

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DORIS MCKENNEY,)
)
 Charging party,) Case No. LA-CE-38-S
)
 v.) PERB Decision No. 269-S
)
 STATE OF CALIFORNIA (DEPARTMENT OF) December 22, 1982
 HEALTH SERVICES),)
)
 Respondent.)
)
 _____)

Appearances; David Longstreet, Attorney (Bet Tzedek Legal Services) for Doris McKenney; Barbara T. Stuart, Attorney for State of California (Department of Health Services).

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

TOVAR, Member: Doris McKenney appeals a hearing officer's dismissal without leave to amend of her amended charge that she was unlawfully dismissed from state service by the State of California, Department of Health Services (Department). As grounds for the dismissal, the hearing officer found that:

- (1) the charge is based upon a matter which occurred more than six months prior to the filing of the charge and is therefore barred by the statute of limitations set forth at subsection 3514.5(a) of the State Employer-Employee Relations Act (SEERA or Act);¹
- (2) the charge fails to state a prima facie case of

¹SEERA is codified at Government Code section 3512

any violation of SEERA; and (3) the amended charge was filed more than 20 calendar days after the issuance of the dismissal

et seq. All statutory references herein are to the Government Code unless otherwise indicated.

Section 3514.5 provides as follows:

The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) 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:

- (1) 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;
- (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.

The board shall have discretionary jurisdiction to review such 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 such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the

with leave to amend of the original charge. Appellant contests each of these findings of the hearing officer. For the reasons set forth below, the Public Employment Relations Board (PERB or Board) finds that the instant charge is barred by the statute of limitations set forth at subsection 3514.5(a), and should therefore be dismissed.

DISCUSSION

Appellant's charge alleges that she was dismissed from state service in January 1979, and that the State Personnel Board issued a final decision upholding that dismissal on August 8, 1979. The instant proceeding before PERB was initiated on March 6, 1981, 19 months after the State's final action on Appellant's dismissal from service.

Section 3514.5 prohibits PERB from issuing 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 section provides, however, that the running of the six-month period will be tolled during the time that a complainant was pursuing grievance machinery which is provided

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.

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by agreement between the parties and which has culminated in settlement or binding arbitration.

PERB has also approved application of the doctrine of "equitable tolling" in appropriate cases. State of California, Department of Water Resources, et al. (12/29/81), PERB Order No. Ad-122-S. In recognition of the fact that the principal purpose of a statute of limitations is to prevent surprise and prejudice to a party from having to defend against stale claims, the doctrine of equitable tolling provides that a statute of limitations will not be imposed to bar a claim where no such risk exists because the defendant has been kept on sufficient notice by the plaintiff's pursuit of his claim in another forum. The general rule is that the doctrine is applicable where "an injured person has several legal remedies and reasonably and in good faith pursues one." Elkins v. Derby (1974), 12 Cal.3d 410. See also, Addison v. State of California (1978), 21 Cal.3d 313. Thus, in State of California, Department of Water Resources, supra, we found that a complaint should issue even though more than six months had passed since the alleged violation of SEERA because the respondent had been placed on sufficient notice by the timely filing and prosecution of a complaint involving the same issues before the State personnel Board.

Appellant here argues that between the date of the State Personnel Board's final approval of McKenney's termination and

the filing of this action before PERB she was continuously pursuing her claim against the Department through the offices of Assemblywoman Teresa Hughes and Senator Green [sic] , and through the "Labor Board [sic]." These activities are not the kind of "legal remedies" contemplated by Elkins or by the Board when it decided Department of Water Resources. We find, therefore, that Appellant's consultations with elected officials failed to toll the statute of limitations set forth at subsection 3514.5 (a).

No reason appearing in the Act or in equity why the six-month statute of limitations should be tolled for the period at issue, the Board finds that Appellant's first amended complaint is properly dismissed based upon Respondent's affirmatively asserted defense of the statute of limitations. Having so found, we see no purpose in considering the hearing officer's remaining grounds for dismissal and Appellant's exceptions thereto.

ORDER

Upon review of the entire record in this case, the Board ORDERS that the charge filed in case NO. LA-CE-38-S is DISMISSED without leave to amend.

Chairperson Gluck and Member jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



DORIS MCKENNEY,)	
)	
Charging Party,)	Case No. LA-CE-38-S
)	
v.)	
)	
STATE OF CALIFORNIA (DEPARTMENT OF)	NOTICE OF REFUSAL
HEALTH SERVICES),)	TO ISSUE COMPLAINT
)	AND DISMISSAL OF
Respondent.)	CHARGE WITHOUT
)	LEAVE TO AMEND

NOTICE IS HEREBY GIVEN that no complaint will be issued in the above-captioned unfair practice charge and that it is hereby dismissed without leave to amend pursuant to PERB Regulation section 32630 (California Administrative Code, title 8, part III).

The charge, as amended, is dismissed on the grounds that (1) the conduct alleged to constitute the unfair practice took place more than six months prior to the filing of the unfair practice charge, (2) the charge fails to state a prima facie unfair practice case, and (3) the amended charge was filed more than 20 calendar days after the dismissal was issued.

PROCEDURAL HISTORY

The Charging Party filed the original charge in LA-CE-38-S on March 6, 1981. The Respondent answered the original charge and moved to dismiss it on March 26, 1981. On April 21, 1981,

the charge was dismissed with leave to amend. The dismissal set forth May 11, 1981, as the last date the Charging Party could file an amendment or an appeal. On May 21, 1981, the First Amended "Complaint" was filed. On June 16, 1981, Respondent filed a First Amended Answer, Motion to Dismiss First Amended Complaint and Motion Requesting Amendment of Caption.

DISCUSSION

1. Six Month Statute of Limitations

Although the First Amended Complaint does not set forth any dates, the subject is the same as the original charge—the dismissal from state service of the Charging Party. The original charge alleges such dismissal occurred in January 1979 with a State Personnel Board (SPB) decision upholding such dismissal on August 8, 1979. Although there are documents in the original charge that refer to the filing of a petition for rehearing the First Amended charge does not affirmatively allege or even suggest that the subject decision was not a final decision of the State Personnel Board on September 7, 1979.

Section 3514.5 (a) Government Code prohibits the PERB from issuing a complaint "in respect of any change based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

2. Charge Fails to State a Prima Facie Unfair Practice Case

The First Amended Complaint alleges Charging Party noticed and reported specified activities of fellow employees.

She ultimately filed a grievance ostensibly on this same or a related subject. She goes on to allege she was closely scrutinized and a detailed account was compiled of her movements in her workplace. She further alleges such compilation was used to support her dismissal. The Charging Party concludes that the complained of employer's activity was in violation of Labor Code section 98.6 which generally states that no person shall discharge or discriminate against any employee because such employee has filed a bona fide complaint relating to his rights.

There are no allegations of any violation of any sections of the State Employer-Employee Relations Act nor can any such violation be reasonably inferred from the facts as alleged. A violation of Labor Code section 98.6 under the subject circumstances, even if proven, would not support a finding of an unfair practice.

3. Amended Charge Filed More Than 20 Calendar Days After Dismissal Was Issued

On April 21, 1981, the Notice of Refusal to Issue Complaint and Dismissal of Charge With Leave to Amend was issued. In the conclusion of such decision, on page 4, the Charging Party was

informed she had until 5:00 p.m. on May 11, 1981 to either file an amended charge or an appeal to the Board itself (See PERB Regulation 32630(b)). No such amendment or appeal was filed by the specified time. The First Amended Complaint was received and filed at the Los Angeles Regional Office at 3:16 p.m. on May 21, 1981.

CONCLUSION

For all of the foregoing reasons, the charge in LA-CE-38-S must be dismissed without leave to amend. It is apparent in the two separate pleadings that the Charging Party's case involves an allegedly improper dismissal from state service in 1979. All of the conduct complained of here took place well before September 6, 1980 (six months prior to the filing date of the charge). Charging Party in two separate and distinct charges has yet to allege any violation of a section in the State Employer-Employee Relations Act. The First Amended Complaint was not filed within the period of time set forth in PERB Regulation 32630(b). The dismissal is without leave to amend. No further allegations could cure the defects set forth and discussed above.

This dismissal without leave to amend is pursuant to PERB Regulation 32630 (a).

Charging Party may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice. (PERB Regulation 32630(b).)

Such appeal must be actually received by the executive assistant to the Board before the close of business (5:00 p.m.) on July 20, 1981 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, must be signed by the Charging Party or her agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32630(b).) The appeal must be accompanied by proof of service upon all parties. (PERB Regulations 32135, 32142, and 32630(b).)

Dated: June 29, 1981

Alién R. Link
Hearing Officer