STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

J.D. DIXON, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES), Respondent.	Case No. LA-CE-141-S PERB Order No. Ad-145-S Administrative Appeal (Interlocutory) April 11, 1985

Appearances: J.D. Dixon, on his own behalf; Department of Personnel Administration, by Christine A. Bologna and Lester L. Jones, for State of California (Department of Developmental Services).

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This interlocutory appeal by the Department of Developmental Services (Department) is before the Public Employment Relations Board (PERB or Board) upon certification by an administrative law judge (ALJ) pursuant to section 32200 of PERB's rules and regulations.[1] The appeal is from the ALJ's denial of the Department's motion to dismiss the instant charge, which alleges that the Department unlawfully discharged J.D. Dixon from his employment. The motion was made on the grounds that, pursuant to

[1]PERB's rules and regulations are codified at California Administrative Code, title 8, section 31001, et seq.

section 3514.5(a) of the State Employer-Employee Relations Act (SEERA),[2] PERB has no jurisdiction to hear the case. Section 3514.5(a) provides in pertinent part that:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: . . . ; (2) 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.

For the reasons which follow, we reverse the ALJ and dismiss Mr. Dixon's charge.

PROCEDURAL HISTORY

On May 24, 1984, Charging Party J.D. Dixon filed an unfair practice charge against his state employer alleging that the Department of Developmental Services had harassed and, ultimately, fired him because of his exercise of rights guaranteed by the SEERA. The charge was assigned to PERB's Los Angeles regional attorney for investigation.

The State's Department of Personnel Administration (DPA), representing the respondent state employer, called the regional attorney's attention to the collectively-negotiated contract

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[2]The SEERA is codified at Government Code section 3512 et seq.

between the Department and Dixon's exclusive representative, the Communication Workers of America (CWA). That agreement contains a provision prohibiting the employer from discriminating against employees because of activity which is protected by the SEERA. Another provision of the agreement provides for a grievance procedure and specifies that if a grievance is not resolved at the first three steps of the procedure, CWA (but not an individual employee) shall have the right to continue the grievance to binding arbitration. Relying on these contract provisions, DPA urged the regional attorney to dismiss the charge on the grounds that section 3514.5(a) requires PERB to defer where, as here, a charge is based on conduct which constitutes a violation of a collectively-negotiated contract and where that contract provides for binding arbitration of such contract-violation claims. The regional attorney acknowledged that the contract does prohibit discrimination because of SEERA-protected activity and does provide for binding arbitration of claims that such discrimination has occurred. Nevertheless, he refused to find deferral appropriate, citing the portion of section 3514.5(a)(2) which reads as follows:

> However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

In a letter to DPA dated August 21, the regional attorney explained his conclusion that resort by Dixon to the

contractual grievance procedure would be futile:

> There is evidence of animosity between Mr. Dixon and his union's officers. The Union's representative has stated that he cannot commit that the Union would take a Dixon-filed grievance to arbitration. Under the grievance procedure, the Union, not the individual employee, has the right to continue the grievance to arbitration.
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> Where there is animosity between an individual and his union representatives who are involved in grievance decisions, deferral is inappropriate. Kansas Meat Packers (1972) 198 NLRB No. 2. Such is the case here, since the persons involved in the decisions regarding whether to seek arbitration are also persons who have a strained relationship with the charging party.

Having refused to defer, and finding further that the facts alleged in the charge stated a prima facie case, the regional attorney issued a complaint on September 25. At no point did the regional attorney reveal the specific evidence, discovered in the course of his investigation, which led him to his conclusion that animosity existed between Dixon and CWA of such a kind as to show that CWA could not be expected to fairly represent Dixon. Rather, he cited section 32162 of PERB's regulations, explaining to DPA that evidence disclosed in the course of a regional attorney's investigation is confidential.[3]

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[3]Section 32162 states as follows:

> The Board shall not disclose any confidential statement submitted by a party,

On October 17, DPA filed an answer to the complaint. Accompanying the answer was a motion to dismiss on the grounds that the matter should be deferred to arbitration. On November 9, Dixon submitted his opposition to DPA's motion to dismiss setting forth allegations of fact in support of his claim of CWA animosity towards him. On November 30, again in support of his claim of CWA animosity, he submitted declarations and copies of leaflets which he allegedly prepared personally and which contain criticism of the local and national CWA organizations. Dixon's submissions provide the information which follows.

Psychiatric Technicians Local 11555, affiliated with Communication Workers of America, is the exclusive representative of all psychiatric technicians in California state service. This statewide Local is part of CWA's

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> or the identity of any person who submits such a statement, unless the person submitting the statement agrees to disclosure or disclosure is required:
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> (a) Pursuant to Section 32206, concerning production of statements of witnesses after direct testimony;
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> (b) In a court proceeding upon a complaint for injunctive relief;
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> (c) By order of the Board itself;
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> (d) By final order of a court of competent jurisdiction.

District 11. In turn, the Local is subdivided such that employees at each state psychiatric hospital constitute a "chapter" of the Local.

The president of the Local is Angel Hernandez. The vice president of CWA for District 11 is William "Bill" Demers. Demers is the CWA official with authority to make all decisions on taking grievances to binding arbitration.

Dixon has been a very active leader of a dissident employee movement at the Camarillo Hospital Chapter. He was initially very supportive of CWA and was a prominent organizer in CWA's campaign which culminated in the certification election victory of Local 11555 in November 1981. Following this election, he held the position of steward at Camarillo Hospital.

After the election victory, CWA Vice President Demers removed most of the original Local organizers from their positions. He then himself selected the persons to fill the paid staff positions of the Local.

In March 1982, Dixon ran for the office of Chapter president. When he complained that candidates favored by the District were using Union resources in their campaigns, the election was cancelled by the District. Dixon thereupon printed and distributed a flyer to employees. The flyer stated the circumstances of the election cancellation and alleged that the true reason for the cancellation was that he, Dixon, was clearly going to win, an event which the District wanted to

avoid. Dixon also sent a letter of complaint to District head Bill Demers.

In April, Dixon sent a long letter complaining of poor union leadership to CWA President Glenn Watts in Washington, D.C. In addition to itemizing his complaints, Dixon demanded the removal of Bill Martin, assistant to District Vice President Demers, and Liz Young, CWA staff representative at Camarillo Hospital. Later that month, the locks on the door of the Chapter office were changed and Dixon was denied a key despite his status as steward. He contacted Local President Hernandez, who told Dixon, "I don't want you to have [a key]."

On May 1, 1982, Dixon received a letter from CWA representative Liz Young informing him that he was terminated as CWA steward at Camarillo.

In June 1983, Dixon ran again for the Chapter presidency against CWA's paid staff representative at Camarillo. He won the ballot count, but the election committee searched for irregularities and leaked word to Dixon's opponent, who thereupon filed an appeal. The election committee then ordered that the election be repeated. Dixon also won the rerun election.

On December 24, Dixon sent a long letter to Local President Hernandez charging him with extensive misconduct and ultimately demanding his resignation. The letter ended with this statement:

> If you fail to resign I will do everything

> within my power to see that you are formally charged under the provisions of the Constitution of Communication Workers of America.

In February 1984, CWA placed Local 11555 under trusteeship at the request of President Hernandez. Dixon was thereafter removed from the office of president of the Camarillo chapter along with some other members of the Local's executive board.

Attached as exhibits to Dixon's declaration are copies of letters and fliers substantiating the facts alleged in the declaration. Also among these are copies of a newsletter called "Concerned Psych Techs." The newsletter indicates that it is a publication of a group of dissident members of Local 11555 who also call themselves "Concerned Psych Techs." The publication, of which Dixon is apparently chief editor and writer, strongly attacks local and national CWA leadership. He accused them of running a dictatorship after the Local was placed in trusteeship. The trusteeship, he wrote, was imposed after he and fellow Concerned Psych Techs were elected to chapter presidencies and thereby gained a majority of seats on the Local's executive board.

Dixon also circulated fliers under the Concerned Psych Tech caption urging the electoral defeat of District Vice-President Dêmers. One accuses Demers of ushering in the "Dark Ages" and of implementing a scheme to take over control of the Local. It also asserts that psych techs have been "forced to fight

without their union against the [employer]." A second flyer sets forth a long list of accusations against Demers.

ALJ's Ruling and the Department's Appeal

On December 5, 1984, the ALJ denied DPA's October 17 motion to dismiss. Her grounds for the denial were stated as follows:

> Based upon the findings made by the Regional Attorney pursuant to his confidential investigation and based upon the supplemental information provided by Mr. Dixon on November 9 and November 30, 1984, it is determined that an adequate showing has been made to reach the conclusion that resort to the grievance arbitration machinery would be futile.

Thereafter, she certified the Department's request to appeal her ruling on an interlocutory basis to the Board itself.

On December 13, DPA wrote to PERB's Chief ALJ requesting that the scheduled hearing on the charge be stayed pending the Board's resolution of the appeal. It also set forth the Department's position on appeal. The Department argues first that Dixon's submissions are inadequate because the conduct revealed therein occurred outside SEERA's six-month statute of limitations period. Second, it argues that in any event, and particularly in light of Dixon's failure to actually ask CWA to take his claim to arbitration, the information disclosed by Dixon's submissions fails to prove that recourse to the grievance procedure would be futile.

DISCUSSION

The appeal now before PERB is from a decision of an ALJ

denying Respondent's motion to dismiss the charge and complaint. That decision, as noted above, was based on "the findings made by the Regional Attorney . . . and . . . the supplemental information provided by Mr. Dixon . . . ."

Initially we note that our review of the ALJ's ruling must be based on the public record amassed thus far in the case. The information collected by the regional attorney in the course of his investigation, and thereafter kept confidential, is not a part of that record. It is not clear from the ALJ's order denying Respondent's motion whether she was made privy to the confidential information discovered by the regional attorney or whether, in basing her determination in part on his findings, she was merely accepting as true his ultimate findings. In either event, however, the ALJ committed error in relying on information not a part of the public record in the case. Respondent was entitled to know the specific factual basis for the ALJ's ruling in order that it might have a fair opportunity to respond to the issues raised thereby. In turn, the Board cannot meaningfully review the ALJ's ruling on Respondent's motion without knowing the specific basis for that decision.

While the ALJ could not properly rely on the regional attorney's findings, the record nevertheless contains a substantial body of evidence bearing on the deferral issue consisting of the uncontroverted declarations and documentary

evidence submitted to the ALJ by Dixon. The ALJ stated in her order that her ruling was based on this evidence as well as the regional attorney's findings. If this evidence is by itself sufficient to support the ALJ's ruling, then her decision should be affirmed.[4]

This Board has not previously considered the standard by which claims of futility such as the one now before us should be decided. The National Labor Relations Board (NLRB), however, has for some time recognized and applied a doctrine of pre-arbitral deferral which no doubt forms the basis of the deferral policy codified in the labor relations acts administered by PERB. Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.

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[4]The Department on appeal argues that the facts submitted by Dixon in support of his futility claim cannot properly be considered by PERB because the events he relies on occurred more than six months prior to the date he filed his charge. This argument is based on a misunderstanding of the SEERA's statute of limitations. Section 3514.5(a) provides only that PERB will not issue a complaint on a charge alleging that a given event constitutes an unfair practice if that event occurred more than six months prior to the filing of the charge. Here, Dixon does not charge that the events referred to in his submissions to the ALJ are unfair practices. He only submits evidence of those events in support of his claim that PERB should take jurisdiction over his charge that his termination by the Department violated the SEERA's unfair practice provisions. The Department does not contend that this termination occurred more than six months prior to the date Dixon filed his charge.

Decisions of the federal labor board interpreting the private sector deferral doctrine were cited by the regional attorney and, by adoption, the ALJ in their respective determinations to send the instant charge to hearing before this agency. These underlying determinations chiefly rely on Kansas Meat Packers (1972) 198 NLRB 543 [80 LRRM 1473]. In that case two employees were fired after repeatedly and vociferously complaining to both management and their union's business agent about safety conditions in the workplace. As a result of these complaints, antagonism developed between the two employees and the business agent. After angry exchanges between these individuals, one of the employees resigned his position as a union steward, and both men gave written notice of resigning from union membership. Following the discharge of the two men, their immediate supervisor testified that their discharge had been requested by their business agent. Thereafter the union took no action to protest or challenge the firings. On these facts the board concluded as follows:

> Under all the facts and circumstances set forth above -- particularly the apparent antagonism between the interests of the discriminatees, on the one hand, and both parties to the collective-bargaining contract herein, on the other, and the discriminatees' resultant election to refrain from seeking redress through that contract's grievance procedures -- we conclude that it would be repugnant to the purposes of the Act to defer to arbitration in this case as to do so would relegate the

> Charging Parties to an arbitral process authored, administered, and invoked entirely by parties hostile to their interests.

Other decisions of the NLRB reflect similar considerations. Thus, in General Motors Corp. (1975) 218 NLRB 472 [89 LRRM 1891], two employees again became disfavored by their union. Evidence showed that union officials had encouraged other employees to name the two disfavored employees, falsely, as the instigators of a wildcat walkout which had resulted in the suspension of all the participants. When the employees did so, the two were discharged while the other employees were reinstated. One union official characterized one of the discharged employees as "a Communist and a pinko and everything" and told employees that the union intended "to come out with a leaflet and show what a . . . [expletive deleted] Communist he really is." On these facts the NLRB refused to defer to grievance machinery in which the union would be defending the two employees.

Upon review of the information submitted by Dixon, we find that it fails to meet the standard suggested by the private sector cases reviewed above. In those cases, the record included a direct showing that the union had committed itself to a position in conflict with the interest of the grievants. In Kansas Meat Packers, supra, the union was shown to be the originator and moving force behind the employer's discharge of

two grievants; in General Motors Corp., supra, the union again actively contributed to the discharge of two grievants by encourging employees to name the grievants as instigators of an unprotected walkout.

In contrast, the instant record is devoid of evidence that the union has acted in furtherance of, or even condones, the employer's action of terminating Dixon's employment. While the extensive evidence of Dixon's own actions in opposition to various union officials may invite speculation as to how the union might be inclined to treat Dixon, we find such speculation to be an insufficient basis to support a conclusion that binding arbitration is unavailable to Dixon. There is no assertion that Dixon has yet requested the union's assistance or that the union has declined to represent him. Therefore, because of the availability of collectively-bargained binding arbitration, we are required in the circumstances of this case and under the terms of section 3514.5(a) to refuse to issue a complaint. Should Dixon return to PERB with evidence that CWA has in fact refused to take his case to arbitration, he may refile his charge. Under the doctrine of equitable tolling, the statute of limitations would begin to run only after he has exhausted the grievance procedure of the collective bargaining agreement. Los Angeles Unified School District (1983) PERB Decision No. 311.

ORDER

Upon the foregoing findings of fact and conclusions of law, the charge in Case No. LA-CE-141-S is DISMISSED.

Members Morgenstern and Burt joined in this Decision.