filing" an appeal includes service, one must find Rule 35002(b), which states:

> 35002(b) An unfair practice charge, an application for joinder and a petition to submit an informational brief shall be considered "filed" by a party when actually received by the appropriate regional office. All other documents referred to in these rules and regulations shall be considered "filed" by a party when actually received by the appropriate regional office accompanied by proof of service of the document on each party.

Thus, to properly follow our rules one must read two nonsequential sections, and then conclude that an appeal is included among "all other documents," which must be served. In addition to this confusion, in cases such as the one at hand, our rules require a party to serve the appeal of a charge that was never served by General Counsel. I question the purpose of informing the District of an appeal, if the District has no knowledge of the charge.

Mr. Olsen should be allowed to properly serve this appeal. The policy of the law favors the preservation of the right of appeal and a hearing of the appeal on the merits. Pesce v. Department of Alcoholic Beverages Control, 51 Cal.2d 310, 313 (1958). I am aware that proper service at this time would not by itself perfect this appeal. An appeal of a dismissal must be filed within ten days. Rule 35007(b). The receipt by the EERB of Mr. Olsen's appeal without service does not constitute "filing." Therefore, normally there would be no extension of the ten day time limit, and Mr. Olsen would be barred from further appealing his charge.

The judiciary considers the time limit to appeal a lower court's decision to be jurisdictional and rarely allows an exception. The jurisdictional time limit for judicial appeals is prescribed by California Rules of Court. Rules 45(c) and 138 (c) specifically prohibit the reviewing court from extending the time for filing an appeal.[5] The EERB has no such prohibition. On the contrary, Rule 35002(d)

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[5]Rules of Court 45(c) and 138(c) state:

Rule 45. Extension and shortening of time

> (c) [Extension of time] The time for filing a notice of appeal or the granting or denial of a rehearing in the Court of Appeal shall not be extended....

grants the Board discretion to extend time limits, if the party shows good cause.[6]
With the exception of the six month period to file a charge, the EERB has no strict jurisdictional time limits.

In Hollister Convalescent Hospital, Inc. v. Rico 15 Cal.3d 660 (1975), the California Supreme Court recently affirmed the strict jurisdictional time requirement for judicial appeals and critically reviewed decisions departing from the requirement. In Hollister, however, the court justified the decision in Mills v. Superior Court, 2 Cal.App.3d 214 (1969), where an appellate court approved a time extension to file an appeal from a small claims court to a superior court. (The clerk at the small claims court misinformed the losing party of the time requirement for an appeal.) In its discussion of Mills, the Supreme Court said the superior court properly based a time extension on the "special considerations" applicable to small claims courts and that small claims appeals are not under the scope of 45(c) and 138(c). The primary "special consideration" was that individuals are greatly dependent on the advice of small claims court officials. Similarly, Mr. Olsen is an individual who requested Board assistance. The Board specially created Rule 35006 to assist individuals. I cannot coldly turn away our responsibilities when an individual requests assistance. We are not bound by the strict jurisdictional requirement.

I recognize that Rule 32007(b) gives discretionary power to the Board to grant an extension for "good cause." Despite our vague and confusing rules, despite Mr. Olsen's request for assistance, despite the lack of guidance given to Mr. Olsen by EERB personnel, despite the fact that Mr. Olsen's appeal sat for

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(continued)

Rule 138. Extension and shortening of time

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(c) [Extension by presiding judge] The presiding judge of the reviewing court, for good cause shown, may extend the time for doing any act required or permitted under these rules, except the time for filing a notice of appeal. An application for extension of time shall be made as provided in Rule 137.

[6]Rule 35002(d) states:

35002. Filing.

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(d) With the exception of the charge, upon timely application and a showing of good cause the Board may extend the required filing date.

months awaiting an adjudication on the merits, despite General Counsel's decision to never serve the charge on the District and therefore the District may not even be a party to the appeal, I apparently speak as a minority of one in finding "good cause" and thus would allow this Board to consider this individual's charge on the merits.

Jerilou H. Cossack, Member