STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRANZ HINEK, Charging Party, v. SOLANO COUNTY FAIR ASSOCIATION, Respondent.	Case No. SF-CE-454-M PERB Decision No. 2035-M June 9, 2009

Appearances: Franz Hinek, on his own behalf; Kim Alexander Yarbor, Deputy County Counsel, for Solano County Fair Association.

Before Rystrom, Chair; Neuwald and Wesley, Members.

DECISION

RYSTROM, Chair: This case is an appeal to the Public Employment Relations Board (PERB or Board) by Franz Hinek (Hinek) of the Board agent's dismissal of Hinek's unfair practice charge against the Solano County Fair Association (SCFA) brought under the Meyers-Milias-Brown Act (MMBA).[1]

Hinek filed his unfair practice charge on July 12, 2007 based on his July 17, 2006 termination by SCFA alleging wrongful termination and retaliation. On August 17, 2007, the Board agent dismissed the unfair practice charge on the bases that Hinek had not established it was filed within the applicable six-month statute of limitations and he had not alleged a prima facie case of discrimination under the MMBA. Hinek filed a timely appeal on September 5, 2007.

[1] MMBA is codified at Government Code section 3500, et seq. Unless otherwise noted, all statutory references herein are to the Government Code.

Upon a review of the entire record, including but not limited to, the unfair practice charge, the SCFA's response thereto, the Board agent's warning letter, Hinek's amended charge and supporting materials, the Board agent's dismissal letter, Hinek's appeal and SCFA's statement in opposition to appeal, we affirm the Board agent's dismissal for the reasons stated below.

BACKGROUND

On July 12, 2007, Hinek filed an unfair practice charge alleging as conclusions wrongful termination, harassment and retaliation under the MMBA. The gravamen of his complaint was that, without legitimate reason and presumably for purposes of discrimination, Hinek had been terminated on July 17, 2006 from his seasonal job as an employee parking lot attendant for SCFA. Hinek alleged he had been constantly harassed at work by other employees with no intervention by his supervisors, subjected to paycheck shortages, moved into jobs with hot working conditions and denied promotions to other horse race track jobs for which he was qualified. No dates were stated for these alleged wrongful acts. According to his allegations, Hinek filed a grievance about his discharge on July 18, 2006, was told there would be a hearing, but then when he contacted the Teamsters Union Local No. 78 (Local 78) representative on July 11, 2007, he was told there would not be a hearing. At that time he was also told he would not be getting his job back.

The Board agent's August 2, 2007 warning letter characterized Hinek's charges as alleging wrongful termination based on retaliation for protected activity and informed Hinek that a six-month statute of limitations applied to his charge and that he had the burden of proving it was timely. The Board agent noted that Hinek had claimed the limitations period had been tolled during the grievance period since July 2006 but that more factual information, such as a copy of the grievance, a copy of the grievance provision in the collective bargaining

agreement (CBA) between Local 78 and the SCFA and any written communications between Hinek and Local 78 regarding his grievance, was needed to determine if the statute of limitations was tolled. Additionally, Hinek was informed that his factual allegations had not established a prima facie case of discrimination in violation of MMBA section 3506 and what needed to be shown to correct that deficiency.

An amended charge was filed consisting of two letters dated August 9, 2007 and a third letter dated August 14, 2007. Hinek responded to the statute of limitations warning by providing a July 3, 2007 letter from an attorney addressed to Local 78's president, which Hinek alleged proved that he was notified on July 3, 2007 of the Local 78 completion of his union grievance against SCFA.

In pertinent part, this July 3, 2007 letter indicated that the Local 78 attorney had reviewed the CBA between the Local 78 and the SCFA effective June 23, 2005 through July 31, 2009. The letter concluded that the CBA has no grievance or arbitration procedures; thus, if Local 78 believed that Hinek's termination was without cause Local 78 could pursue a claim in state or federal court.

By letter dated August 27, 2007, the Board agent informed Hinek his unfair practice charge was being dismissed because he had failed to establish that his charge was timely filed or to allege a prima facie case of discrimination

HINEK'S APPEAL

On September 5, 2007, Hinek filed an appeal with numerous attached documents and many new factual allegations.

Pursuant to PERB Regulation 32635(a)(1),[2] which requires an appeal to state the specific issues being appealed, Hinek's appeal stated only one issue: that his charge should not have been dismissed because the July 3, 2007 letter from Local 78's attorney proves the grievance procedures ended on July 3, 2007.[3] Hinek argues that this fact is shown by the following language in the letter: "I do not recommend that the Union pursue the grievance filed by Mr. Hinek."

The remainder of Hinek's appeal consists of factual allegations, many of them new, which he argues support the discrimination and harassment claims in his unfair practice charge.

SCFA'S STATEMENT IN OPPOSITION TO APPEAL

SCFA's September 7, 2007 opposition to Hinek's appeal contends that Hinek has not shown that his unfair practice charge was timely nor that he supplied the factual allegations to show a nexus between his allegedly protected conduct and his termination on July 17, 2006. Additionally, SCFA objects to Hinek's presentation of new evidence in his appeal.

HINEK'S RESPONSE TO SCFA OPPOSITION TO APPEAL

On September 11, 2007, Hinek responded to SCFA's opposition by fax with a letter which was subsequently filed on September 17, 2007. In this letter, which included additional attached documents, Hinek argues that his appeal does not present any new charges or supporting evidence contrary to the assertion by SCFA. He also argues that the July 3, 2007 attorney's letter to Local 78 proves the grievance procedure ended on that date.

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

[3] PERB Regulation 32635(a)(1) provides that an appeal shall: "State the specific issues of procedure, fact, law or rationale to which the appeal is taken."

On September 18, 2007 and October 9, 2007, Hinek filed additional letters containing more factual allegations and arguments, none of which added to his equitable tolling claims.

DISCUSSION

The issue presented by Hinek's appeal is whether his July 12, 2007 unfair practice charge of an alleged July 17, 2006 wrongful termination is timely.

The statute of limitations period for processing an unfair practice claim under the MMBA is six months. (*County of Siskiyou* (2006) PERB Decision No. 1837-M; *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090 (*Coachella*).)

When Statute of Limitations Begins to Run

In *Regents of the University of California* (2004) PERB Decision No. 1585-H (*Regents*), PERB found that the six-month limitations period begins to run on the actual date of the termination. This ruling was based on *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493 (*Romano*), which held that under the Fair Employment & Housing Act the statute of limitations for an unfair employment practice based on a termination does not begin to run until the date of actual termination. In *Regents*, PERB adopted the *Romano* rule, finding that it was a better method when dealing with reprisals and discrimination and on the public policy grounds that the rule includes the benefit of simplicity in determining when the unfair practice occurred.[4] We find for the same reasons that the *Romano* rule should apply to unfair practice charges based on alleged wrongful terminations under the MMBA.[5]

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[4] This rule was also based on the Higher Education Employer-Employee Relations Act (HEERA) section 3563.2 providing that the limitations period is triggered when the unfair practice occurs. (HEERA is codified at § 3560 et seq.)

[5] This holding is consistent with the high court's conclusion in *Coachella*, that the Legislature intended the manner in which PERB processes unfair practice charges, including

Under the *Romano* rule, the applicable six-month statute of limitations period began to run on the date of Hinek's termination, July 17, 2006. Therefore, Hinek's July 12, 2007 alleged retaliatory termination charge was untimely. Hinek argues that the statute of limitations was tolled because he pursued a grievance procedure and, therefore, his charge was timely.

Equitable Tolling

In *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach II*), the Board reaffirmed its decision in *Long Beach Community College District* (2003) PERB Decision No. 1564 (*Long Beach I*), which confirmed that equitable tolling is available under the Educational Employment Relations Act (EERA) when parties are utilizing a non-binding dispute resolution procedure.[6] Likewise, in *Trustees of California State University (Onkvisit)* (2009) PERB Decision No. 2032-H, the Board recently concluded that equitable tolling applies to cases under HEERA when parties utilize a binding dispute resolution procedure contained in a negotiated agreement.

PERB has not yet considered whether the equitable tolling doctrine set forth in *Long Beach II* applies also to cases under the MMBA. In *Coachella, supra,* the California Supreme Court recognized that the MMBA "is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB." (*Coachella*, at p. 1089.) Thus, the Court found it reasonable to infer that the Legislature intended that there be 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."

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the limitations period, to be the same for MMBA as it is for the other public employment relations laws under PERB.

[6] EERA is codified at Section 3540 et seq.

(*Id.*, at p. 1090.) Accordingly, although the MMBA itself did not specify the statute of limitations for filing a charge with PERB under that statute, the Court found that the Legislature intended for the same six-month limitations period to apply to charges filed with PERB under the MMBA as that provided in all the other statutes under PERB's jurisdiction.

In *Long Beach II*, PERB found that requiring the existence of an agreement on the dispute resolution process is integral to insuring the application of the traditional standards for equitable tolling. This limitation was also found to be consistent with the goals and framework of EERA as delineated in EERA section 3540, which are very similar to the goals specified in MMBA section 3500(a). We hold that this same limitation on equitable tolling should apply to cases filed under the MMBA.[7]

We find these same principles applicable to the doctrine of equitable tolling, and hold that the doctrine of equitable tolling applies to cases filed under the MMBA. Under *Long Beach II*, the six-month statute of limitations under EERA "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." (*Long Beach II*, at p. 15.) *Long Beach II* merely refined the equitable tolling test set forth in *Long Beach I*, which held that the six-month limitations period under EERA and related statutes was no longer jurisdictional, and that the six-month limitation period should be

[7] It is appropriate to take guidance from cases interpreting California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

extended equitably only when a party utilizes a bilaterally agreed upon dispute resolution procedure. (*Long Beach I*, at p. 16.)

Hinek argues the limitations period applicable to his charge was equitably tolled because the alleged grievance procedures he pursued immediately following his July 17, 2006 termination did not end until July 3, 2007. To determine whether equitable tolling applies herein, our threshold issue is whether Hinek has alleged facts showing that his grievance was being pursued under a bilaterally agreed upon dispute resolution procedure. The only factual allegations Hinek made regarding the processing of his grievance concerned the July 3, 2007 letter he attached to his amended charge. In his amended charge, Hinek alleges that this letter "proves that I was notified July 3, 2007 of Teamsters Local 78 [sic] completion of my union grievance versus Solano County Fair" and that "This [letter] should prove I meet the deadline of six months of [sic] the Statute of Limitations."

We find that this letter does not establish that Hinek's July 18, 2006 grievance had been pursued for almost a year under grievance procedures in his CBA. To the contrary, the letter notifies Hinek that no grievance has been filed on his behalf by Local 78 because there are no grievance procedures available under the CBA between Local 78 and the SCFA.

Based on the criteria for equitable tolling established in *Long Beach II* and Hinek's failure to allege facts in either his original or amended charge to show that his termination claim is timely, we hold Hinek's unfair practice charge must be dismissed. Whatever grievance Hinek filed against the SCFA, there were no facts alleged to show it was pursuant to a bilaterally agreed upon dispute resolution procedure and that the processing of his grievance under the CBA's procedures ended on a date which would make his unfair practice charge timely.

We next address SCFA's objection based on PERB Regulation 32635 that Hinek's new factual allegations and documentary evidence contained in his appeal were improper. PERB Regulation 32645(b) prohibits a party from presenting new supporting evidence in an appeal before PERB, unless good cause is shown. We agree with SCFA that Hinek did not show good cause to present new evidence supporting his appeal and we decline to consider any of the new factual allegations or additional documentation presented by Hinek on appeal.

ORDER

The unfair practice charge in Case No. SF-CE-454-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.