STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM SCHWARTZMAN, M.D.,	)	
	)	
Charging Party,	)	Case No. SF-CE-68-S
	)	
v.	)	PERB Decision No. 561-S
	)	
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	January 9, 1986
	)	
Respondent.	)	
	)	

Appearances; William Schwartzman, M.D., on his own behalf.

Before Hesse, Chairperson; Jaeger and Porter, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (Board) on appeal by William Schwartzman, M.D. (Charging Party) of the Board agent's proposed decision, attached hereto, which dismissed without prejudice Charging Party's unfair practice charge against the State of California, Department of Corrections.

We have reviewed the entire record in this case and the proposed decision and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The Board agent's dismissal without prejudice in Case No. SF-CE-68-S is hereby AFFIRMED.

Chairperson Hesse and Member Jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM SCHWARTZMAN. Charging Party. v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS). Respondent.	)	Unfair Practice Case No. SF-CE-68-S PROPOSED DECISION AND ORDER DISMISSING COMPLAINT (5/20/85)

Appearances: William Schwartzman, charging party; Edmund K. Brehl, attorney for respondent.

Before: Barry Winograd. Administrative Law Judge.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Respondent has moved that the complaint be dismissed because the subject matter is covered by the grievance and binding arbitration machinery of an applicable collective bargaining agreement. For the reasons noted below, respondent's motion is granted.

. William Schwartzman filed this charge on February 15. 1985 and submitted an amendment on February 28. 1985. The respondent is the State of California. Department of Corrections. Schwartzman has alleged that on or about December 1. 1984 he was not hired for a psychiatrist position at San Quentin Prison, and that this was a discriminatory refusal in violation of section 3519(a) of the State

Employer-Employee Relations Act (hereafter SEERA or Act).[1] 1

The PERB issued a complaint on March 12. 1985. Respondent filed its answer on April 3. 1985. admitting certain facts but generally denying the allegations of unlawful conduct. Respondent also advanced a number of affirmative defenses, including an objection that the complaint was subject to grievance and arbitration deferral and should be dismissed pursuant to section 3514.5(a)(2) of the SEERA.[2] 2 In connection with this affirmative defense, respondent stated its willingness to waive timeliness and procedural defenses regarding a possible grievance, and contended that there was no showing of futility to excuse utilization of the contractual

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[1]The Act is codified at Government Code section 3512, et seq., and is administered by the Public Employment Relations Board (hereafter PERB or Board). All statutory references are to the Government Code unless otherwise indicated. Section 3519 provides in relevant part that it shall be unlawful for the state employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]That section states that the PERB shall not,

> . . . (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. . . .

procedure.[3] Accompanying its answer, as required by PERB regulations, respondent filed a motion to dismiss urging deferral.[4]

The deferral question was argued by the parties on April 30. 1985. at the time of the scheduled settlement conference. On that date, the intended ruling on respondent's motion was announced, thereafter to be formalized in this written decision and order. (Schwartzman on May 15. 1985 filed a motion for reconsideration of the intended ruling.)

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[3]Section 3514.5(a) provides in part that,

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

[4]Board regulations (hereafter PERB Rules) are set forth in the California Administrative Code, title 8, section 31001, et seq. PERB Rule 32646(a) establishes the procedure for raising the deferral claim:

> If the respondent believes that issuance of the complaint is inappropriate . . . because the dispute is subject to final and binding arbitration . . . the respondent shall assert such a defense in its answer and shall move to dismiss the complaint, specifying fully the legal and factual reasons for its motion.

Rule 32644(c)(6) also provides that the answer must include affirmative defenses on respondent's behalf. The Board's rulemaking authority is contained in section 3541.3(g), incorporated in the SEERA by section 3513(g).

A second motion by the employer challenged the sufficiency of the charging party's claims of protected concerted activity. Given the ruling on the deferral issue, the second motion was not decided.

The relevant facts drawn from the pleadings and declarations of the parties may be summarized briefly.

Schwartzman has been a psychiatrist at Napa State Hospital for many years. As a medical doctor he is included within Unit 16 of the State of California. The exclusive representative for that unit is the Union of American Physicians and Dentists (UAPD). Schwartzman's charge alleged that between December 1982 and June 1984 several grievances were filed, mostly linked to working conditions that he believed were unsafe and to related disciplinary measures. During this period, he also pursued cases with the State Personnel Board and the Division of Labor Standards Enforcement. On some of these grievances and administrative matters he handled the proceedings himself, while on others he was—and continues to be—represented by his union.

According to the charge, in November 1984 Schwartzman was interviewed for a psychiatrist position at San Quentin Prison, but, two weeks later, was informed that the job would be offered to another candidate instead. Schwartzman claims that comments made during the interview referring to his disputes at Napa State formed a basis for the refusal to hire, as reflected in the later letter denying him the job. Schwartzman contends that by relying on the Napa State situation, which involved protected activity on his part, San Quentin's decision

constituted discrimination.[5]

Unit 16 employees are covered by a collective bargaining agreement that includes an article tracking the statutory protection available under section 3519(a) of the Act:

> The State and UAPD shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by the State Employer-Employee Relations Act.

Another relevant contract provision is the article governing health and safety, which includes the promise that the "State shall attempt to provide a safe and healthy work place for State employees . . .," and allows for expedited treatment of related grievances.

The contract also contains a five-step grievance procedure. A grievance may be initiated by an individual employee or by UAPD. An employee may carry the case through the fourth step, an appeal to the Department of Personnel Administration. Under the contract's time limits, this should take no more than three to four months. Thereafter, only the union may take a case to the fifth step, binding arbitration.

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[5]In Schwartzman's view, the discrimination is continuing because the other candidate did not accept the position and San Quentin reopened the recruitment process rather than offer the post to Schwartzman.

It is undisputed that neither Schwartzman nor UAPD filed a grievance regarding the San Quentin hiring refusal.

Schwartzman has asserted that his relationship with UAPD is so strained, and UAPD so hostile, that it would be futile to compel utilization of the grievance and arbitration procedures under the contract. To support this claim, on April 30 Schwartzman filed an extensive declaration in response to the employer's deferral objection. In the declaration, Schwartzman recounted a series of disputes with UAPD representatives regarding case-handling decisions. Taken together, Schwartzman's allegations amount to claims of union misconduct in connection with matters that largely preceded the filing of this charge with the PERB. Specifically, regarding the San Quentin issue, Schwartzman also stated that a union lawyer,

> . . . indicated verbally on several occasions in and around early January 1985, that the UAPD and she had no interest in full [sic] representing me on a grievance against San Quention, and would not arbitrate it. if it failed through a Level IV review. . . .[6]

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[6]In another paragraph, Schwartzman claimed that other UAPD officials who were handling cases related to Napa State were aware of his San Quentin job denial, but they did not,

> . . . agree to initiate and represent me on a new grievance against San Quentin.

Despite the fact that one can infer a request for UAPD representation on a San Quentin grievance from the above quoted passages, other exhibits suggest that an express request might not have been made. or. was lost in a shuffle of profuse litigation. For example, no reference to a possible

In sharp contrast to Schwartzman's claims about UAPD's failure to represent him. the union indicated by letter of April 25 and by appearance on April 30. that it was prepared to represent Schwartzman in good faith if an actual request was made to pursue a legitimate grievance, up to and including possible arbitration.

Schwartzman challenged the union's assurance and requested an evidentiary hearing to demonstrate a prior refusal to represent him, and the union's bad faith and continuing hostility. The request for a hearing was denied as premature, because, as a matter of law for the reasons enumerated below, there was no showing that resort to the contract grievance procedure would be futile.

San Quentin grievance was made in two letters written by Schwartzman to the union in December 1984 and January 1985. Each dealt at length with detailed aspects of his other claims of retaliation but neither San Quentin nor a union failure to represent him were mentioned. Nor was the UAPD's alleged refusal to represent mentioned in a February 1985 declaration to PERB in support of an injunctive relief request in this case. Although Schwartzman stated that in his "opinion . . . the UAPD would not expeditiously pursue the remedies and mediation and/or arbitration procedures," he commented elsewhere in the same declaration that, even with union withdrawal on one pending matter.

> [R]epresentation by the UAPD labor representatives continues on the grievances extant and on all other future employee matters <u>if requested by me</u>. (Emphasis added.)

Under these circumstances, Schwartzman at this stage may be estopped from inconsistently asserting, as he did in his later April 30 declaration, that the union was unwilling to take his case.

CONCLUSIONS OF LAW

While one can view with sympathy the tribulations allegedly encountered by Schwartzman in his disputes with Napa State and others, dismissal of the complaint is compelled by the Board's recent decision in State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S. In that case, the PERB dismissed a complaint regarding a discharge, and required deferral to grievance and arbitration machinery, despite ample evidence of intra-union political conflict that raised doubts about a union's readiness to provide fair representation to a dissident employee. (Id., at p. 14.) However, the Board concluded that there was no evidence that the union had committed itself to a position in conflict with the employee, or that it acted to further the employer's aims, or even condoned the termination. The Board also concluded that there was no claim by the employee of a request for union assistance and a union refusal that rendered arbitration unavailable.

In this proceeding there certainly is evidence in Schwartzman's pleadings and his April 30 declaration of disagreement and tension between Schwartzman and the UAPD. At the time the deferral motion was argued, Schwartzman also stated that he did not wish the union to represent him any longer, and opposed a ruling that would force that upon him. But Developmental Services requires more than disagreement or

personal preference to bypass the statutory deferral requirement. Thus, there is no evidence that UAPD is committed to a position antagonistic to Schwartzman's. perhaps by supporting another candidate, nor that UAPD approves or condones a reprisal by denial of a job at San Quentin. Further. Schwartzman's statement that representation was previously requested and denied is doubtful on this record, which shows no unequivocal express request during the relevant time period, union involvement that continues on other cases, and UAPD's stated readiness to pursue a legitimate grievance.

More significantly, and determinative as a legal matter. Schwartzman has failed to offer any satisfactory explanation of why he did not commence the grievance procedure himself, which would have allowed, if the case went that far. a demand that arbitration be undertaken by UAPD and an analysis of the evidence at that stage. If a refusal to arbitrate then occurred, according to Developmental Services, his charge would be ripe for refiling with the PERB. (Id. at p. 14.)

This approach is consistent with the public interest as well as that of management and labor in securing the benefit of their bargain. Management and the union negotiated a grievance and arbitration procedure that incorporated by reference discrimination claims arising under the SEERA. By so doing, collateral and possibly cumulative proceedings before the PERB are avoided, taxpayer and participant resources are preserved.

and prompt, final dispositions are promoted. The chance for uniform contract interpretation also is enhanced, not only because the arbitration procedure applies, but also because labor and management can monitor contract performance through other levels of the grievance procedure, ensuring appropriate responses by lower level officials.

These substantial benefits, which unions and employers share, and which extend to employees as well, would be effectively eliminated if an individual worker could opt out of the contractual mechanism without any evidence it has been invoked at all and with a questionable claim of futility. Ultimately, too, the public interest in stable, consistent labor relations would suffer if the interests of exclusive representatives and the employer could be cast aside as a matter of personal preference and PERB jurisdiction chosen instead. Clearly, the statutory deferral requirement is intended to prevent the kind of contract nullification and selective forum-shopping sought by Schwartzman.

In the long run, a dismissal at this stage also will be to Schwartzman's advantage. If a complaint went forward on the present record, without giving the grievance procedure the minimal statutory protection required, a jurisdictional cloud would hang above his case, impairing the prospects for relief and PERB's ability to render and enforce a decision. If UAPD actually fails to satisfy its representation duty, that will be

known soon enough and the door to PERB will be open once again.[7]

PROPOSED ORDER

For the reasons expressed above, the complaint in this proceeding is dismissed without prejudice.[8]

Pursuant to California Administrative Code, title 8. part III. section 32305, this Proposed Decision and Order shall become final on June 10. 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8. part III. section 32300. Such statement of exceptions and supporting brief must be actually received by the Public

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[7]The charging party's case remains viable in the future because the statute of limitations under the SEERA (sec. 3514.5(a)) is tolled while the grievance procedure is utilized. (See, e.g.. Los Angeles Unified School District (1983) PERB Decision No. 311; Department of Water Resources (1981) PERB Order No. Ad-122-S.)

[8]PERB Rule 32646(a) states that an appeal from the dismissal of a complaint following a deferral motion shall be subject to PERB Rule 32200. The requirements of PERB Rule 32200 governing certification of such appeals are met because the issue is one of law and is controlling, and disposition will materially advance resolution of the case. The ruling on this motion is not simply an administrative decision, however, because it does not meet the narrow definition of PERB Rule 32350. Hence, in order to ensure due process to the charging party, the procedure and longer timeline for filing exceptions to a hearing officer decision dismissing a complaint shall be utilized. (See PERB Rules 32214. 32300.)

Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on June 10. 1985. or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8. part III. section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8. part III, sections 32300 and 32305.

Dated: May 20. 1985

BARRY WINOGRAD
Administrative Law Judge