STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LONG BEACH COUNCIL OF CLASSIFIED EMPLOYEES, Charging Party, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4373-E PERB Decision No. 1564 December 8, 2003

Appearance: Rodney W. Wickers, Attorney, for Long Beach Council of Classified Employees.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Long Beach Council of Classified Employees (LBCCE) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Long Beach Community College District (District) violated the Educational Employment Relations Act (BERA) [1] by unilaterally changing the classified staff s work week from a five (5) day, eight (8) hour schedule to a four (4) day, ten (10) hour schedule (4/10 schedule) from June 4 through July 26, 2001. The Board agent dismissed the charge as untimely.

On appeal the LBCCE asks the Board to "equitably toll" the statute of limitations by overruling PERB's caselaw which eliminated the doctrine of equitable tolling. In the past, the Board would "equitably toll" the six-month limitations period under certain circumstances.

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board did not eliminate the doctrine of equitable tolling on its merits. Instead, the doctrine of equitable tolling disappeared after the Board held that the six-month limitations period for filing a charge was jurisdictional, rather than an affirmative defense. Since the limitations period was jurisdictional, it could not be waived by the parties or equitably tolled by the Board.

After reviewing the entire record in this matter, the Board finds EERA's six-month limitations period for filing a charge to be a statute of limitation which must be asserted as an affirmative defense, rather than a jurisdictional bar. With this barrier to equitable tolling removed, the Board returns equitable tolling to our decisional law. On that basis, the Board reverses the Board agent's dismissal and remands the case to the Office of the General Counsel for further investigation and processing consistent with this decision.

BACKGROUND

According to the charge, on April 10, 2001, the District sent a memorandum to LBCCE's president stating that the District would adopt a summer modified schedule. The memorandum stated that if the LBCCE wanted to discuss the matter in more detail, it could arrange an appointment. The parties apparently met on April 13, 2001. On April 24, 2001, the District notified the admissions and records staff of the change in the summer work schedule. On May 1, 2001, the District issued a memorandum to classified staff indicating that it had met with LBCCE on April 13, 2001, to reaffirm the District's earlier communication to implement a 4/10 schedule and referenced "the compelling business necessity for the change." In

previous years, deviation from the regular work week (if it occurred) appears to have been made after negotiations.[2]

LBCCE filed a grievance on June 20, 2001, alleging that the District imposed the 4/10 schedule without negotiating hours of employment, vacation time, and leave without pay and did not allow some unit members to retain their five-day normal work schedules. The grievance sought restoration of vacation time and/or back-pay. The grievance proceeded through mediation on August 2, 2001, the last step in the grievance procedure, without resolution.

BOARD AGENT'S DISMISSAL

The Board agent found that LBCCE was informed on April 10 and May 1, 2001, of the District's intent to implement the change in the summer work schedule. The Board agent reasoned that even if LBCCE did not have full knowledge of the District's intent until as late as June 4, 2001, it had until December 4, 2001, to file the charge. As the charge was not filed until January 25, 2002, it was untimely.

LBCCE argued before the Board agent that the six-month limitations period should be tolled because: (1) they did not believe the District would implement the proposed change; (2) they were attempting to negotiate in good faith; and (3) the grievance procedure was activated on June 20, 2001. The Board agent rejected this reasoning, noting that EERA requires deferral and the tolling of the limitations period to contract grievance procedures only where those procedures culminate in settlement or binding arbitration. (EERA sec. 3541.5;

[2]The prior negotiations were actually with the California School Employees Association (CSEA). LBCCE became the exclusive representative in April 2001 after decertifying the unit represented by CSEA. The LBCCE and the District have operated under the CSEA agreement while negotiating for a new agreement.

Pittsburg Unified School District (1982) PERB Decision No. 199.) The Board agent rejected LBCCE's request for "equitable tolling" on the ground that PERB no longer recognizes the doctrine.

LBCCE's APPEAL FROM DISMISSAL

LBCCE argues that the limitations period should be tolled, either through equitable tolling or statutory tolling. LBCCE asserts that it was under the belief that further negotiations would take place related to the 4/10 schedule, as had been the practice and procedure during the prior several years. LBCCE contends the limitations period should be tolled while the discussions occurred, because there was no expectation that the District would simply implement their decision and ignore those negotiations.

LBCCE argues that the tolling statute authorizes PERB to toll the limitations period based upon equitable principles, but that PERB has chosen to recognize those principles only where the grievance procedure ends in binding arbitration. LBCCE argues that as the term "binding arbitration" is not consistently repeated in critical areas of the statute, the additional restriction on PERB's "statutory authority is a disservice to the statute and an abdication of PERB's equitable authority."[3]

DISCUSSION

The Board begins with the fundamental premise that allowing parties the opportunity to utilize mutually agreed upon grievance machinery before filing an unfair practice charge with PERB promotes the purposes of EERA. The Board believes this to be true whether or not the agreed upon grievance machinery culminates in binding arbitration. PERB's current jurisprudence discourages the use of such grievance machinery by prohibiting the tolling of

[3]The District did not file a response to LBCCE's appeal.

EERA's statute of limitations. In this decision the Board examines whether such a rule is required by the language of EERA. Concluding that it is not, the Board holds that the statute of limitations under EERA is not jurisdictional, but an affirmative defense that can be waived. Finding that the statute of limitations is not a jurisdictional bar, the Board further concludes that the doctrine of equitable tolling should be reinstated and recognized.

Statutory Tolling

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.

However, Section 3541.5(a)(2)[4] provides that in certain circumstances, the six-month limitations period may be tolled. According to its terms, only where a collectively negotiated agreement provides for binding arbitration will the statute of limitations be tolled during the

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[4]EERA section 3541.5(a)(2) provides, in pertinent part, that the Board shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. The 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.

efforts of the parties to resolve their differences through the grievance machinery. The contract between the District and the LBCCE only provides for mediation. As a consequence, the limitations period is not statutorily tolled during the time the LBCCE sought relief through the grievance machinery. (San Dieguito Union High School District (1982) PERB Decision No. 194. (San Dieguito).)

The LBCCE argues that because the words "binding arbitration" are not repeated in the last sentence of Section 3541.5(a)(2), PERB must toll the time taken to exhaust any grievance machinery, even machinery that does not result in binding arbitration.

The Board does not agree that Section 3541.5(a)(2) addresses anything other than grievance machinery that culminates in binding arbitration. The Board therefore rejects this "statutory tolling" argument consistent with PERB precedent. On its face, the LBCCE's argument seeking to toll the limitations period pending completion of a grievance procedure not ending in arbitration seems plausible and consistent with the policies underlying EERA. However, if the Board applied the same reasoning to other portions of Section 3541.5(a)(2), the Board would be faced with mandatory deferral to this same type of grievance machinery. The Board does not believe that mandatory deferral to grievance machinery that does not culminate in binding arbitration is consistent with the intent or purpose of EERA[5] or is in the best interest of the parties. To this end, the Board affirms the precedent in San Dieguito wherein the Board concluded that EERA's statutory tolling provision only applies where a collectively negotiated agreement provides for binding arbitration.

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[5]The Final Report of the Assembly Advisory Council on Public Employee Relations (also known as the Aaron Commission report) (March 15, 1973), at pp. 52-53, clearly indicated a preference for deferral only to a grievance procedure "under which a grievance based on the alleged unfair practice can be finally resolved."

History of Equitable Tolling Under PERB Administered Statutes

The doctrine of equitable tolling was first recognized by the Board shortly after its inception through the promulgation of PERB Regulation 35003(b).[6] That regulation provided:

> Such [unfair practice] charge shall be filed no later than six months subsequent to the conduct alleged to constitute the unfair practice, except any period of time used by the charging party in exhausting the grievance machinery of any agreement shall not be included in calculating the six-month limitation. [June 22, 1976 adopted Regulation 35003 subdivision (b).][7]

Through the years, the Board continually affirmed the existence of the doctrine of equitable tolling. (See San Dieguito; Poway Unified School District (1983) PERB Decision No. 350; Victor Valley Community College District (1986) PERB Decision No. 570 (Victor Valley).) In Victor Valley, the Board defined the scope and parameters of the doctrine. There, the Board held that doctrine of "equitable tolling" acts to toll the limitations period for filing a charge during the period of time that a grievance was being pursued where: (1) the grievance involved the same dispute that was the subject of the charge; (2) the charging party reasonably and in good faith pursued an alternate method of relief; and (3) tolling did not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (Victor Valley at p. 14.) The doctrine of equitable tolling was never eliminated by the Board on its merits. Rather, the doctrine disappeared as a necessary corollary to the Board's decision in California State University, San Diego (1989) PERB Decision No. 718-H (CSU, San Diego). In CSU, San Diego, the Board held that the six-month limitations period

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[6]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

[7]The substance of this regulation remained through 1983 when the Board's regulations were modified.

contained in the Higher Education Employer-Employee Relations Act (HEERA) was jurisdictional and not an affirmative defense. As the limitations period was jurisdictional, it could not be waived by the parties or tolled by the Board. (The Regents of University of California (1990) PERB Decision No. 826-H (Regents).)

In Regents, the Board confirmed that the doctrine of equitable tolling did not survive CSU, San Diego:

> Cases construing the National Labor Relations Act (NLRA) consider the 6-month statute of limitations to be an affirmative defense, and the proponent of such defense has the burden of establishing notice on the part of the charging party. (Harvard Folding Box Company (1984) 273 NLRB 841 [118 LRRM 1323]; Strick Corp. (1979) 241 NLRB 210 [100 LRRM 1491].) In the past, PERB has also held the 6-month statute of limitations to be an affirmative defense which was waived by the proponent of such defense if not raised in the answer. (Walnut Valley Unified School District (1983) PERB Decision No. 289.) Walnut Valley, however, was overruled by the Board in [CSU, San Diego]. There the Board held that the 6-month time period is not a statute of limitations and need not be raised as an affirmative defense. Rather, the time period is jurisdictional and cannot be waived by either of the parties or by the Board itself. Based upon the Board's interpretation of the 'statute of limitations' found in all three of the statutes which it administers, if the charge is not filed within the relevant 6-month period, the Board has no subject matter jurisdiction over the case and may not issue a complaint under any circumstances.
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> A logical progression of the analysis used in [CSU, San Diego] results in the conclusion that the doctrine of equitable tolling does not survive. That decision stated emphatically that the 6-month time period was jurisdictional in nature and could not be waived, for any reason, by either of the parties or by the Board itself. The doctrine of equitable tolling allowed the Board, in its discretion, and in furtherance of the principles of equity, to waive, in essence, the 6-month statute of limitations for the time period during which a grievance was pursued. Under [CSU, San Diego] the Board no longer has discretion to waive the 6-month period, as it has no power to entertain the case for lack of jurisdiction. (Footnotes omitted.)

The Six-Month Limitations Period

As discussed above, in CSU, San Diego the Board found that the six-month limitations period contained in HEERA, the language of which is nearly identical to that in EERA, leaves the Board without jurisdiction to consider most allegations beyond six months. This result was necessitated by the Board's holding that the language of HEERA section 3563.2(a) proscribes the Board from issuing a complaint concerning conduct that occurred more than six months before the charge was filed. The Board reached this conclusion by initially noting that it has only such jurisdiction and powers as have been conferred upon it by statute and that where the Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, by waiver or estoppel, nor by the established practices, customs or Board regulation. (CSU, San Diego at pp. 8-9.) The Board then determined that it "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (CSU, San Diego at p. 9 citing Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144] (Moyer).)

The Board in CSU, San Diego concluded that the Legislature intended to proscribe the Board's jurisdiction to issue a complaint involving conduct that occurred more than six months prior to the filing of the charge. The Board based this conclusion on the language of the statute which provides that, "the Board shall not issue a complaint. . ." (CSU, San Diego at p. 10 [emphasis in original].) The Board also suggested that extending the time during which an unfair practice charge may be raised prolongs the threat of disruption of collective bargaining relationships and is "antithetical to HEERA's foremost goal of promoting the improvement of harmonious employer-employee relations." (CSU, San Diego at p. 10.) As discussed below, the Board disagrees.

First, CSU, San Diego properly sought to establish the legislative intent underlying the statutory language at issue. However, the Board believes that CSU, San Diego erred by focusing solely upon the language of Section 3541.5 (a)(1), instead of considering that section within the context of the entire statute.

As noted in CSU, San Diego, it is a fundamental rule of statutory construction that the intent of the Legislature should be examined in order to effectuate the purpose of the law. (Moyer at p. 230.) In determining intent, it is important to examine the language of the statute and to give effect to each word. (Moyer at p. 230.) However, it is also a fundamental rule of statutory construction that a statute must be construed in context, "keeping in mind the nature and obvious purpose of the statute where they appear." (Moyer at p. 230.) "[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (Moyer at p. 230.) As discussed below, the Board believes that the Legislature fully intended to model EERA, and its related Acts, after the National Labor Relations Act (NLRA). As the statute of limitations under the NLRA has long been held not to be jurisdictional, the Board believes that the Legislature intended a similar rule under EERA.

There can be little dispute that EERA is in the main derived from the NLRA. The following excerpt from the California Supreme Court describes, in part, the origin of EERA:

> In 1972, following the first major state employee strike, the Legislature created the Assembly Advisory Council on Public Employee Relations, chaired by UCLA Professor Benjamin Aaron, to formulate recommendations "for establishing an appropriate framework within which disputes can be settled between public jurisdictions and their employees." (Assem. Res. No. 51 (1972 Reg. Sess).) In its 1973 report the Advisory Council recommended the enactment of a comprehensive state

> law, modeled on the National Labor Relations Act, which would afford formal collective bargaining rights to all public employees.
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> The Legislature, however, was unable to agree on a comprehensive bill covering all public employees and decided instead to draft separate collective bargaining statutes directed to the specific needs and problems of different categories of public entities. In line with this approach, the Legislature in 1975 first enacted the Educational Employment Relations Act (EERA) (Stats 1975, ch. 961, § 2, p. 2247, codified in § 3540 et seq.); EERA repealed the Winton Act, established formal negotiating rights for public school employees, and created the Educational Employment Relations Board, an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act.
> (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 177 [172 Cal.Rptr. 487].) [Emphasis added.]

The "Aaron Commission" report (Report) described above by the Supreme Court in its entirety supports the proposition that the Legislature intended to follow the NLRA in many areas. The introduction provides that:

> Although recognizing that there are important differences between the public and the private sectors, the Advisory Council has concluded that there are equally important similarities. It has not hesitated, therefore, to recommend that certain practices and procedures under the National Labor Relations Act, which have been tested for almost 40 years, be incorporated in a proposed new statute covering employer-employee relations in the government service in this State, included in this Report as Appendix A.
> (Cal. State Assem. Advisory Council on Pub. Emp. Rel. (1973) pp. 3-4.)

Consistent with this setting under which the Legislature promulgated EERA, this Board long ago recognized, and recently reaffirmed in State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S, that Section 3541.5(a) essentially codifies the policy developed by the National Labor Relations Board (NLRB). It is therefore appropriate to look to the private sector and the NLRB for guidance in interpreting this Board's statute.

(Sweetwater Union High School District (1976) EERB Decision No. 4;[8] Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81, citing Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

As noted earlier, 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.

This language mirrors the language setting forth the limitations period for unfair practice charges contained in Section 10(b) of the NLRA. That section states, in pertinent part:

> Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. [Emphasis original]

In interpreting Section 10(b) of the NLRA, which is virtually identical to Section 3541.5(a) of EERA, the NLRB has long held that the statute of limitations is not jurisdictional, but is an affirmative defense which must be timely raised in the answer or it is waived. (Chicago Roll Forming Corp. (1967) 167 NLRB 961 [66 LRRM 1228]; NLRB v. A.E. Nettleton Co. (2nd Cir 1957) 241 F.2d 130 [39 LRRM 2338].)

Another fundamental rule of statutory construction is that the "Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.' [Citations omitted.]" (Viking Pools. Inc. v. Maloney (1989) 48 Cal.3d 602, 609 [257 Cal.Rptr. 320].) Accordingly, the Board must presume that the Legislature was not only aware of the NLRA and decisions interpreting the NLRA, but that the

[8]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

Legislature had the NLRA in mind when it enacted the EERA. Such a presumption is especially warranted given the overwhelming evidence that the Legislature directly modeled the EERA upon the NLRA. Accordingly, the Board easily finds that the Legislature, when it enacted EERA section 3541.5(a), did not intend the six-month limitations period to be jurisdictional. Instead, it is a statute of limitations which must be raised as an affirmative defense.

The Board in CSU, San Diego reached a contrary conclusion by focusing solely on the words, "the Board shall not issue a complaint" in HEERA section 3563.2. The Board concluded that the mandatory language "shall not" rendered the limitations period jurisdictional. As discussed above, the Board disagrees. Indeed, in Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 134 [142 Cal.Rptr. 325] (Hogya), one of the cases cited by CSU, San Diego - the court cautioned that, "justice is not the slave of grammar, and 'shall' has sometimes been judicially construed as directory or permissive. [Citation omitted.]" As the court noted in Hogya, although the term "shall" usually has a mandatory meaning, that is not always the case. As the California Supreme Court expressed long ago, the test as to "whether a statute is mandatory or directory depends upon the legislative intent as ascertained from the consideration of the whole act." (Frances v. Superior Court (1935) 3 Cal.2d 19, 28.) As already discussed, the Board believes that the Legislature plainly intended to model EERA, and its related Acts, after the NLRA.

The Board in CSU, San Diego also rejected the reasoning in Walnut Valley Unified School District (1983) PERB Decision No. 289 (Walnut Valley), which held that the limitations period under EERA is not jurisdictional. Walnut Valley held that, "[i]t is a well-settled principle of California law that the statute of limitations is a personal privilege which must be affirmatively invoked by appropriate pleading or it is waived. [Citations omitted.]" (Walnut

Valley at p. 11.) The Board notes that this general rule applies to proceedings before an administrative tribunal. (Cal. Employment Com. v. MacGregor (1944) 64 Cal.App.2d 691, 693 [149 P.2d 304]; Bohn v. Watson (1954) 130 Cal.App.2d 24 [278 P.2d 454].) The Board in CSU, San Diego summarily rejected the reasoning in Walnut Valley on the grounds that it was "inconsistent with the jurisdictional proscriptions expressed in [EERA]." (CSU, San Diego at p. 3.) However, as the Board has already held, CSU, San Diego erred in interpreting the limitations period under EERA to be jurisdictional. Therefore, there is no reason why the Board, as administrative agency, should not treat the limitations period under EERA as an affirmative defense.

Finally, the Board in CSU, San Diego held that interpreting the limitations period as jurisdictional was sound public policy. Again, the Board disagrees. Under CSU, San Diego, a party desiring to utilize grievance machinery that did not end in binding arbitration would be forced to also file an unfair practice charge within six months of the alleged unfair practice to preserve standing and a remedy before PERB. By encouraging multiple filings, such a policy necessarily results in the waste of resources. Such a policy also does not promote the underlying purpose of EERA, which is to encourage harmonious employer-employee relations. (EERA sec. 3540.)

Further, the CSU, San Diego decision acts to discourage the use of bilaterally agreed upon grievance procedures when those procedures do not result in binding arbitration. This is because when faced with limited resources, a party may decide to forego or abandon midway the time and expense required of the grievance procedure, which offers no binding arbitration, and opt to bring a charge before PERB. The Board believes that the parties to a negotiated grievance procedure, even one that does not culminate in binding arbitration, should be encouraged to

utilize such a procedure whenever possible. This is because the Board believes that as a matter of sound public policy disputes should be settled at the most informal level whenever possible.

The Board in CSU, San Diego argued that if the limitations period under EERA was not jurisdictional, disputes would linger longer. The Board in CSU, San Diego opined that, "[e]xtending the time during which an unfair practice charge may be raised prolongs the threat of disruption of such collective bargaining relationships, and is antithetical to HEERA's foremost goal of promoting the improvement of harmonious employer-employee relations." (CSU, San Diego at p. 4.) The Board disagrees. The Board does not believe that encouraging the use of a negotiated grievance procedure will result in greater disruption than the disruption created by the filing of an unfair practice charge before PERB. Although disputes may last longer, the Board fails to see how that alone will unduly disrupt the collective bargaining relationship.

Return to Equitable Tolling

Because the Board holds that the limitations period under EERA, and its related Acts, is not jurisdictional, the Board also announces today the return of the doctrine of equitable tolling. Equitable tolling is a well established principle utilized by the courts. Under California law, the "equitable tolling" doctrine evolved in the 1970's to toll statutes of limitation when plaintiffs reasonably pursued one of several legal remedies in good faith and there was no prejudice to the defendant. (Downs v. Department of Water & Power (1997) 58 Cal.App.4th 1093 [68 Cal.Rptr. 2d 590] (Downs), citing Collier v. City of Pasadena (1983) 142 Cal.App.3d 917, 922-923 [191 Cal.Rptr. 681] (Collier).)

In the California courts, three factors determine whether the statute of limitations is equitably tolled in a particular case: (1) timely notice to defendants in filing the first claim;

(2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim. (Downs citing Collier at p. 94 and Addison v. State of California (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224].) This approach is entirely consistent with the Board's prior approach in Victor Valley.

In returning equitable tolling to our decisional law and case processing, the Board does so with a limitation. The six-month limitation period should be extended equitably only when a party utilizes a bilaterally agreed upon dispute resolution procedure. Agreement on the process is an integral part of insuring the standards in Downs. This finding is also rooted in the goals and framework of EERA as the collective negotiations process is the means by which the EERA's purposes of improving personnel, management and employer-employee relations is to be realized. (Placerville Union School District (1978) PERB Decision No. 69.)

When a grievance has been filed utilizing a bilaterally agreed upon dispute resolution procedure in an effort to resolve the same dispute which is the subject of the charge, the statute of limitations is tolled during the period of time the grievance is being pursued if: (1) the charging party reasonably and in good faith pursues the grievance; and (2) tolling did not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

Application of Equitable Tolling to Charge

It is undisputed that the contractual grievance filed by LBCCE was part of a "bilaterally agreed upon dispute resolution procedure." That procedure ended with an unsuccessful mediation session on August 2, 2001. Under the doctrine of equitable tolling, the period of time utilized to exhaust the contractual grievance process is not counted towards the six-month

limitations period. (See State of California (Secretary of State) (1990) PERB Decision No. 812-S.) Accordingly, after August 2, 2001, the limitations period began to run again. LBCCE did not file its unfair practice charge until January 25, 2002. Thus, even after the contractual grievance procedure ended, LBCCE waited five months and twenty-three days before filing its charge.

What is unclear is when the contractual grievance procedure began. According to the charge, LBCCE was informed of the District's intent to change the summer work schedule as early as April 10, 2001. LBCCE did not file its formal first-level grievance until June 20, 2001. However, the contractual grievance procedure also provides for an informal grievance stage. There is evidence in the record that LBCCE met with the District to discuss the proposed schedule change as early as April 13, 2001. What is unclear is whether that meeting was intended to constitute LBCCE's initiation of the grievance process. In light of this ambiguity, the Board remands this case to the Office of the General Counsel for further investigation and processing consistent with this decision.

ORDER

The Board REVERSES the Board agent's dismissal of the unfair practice charge in Case No. LA-CE-4373-E and REMANDS this case to the Office of the General Counsel for further investigation and processing consistent with this Decision.

Member Whitehead joined in this Decision.

Member Neima's concurrence and dissent begins on page 18.

NEIMA, Member, concurring in part and dissenting in part: I agree that, in accordance with well reasoned labor law precedent and consistent with California law, the six-month limitation period codified in section 3541.5(a)(2) of the Educational Employment Relations Act (EERA) is an affirmative defense, not a jurisdictional bar. I also agree that the Public Employment Relations Board (PERB or Board) can and should reinstate the well-established doctrine of equitable tolling. I write separately to emphasize that, by "return[ing] equitable tolling to our decisional law and case processing practice,"[1] the Board also re-adopts essential limitations on the equitable tolling doctrine articulated during the period of its adoption and application by PERB. Applied to the facts of this case, I would find that those limitations mandate rejection of the union's charge, even if on remand the charge were found otherwise timely if equitably tolled.

As noted by the majority, it is well settled that statutory tolling under EERA section 3541.5(a)(2) does not extend to grievance procedures that do not culminate in binding arbitration. (San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito).) As the grievance procedure at issue in this case culminated in mediation and the charge was not timely filed, consideration of the charge would only be an option if equitable tolling were available and its application justified.

I agree with the majority's well-reasoned analysis that the limitations period in Section 3541.5(a)(2) is properly understood as an affirmative defense. That holding is consistent with and properly guided by the manner in which the National Labor Relations Board had long interpreted comparably mandatory language in section 10(b) of the National

[1]Supra, p. 2.

Labor Relations Act at the time EERA was enacted. It is also consistent with the general principle in California law that statutes of limitations, including those applicable to proceedings before an administrative tribunal, are personal privileges that are waived if not affirmatively invoked.

In light of that holding, I also concur with the Board's decision to return to its doctrine of equitable tolling, which California State University, San Diego (1989) PERB Decision No. 718-H overruled on the now-rejected grounds that the limitations period in EERA was jurisdictional. I write separately from my colleagues, however, to emphasize, that the case law to which we return sets forth clear limitations on the doctrine which are essential to its reasonable and fair application.

Equitable tolling was first adopted by the Board under the State Employer-Employee Relations Act[2] in State of California, Department of Water Resources/State of California, Department of Developmental Services (1981) PERB Order No. Ad-122-S and was applied to EERA and further explained in San Dieguito, supra. In San Dieguito, the Board made clear that equitable tolling can only be invoked if two criteria are met: First, "it is necessary that tolling in the particular instance not frustrate the achievement of the purpose underlying the statute of limitations" which is "to prevent surprises through the revival of claims that have been allowed to slumber until the evidence has been lost, memories have faded, and witnesses have disappeared." (San Dieguito, supra, citations omitted.) Second, if the notification purpose is met and prejudice is thereby avoided, "the running of the limitations period is tolled

[2]In 1981, the Ralph C. Dills Act (Dills Act) was known as the State Employer-Employer Relations Act or SEERA.

when the injured person has several legal remedies and reasonably and in good faith pursues one." (Ibid.) Stated conversely, stale claims or an inadequate showing that the party invoking equitable tolling reasonably pursued other remedies and did so in good faith will preclude application of the doctrine.

Applying those criteria, the Board in San Dieguito rejected the association's charge, noting that the association's delay in filing a Board charge was not explained and stating,

> Before this Board is willing to relieve a charging party from the effects of the statute of limitation, there should be indication in the record that the alternative chosen represented a practical effort to resolve this dispute expeditiously.
> (San Dieguito at p. 14.)

In order for the doctrine of equitable tolling to be truly equitable, the Board must balance the parties' interests and consider a party's request to toll the limitations period in light of the criteria set forth in San Dieguito. Applying those criteria here, I note that, as in San Dieguito, there was a substantial, unexplained delay between completion of the grievance process at issue and the association's filing of the charge. Moreover, there is no showing that delaying filing of a PERB charge during and for more than five months after completion of a grievance process that culminated in unsuccessful mediation "represented a practical effort to resolve this dispute expeditiously." Thus, I would affirm dismissal of the charge as untimely even if, with tolling, the charge would have been filed within the statutory six-month period.

I submit that departure from the strictures of the statutory limitations period should be an extraordinary leniency granted to parties only upon a clear demonstration that it is required by principles of fairness under the facts of the case and is consistent with the policy goals of the limitations period, as explained in San Dieguito.

In accordance with and to effectuate the policy considerations that underlie the equitable doctrine, the foregoing limitations must be applied on a case-by-case basis when a party requests equitable tolling. In this case, I submit that those limitations preclude equitable tolling, so dismissal should be affirmed. Accordingly, I respectfully dissent from the majority's decision to remand for further investigation.