STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| SAUGUS TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. SAUGUS UNION SCHOOL DISTRICT, Respondent. | ) | Case No. LA-CE-1972<br>PERB Decision No. 443<br>November 29, 1984 |

Appearances: Michael R. White, Attorney for the Saugus Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo for the Saugus Union School District.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.*

## DECISION

This case is before the Public Employment Relations Board (Board) on an appeal by the Saugus Teachers Association, CTA/NEA of the Board agent's dismissal, attached hereto, of its charge alleging that the Saugus Union School District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (Government Code section 3540 et seq.).

We have reviewed the dismissal and, insofar as the Board agent concludes that the charge was untimely filed, we adopt it as the Decision of the Board itself.

## ORDER

The unfair practice charge in Case No. LA-CE-1972 is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

*Members Tovar and Burt did not participate in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
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LOS ANGELES, CALIFORNIA 90010
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June 15, 1984

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RE: LA-CE-1972, Saugus Teachers Association v. Saugus Union School District,
DISMISSAL OF UNFAIR PRACTICE CHARGE

This charge was filed on March 23, 1984. While it contains much factual background information, the essential allegation is that: during the 1980-81 and 1981-82 school year, the District refused to reinstate Sally Dixon to the appropriate salary schedule pursuant to Education Code section 44931 and contrary to Article XIX of the parties' collective bargaining agreement. The charge therefore alleges that the District's action constitutes a unilateral change in the policy embodied in that agreement.

The essential facts are as follows. Sally Dixon had been employed at Saugus Union School District for some 12 years as a teacher prior to her resignation (effective during the 1979-80 school year). In July, 1980, she sought reemployment by the District. Although she was hired for the 1980-81 school year, she was placed on the salary schedule Step 6, Column V, which was far below the level she occupied at the time she resigned (Step 12, Column V). The difference was that the District gave her credit for only 5 years of previous service instead of her actual 12 years which the Union claims should have been the proper credit.

Throughout the 1980-81 school year, Dixon repeatedly requested that the District reinstate her to the salary schedule placement she occupied at the time of her resignation pursuant to Education Code Section 44931. She was not granted that request, nor did she file a grievance. Instead, she continued her employment at the disputed level for the 1981-1982 school year as well.

On June 6, 1982, the Union (Saugus Teachers Association) filed a Writ of Mandate with the Superior Court in Los Angeles to compel compliance with the Education Code. The action was dismissed without prejudice in July, 1982 for failure to exhaust administrative (grievance) remedies.

The Union submitted the issues to arbitration under the grievance procedure in the parties' collective bargaining contract. Because the grievance procedure did not end in binding arbitration, the District vacated the arbitrator's decision, which had been favorable to the union and issued on March 22, 1983.

Thereafter, the District filed a second Peremptory Writ of Mandate with the Superior Court on about September 22, 1983. On October 17, 1983, the Court abated the action to permit the Union to exhaust its administrative remedies before the PERB, finding that the claim constituted "an arguable unfair practice within an exclusive initial jurisdiction of the Public Employment Relations Board (PERB)". The Union thereafter filed this charge as noted above.

In order to establish that the Employer committed an unlawful action, Charging Party must establish that it (Employer) breached or otherwise altered the collective bargaining agreement or its own established past practice, a required element under Grant Joint Union High School District (2/26/82) PERB Decision No. 196. See also Kern CCD (8/19/83) PERB Decision No. 337, p. 9.. When the contract language is not clear on a policy relating to terms and conditions of employment, the PERB looks at evidence of past pratice to determine whether an unlawful change took place. Pajaro Valley (5/22/70) PERB Decision No. 51; Rio Hondo (12/31/82) PERB Decision No. 279, p. 17; Marysville (5/27/83) PERB Decision No. 314.

The contract article which allegedly embodies the policy, and thus, the "status quo", reads:

> Salary Regulations
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> A. All teachers shall be placed on the schedule on the basis of training, years of service in the Saugus Union School District and prior service.

B. Teaching experience outside the Saugus Union School District may be recognized to a maximum of five years on the schedule.

According to the charge, this language can be read to require the District to credit Dixon with all her 12 years experience gained within the District, and thus to place her at the salary level that she occupied at the time of her resignation.

Education Code section 44931 is not incorporated into the contract, and the contract language is not clear as to whether the District must place teachers at any particular salary level.[1] Because the contract language is ambiguous, it cannot form the basis for establishing the status quo. And, since the charge does not allege, nor has Charging Party produced evidence of what the past practice was, an unlawful unilateral change in terms and conditions of employment has not been established.

The charge must be dismissed for the additional reason that the alleged violations of the EERA occurred more than six months prior to its filing before the PERB. Government Code section 3541.5 states that PERB cannot 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.

The allegations of District misconduct occurred, as noted above, during 1980 and 1981, far beyond the filing date of March 23, 1984, and also more than six months before the Union's filing of the initial court action on June 6, 1982. Although PERB allows the six-month requirement to be tolled under some circumstances, tolling is inappropriate here.

In order to toll the six-month filing requirement, two criteria must be met. First, tolling must not frustrate the achievement of the purpose underlying the statute of limitations (i.e. to prevent surprises through the revival of claims that have been

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[1]The Union's allegations appear to be addressed by Education Code section 44931, which grants teachers, who are reemployed within 39 months, the right to be restored to all rights and benefits as though there was no break in service. Although the alleged conduct arguably violates the Education Code, the California Courts, not PERB, are empowered to enforce that statute. Therese Dyer v. CSEA (5/22/84) PERB Decision No. 342a. The Government Code, at Section 3541.5 further denies PERB the authority to issue a complaint based upon an alleged violation of a collective bargaining agreement that would not also constitute an unfair practice.

allowed to slumber until evidence is lost, memories have faded, etc.). San Dieguito (2/25/82) PERB Decision No. 194. Second, if the first test is met, it must be shown that the charging party had several legal remedies and reasonably and in good faith pursued one of them. Ibid.

Here, aside from repeatedly requesting that the District reinstate her to her former salary level, Sally Dixon did nothing between September, 1980 and June, 1982 to pursue any legal or administrative remedy. This situation is not unlike that considered by the Board in CSEA v. Regents of U. C. (10/27/83) PERB Decision No. 353-H, where, during the six months prior to the filing of the charge, the charging party's only actions were to express to management its wish that some employees be properly reclassified and that the University conduct a reclassification investigation. The Board held that these actions did not justify a tolling of the statute.[2] Because the charging party slept on her rights during 1980 and 1981, the equitable tolling principle will not be applied here to revive her claim before PERB.

For all of the foregoing reasons, the charge is hereby dismissed.

Pursuant to Public Employment Relations Board regulation 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the

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[2]It is questionable that the Union in this case could have met the second criterion under the test, since, because PERB does not enforce the Education Code, it cannot be shown that it (Union) had several legal remedies, inasmuch as there is no showing that there was a unilateral breach of an established policy relating to terms and conditions of employment.

close of business (5:00 p.m.) on July 5, 1984, or sent by telegraph or certified United States mail postmarked not later than July 5, 1984 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the executive assistant to the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The documents will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

Dennis Sullivan
General Counsel

Manuel M. Melgoza
Regional Attorney

MMM:djm