

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TONY HICKS, et al.,

Charging Parties,

v.

COMPTON UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4900-E

PERB Decision No. 2015

April 1, 2009

Appearance: Tony Hicks, on behalf of himself and all other Charging Parties.

Before Rystrom, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Tony Hicks and twelve other charging parties (Charging Parties) of a Board agent's dismissal of their unfair practice charge. The charge alleged that the Compton Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by failing to meet with Charging Parties to discuss terms and conditions of employment and retaliating against Charging Parties when it revised their seniority status. The Board agent dismissed the charge finding that it was untimely filed.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the District's response, the Board agent's warning and dismissal letters, and Charging Parties' appeal. The Board affirms the dismissal of the charge for the reasons discussed below.

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

BACKGROUND

On or after July 1, 1997, Charging Parties were hired by the District as Parent Involvement Specialists (PIS). The PIS employees performed the same duties as employees in another District job classification, Community Relations Assistant (CRA). The CRA classification was included in the bargaining unit represented by the California School Employees Association (CSEA). The District deemed the PIS classification exempt from the bargaining unit.

Beginning in 2001, Charging Parties complained to the District about the difference in terms and conditions of employment between the PIS and CRA classes. The District met with Charging Parties once or twice but then declined further meetings.

Charging Parties continued to voice their complaints to the District in 2003 and expressed an interest in joining CSEA. Shortly thereafter, the District initiated a classification study involving the PIS and CRA classes. The study reported no substantial difference between the duties of the two classes and recommended the two classifications be consolidated in a new class titled Community Relations Specialist (CRS).

In September 2003, the District adopted the study recommendations and consolidated the PIS and CRA classes into a new CRS class. The CRS class was included in the bargaining unit represented by CSEA.

As a result of the reorganization, the District required all PIS employees to take a performance test and reapply for positions in the CRS class. Until the hiring process was completed, the PIS employees were deemed provisional employees. After the PIS employees were hired into the CRS class, the District assigned them seniority dates based on their status in 2003 as provisional employees. The former CRA employees were not required to test for the position and their seniority was calculated from the date they were originally hired into the

CRA classification. An employee's seniority is used to determine certain terms and conditions of employment such as salary, benefits and paid time off.

Charging Parties filed grievances in September and December 2003. The District rejected Charging Parties' grievances indicating they could not use the grievance procedure because they were not yet included in the bargaining unit. District officials also told Charging Parties the District did not want to get involved in a fight with CSEA.

In early 2004, Charging Parties requested a meeting with the Compton Board of Education, but the request was denied. Charging Parties then filed a complaint pursuant to the District's complaint procedure. Two weeks later, the District's Compliance Office advised Charging Parties to seek relief through a government agency or retain an attorney.

Board Agent's Dismissal

The Board agent noted that since 2001, the District declined to discuss terms and conditions of employment with the Charging Parties. Further, the decision to change seniority dates was made in September 2003. As the charge was filed on October 21, 2005, the Board agent concluded the charge was filed well outside the six month statute of limitations.

The Board agent also determined that equitably tolling the statute of limitations under *Long Beach Community College District (2003) PERB Decision No. 1564 (Long Beach CCD I)* was not applicable in this case. The Board agent noted that Charging Parties were not covered by the contractual grievance procedure. Moreover, Charging Parties' grievances were denied in 2003, concluding the grievance process. Thus, even if the grievances had been processed under a contractual grievance procedure, and tolling was applied, the charge was filed more than six months beyond the expiration of the tolling period. The Board agent also concluded the charge did not allege facts to establish a continuing violation.

Finally, assuming the charge was timely filed, the Board agent held that the charge did not demonstrate that the District's actions were unlawfully motivated by the Charging Parties' participation in protected activity.

Charging Parties' Appeal

On appeal, Charging Parties continue to assert their charge is timely under both equitable tolling and continuing violation theories. In addition, Charging Parties maintain they have established a prima facie case of retaliation. In support of their appeal, Charging Parties attach additional documents, some of which were not previously submitted to the Board agent with their charge.

DISCUSSION

EERA section 3541.5(a)(1) 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 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.)

The Board agent correctly determined the charge was untimely filed. Charging Parties knew or should have known in 2001 the District would no longer meet with them to discuss terms and conditions of employment after the District declined further meetings. Furthermore, the District implemented the change in seniority status in 2003. Charging Parties were well aware of this change as they filed grievances in 2003 and a complaint in 2004 challenging the

decision to modify the seniority status of the former PIS employees. The charge was filed on October 21, 2005, well beyond the six month statutory limitations period for these allegations.

Charging Parties argue the statute of limitations should be tolled because of the District's bad faith denial of their grievances and Charging Parties' continued efforts to dispute the change in their seniority status.

The statute of limitations may be tolled under one of two theories and is tolled only for the time it takes a charging party to exhaust the contractual grievance procedure. First, under EERA section 3541.5(a)(2), the statute of limitations is tolled while the parties are participating in a contractual grievance procedure that ends in binding arbitration. Second, the Board recently affirmed the doctrine of equitable tolling in *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach CCD II*),² involving bilaterally established grievance procedures that do not end in binding arbitration. The Board held in *Long Beach CCD II*, "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."

The evidence strongly suggests the Charging Parties were not covered by a negotiated grievance procedure as they were not in the new bargaining unit positions when they filed the grievances. However, assuming Charging Parties were in the bargaining unit, the Board does

² In *Long Beach CCD II*, the Board overruled the determination in *Long Beach CCD I* that the statute limitations is an affirmative defense.

not find that tolling extends the statute of limitations in this case under either statutory or equitable tolling theories.

A charging party bears the burden of demonstrating a charge is timely filed.

(Los Angeles Unified School District (2007) PERB Decision No. 1929; Long Beach CCD II.)

The charge does not allege facts demonstrating that Charging Parties were covered by a negotiated grievance procedure that either ended in binding arbitration or constituted a non-binding dispute resolution procedure. Absent this information, the charge fails to demonstrate sufficient facts to establish that the statute of limitations is subject to statutory or equitable tolling. In addition, the complaint filed in 2004 clearly does not allege it was processed under a negotiated written agreement. Finally, as the Board agent found, even if the statute of limitations was tolled while the Charging Parties pursued their grievances and complaint, they were denied by the District in 2003 and 2004, respectively. The charge was filed more than six months after the grievances and complaint were denied.

Charging Parties assert, in the alternative, the charge should be found timely under a continuing violation theory. To establish a continuing violation a charging party must show there is some new violation, sufficiently independent of the original act, occurring within the statutory limitations period. *(North Orange County Community College District (1999) PERB Decision No. 1342.)* A continuing violation is not found where an employer's conduct during the statutory period is simply maintaining the original position or action it took outside the limitations period. *(Ibid.)*

Charging Parties allege that PIS employees were actually part of the bargaining unit represented by CSEA, but the District falsely informed them they were exempt. Charging Parties further allege they discovered within the statutory period that from 1997-2000 CSEA

operated a “closed shop,” which Charging Parties believed meant all bargaining unit members must either join the union or become an agency fee payer.

These allegations do not establish a continuing violation. Charging Parties knew or should have known when they were hired in 1997 that the District deemed them exempt employees. Certainly, Charging Parties knew in 2001 that the District considered them exempt because Charging Parties met with the District to discuss differences in the PIS and CRA classification benefits. The fact that the District continued to maintain the position that the PIS employees were exempt until they were reclassified, does not make the charge timely under the continuing violation theory. Accordingly, the Board agent properly dismissed the charge as untimely filed.³

Finally, Charging Parties attached new documents to their appeal that were not previously presented to the Board agent for consideration but were available to the Charging Parties when they filed their unfair practice charge. PERB Regulation 32635(b)⁴ precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. Charging Parties have not demonstrated good cause to present new supporting evidence on appeal, and nothing in the documents filed with the appeal indicates good cause. (*Los Banos Unified School District* (2006) PERB Decision No. 1828.) Therefore, the Board did not consider the new evidence submitted on appeal.

³ As the Board finds the charge untimely, it is unnecessary to address whether the charge states a prima facie case of retaliation.

⁴ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

ORDER

The unfair practice charge in Case No. LA-CE-4900-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Rystrom and Member McKeag joined in this Decision.