STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF PUBLIC SCHOOL SUPERVISORY EMPLOYEES,	)	
Charging Party,	)	Case No. LA-CE-3515
v.	)	PERB Decision No. 1180
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	December 6, 1996
Respondent.	)	

Appearance: Wanda Robinson, Labor Relations Representative, for Association of Public School Supervisory Employees.

Before Garcia, Johnson and Dyer, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Association of Public School Supervisory Employees (APSSE) to a PERB administrative law judge's (ALJ) proposed decision (attached). In his decision, the ALJ dismissed as untimely filed APSSE's unfair practice charge which alleged that the Los Angeles Unified School District violated section 3543.5 of the Educational Employment Relations Act (EERA)[1] when it changed

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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

job duties and overtime opportunities for certain classified supervisors without notice and an opportunity to meet and discuss.

The Board has reviewed the entire record in this case, including the proposed decision, hearing transcripts, exhibits and APSSE's exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

The complaint and unfair practice charge in Case No. LA-CE-3515 are hereby DISMISSED.

Member Dyer joined in this Decision.

Member Garcia's concurrence begins on page 3.

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guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

GARCIA, Member, concurring: I agree the case should be dismissed however, please take notice that the Board itself, through adoption of the administrative law judge's (ALJ) rationale, now makes it clear that employee organizations are expected to use reasonable diligence to uncover potential unfair practices. As the ALJ correctly stated in his decision, the burden is on the charging party to establish that an alleged unfair practice charge was timely filed. The charging party establishes timeliness by identifying when the charging party knew or should have known of the alleged unfair practice. In his decision, the ALJ makes it clear that the charging party must prove that the unfair practice could not have been discovered even with the exercise of reasonable diligence.[1] Through our decision today we are adopting the ALJ's statement, "If individual employees are expected to exercise reasonable diligence, employee organizations should also be expected to exercise reasonable diligence."

1Page 11 of the proposed decision citing California School Employees Association (LaFountain) (1992) PERB Decision No. 925; International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF PUBLIC SCHOOL SUPERVISORY EMPLOYEES (APSSE),	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-3515
v.	)	
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION (5/7/96)
Respondent.	)	

Appearances: Wanda Robinson, Representative, for Association of Public School Supervisory Employees; Belinda D. Stith, Attorney, for Los Angeles Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union that is a nonexclusive representative of classified supervisors contends that a public school district changed job duties and overtime opportunities without giving the union notice and opportunity to discuss the changes. The district contends that its conduct was lawful and that the union's unfair practice charge was untimely.

On January 13, 1995, the Association of Public School Supervisory Employees (APSSE) filed an unfair practice charge against the Los Angeles Unified School District (District). On June 28, 1995, the deputy general counsel of the Public Employment Relations Board (PERB) issued a complaint, alleging that the District had violated section 3543.5(a) and (b) of the

Educational Employment Relations Act (EERA).[1] The complaint alleged that the District violated these sections by making two changes without giving APSSE notice and opportunity for discussion: (1) during the 1992-93 school year, the District added gardening work to the duties of classified supervisors; and (2) on August 17, 1992, the District took away from classified supervisors the opportunity to do overtime work when school facilities were used by community groups under permit. The complaint alleged that APSSE became aware of these changes for the first time on or about July 28, 1994, and July 14, 1994, respectively.

On July 19, 1995, the District answered the complaint, denying that the District's conduct violated section 3543.5(a) and (b) and asserting that APSSE's charge was untimely. An

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 and following. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

informal settlement conference was held on August 21, 1995, but the matter was not resolved.

A formal hearing was held on November 7, 8, and 9, 1995. At the beginning of the hearing, the District made a motion to dismiss, on the ground that APSSE's charge was untimely. The motion was denied without prejudice. The administrative law judge noted that timeliness would be an issue in the hearing and that the burden of proof would be on the charging party (APSSE). After the filing of post-hearing briefs, the matter was submitted for proposed decision on February 1, 1996.

FINDINGS OF FACT

The District is a public school employer under the EERA. APSSE is an employee organization and is a nonexclusive representative of employees in a unit of the District's classified supervisors.

Among the classified supervisors in the unit are plant managers, who are part of the District's maintenance and operations staff. Prior to July 29, 1992, the employees supervised by the plant managers were called Custodians; thereafter, they were called building and grounds workers. The plant managers were expected to participate in the work of the employees they supervised.

The District employs at least 800 plant managers. At some school sites, the plant manager is the only maintenance and operations employee on duty during the day.

Gardening

Prior to 1992, gardening at the District's school sites was performed by separate gardening staff, who often roved from site to site. In 1992, however, in the face of a budget crisis, the District eliminated much of this gardening staff. On June 29, 1992, when Custodians were renamed building and grounds workers, their job description was changed to include gardening duties, including "mowing, edging, and pruning." The job description for plant managers was not changed. It was expected, however, that at least at the school sites where plant managers were the only maintenance and operations employees on duty during the daytime, the plant managers would do the gardening.

In the fall of 1992, school sites became responsible for their own gardening. Lawn mowers were delivered to the school sites, and plant managers were trained in gardening, with the expectation that they would train building and grounds workers.

At the hearing, two plant managers testified that at a plant managers' meeting in 1992 they were told that gardening would be part of their duties. One testified that 30 to 50 plant managers were present at the meeting he attended, and that he in fact starting mowing in 1992. A work schedule he prepared in or around November 1992 listed one of his jobs as "do gardening when necessary (mow lawn, edge, trim, etc.)."

Another plant manager testified that at a plant managers' meeting in September 1992 he was told that building and grounds workers, not plant managers, would do gardening. The same plant

manager also testified, however, that in fact he or his assistant mowed the lawn between 1992 and 1995, unless parent volunteers did it, because the building and grounds worker refused to do it.

Overtime for Use of School Facilities

Traditionally, the District has made its facilities available to qualified community groups at no cost, under Civic Center and Youth Services permits. Prior to 1992, the District authorized overtime for maintenance and operations staff, including plant managers, when school facilities were used under permit. In 1992, however, the District changed this policy, in the face of a budget crisis.

On August 17, 1992, the District issued Memorandum No. 9, which was distributed to all District schools and offices. Memorandum No. 9 stated in part that "custodial overtime will not be allocated to clean-up after permit use." Each permitted group was expected to leave facilities clean and ready for school use. Supervision of permits, including approval or disapproval of facility cleanliness, was assigned to the District's Youth Services staff.

It is not entirely clear from the evidence presented at the hearing to what extent Memorandum No. 9 was distributed to plant managers, or how and when plant managers were informed of the change. The agenda for a plant managers' workshop on September 10, 1992, indicates that Memorandum No. 9 was to be a handout at the workshop. One plant manager testified, however, that he was denied overtime after 1992 without any explanation.

The Civic Center and Youth Services permit forms, copies of which went to plant managers, were revised in March 1993 and stated in part, "Permit does not authorize time for custodial services."

APSSE's Involvement

In the spring of 1994, APSSE did a mailing to the District's classified supervisors, including plant managers. APSSE sent out approximately 1700 pieces of mail, addressed to particular school sites. The mailing gave notice of a meeting to be held on June 8, 1994. The mailing also included a Business Reply Mail card, with a "Comments" line below the following request:

> Please inform us (below) if there are any changes to your job description, such as, transfer of work from a supervisory unit to a non-supervisory unit, and/or volunteers or contract vendors.

According to testimony, the mailing was made at least a week or two before the planned meeting date.

There were two problems with the mailing: (1) several (if not all) of the classified supervisors received the mailing after the planned meeting, with the result that no one came to the meeting; and (2) the return address on the Business Reply Mail card was an old address of APSSE, with the result that cards returned to that address were not promptly received by APSSE. These two problems were exacerbated by a third: the forwarding address APSSE had on file with the post office was the address of an earthquake-damaged building from which APSSE was moving, with the result that APSSE's receipt of Business Reply Mail cards was further delayed.

One of the recipients of the mailing was Plant Manager Richard Bernal. He wrote on the Business Reply Mail card the comment, "We are now doing gardening," and mailed it on June 10, 1994. According to testimony, APSSE actually received this card (and 16 others) sometime after July 22, 1994.

APSSE did receive one Business Reply Mail card prior to July 22, 1994. That card was not sent to the old APSSE address but rather was placed in an envelope and sent to the newer address (the earthquake-damaged building). The card was unsigned, but it bore the note, "Rec'd on 6/13/94," and the question, "Can you do anything about Youth Services?" Enclosed in the envelope was a copy of District Memorandum No. 9. According to testimony, APSSE received the card and enclosure on or after July 14, 1994.

APSSE Representative Wanda Robinson testified that after reading the Business Reply Mail cards she "started calling members and getting more specific information as to gardening services and the Youth [Services] Civic Center issue." She did not testify whether or not she (or any other APSSE officials) had knowledge of those issues prior to July 1994, when APSSE received the cards. There was no testimony or other evidence as to whether or not APSSE did mailings or scheduled meetings or otherwise attempted to communicate with classified supervisors about changes in their duties or working conditions prior to the spring of 1994.

ISSUES

(1) Was the charge timely filed?

(2) If the answer to No. 1 is yes, did the District violate section 3543.5(a) and (b) by changing the duties and overtime opportunities of plant managers without giving APSSE notice and opportunity for discussion?

CONCLUSIONS OF LAW

Timeliness of the Charge

EERA section 3541.5(a)(1) states that PERB shall not "[i]ssue 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." In California State University, San Diego (1989) PERB Decision No. 718-H, PERB held that the parallel provision in section 3563.2(a) of the Higher Education Employer-Employee Relations Act constituted a jurisdictional bar to charges filed outside the prescribed six-month time period. PERB noted that the statutory provision used mandatory ("shall not") language and that the legislative history indicated an intent to eliminate "stale" claims.

PERB therefore overturned its previous decision in Walnut Valley Unified School District (1983) PERB Decision No. 289, in which PERB had treated Untimeliness as an affirmative defense subject to waiver. In The Regents of the University of California (UC-AFT) (1990) PERB Decision No. 826-H, PERB made clear that a charging party now had the burden to prove timeliness as part of its prima facie case.

Given the statutory language, the present unfair practice charge and complaint would appear to be untimely on their face. The complaint alleges unfair practices occurring during the 1992-93 school year, but the unfair practice charge was not filed until January 13, 1995, more than 18 months after the end of the 1992-93 school year. If the jurisdictional bar against any charge based upon an unfair practice "occurring" more than six months prior to the filing of the charge were to be interpreted literally, the charge and complaint in the present case would have to be dismissed on their face.

PERB has indicated, however, that the six-month limitation period does not necessarily begin to run when an unfair practice occurs. PERB has stated, "The statutory period begins to run once the charging party knows, or should have known, of the conduct underlying the charge." (University of California (AFSCME) (1993) PERB Decision No. 1023-H and Regents of the University of California (Alderson) (1993) PERB Decision No. 1002-H, both citing Fairfield-Suisun Unified School District (1985) PERB Decision No. 547 and Healdsburg Union High School District (1984) PERB Decision No. 467.)

Where a charge has been filed more than six months after an alleged unfair practice occurred, the burden on the charging party is therefore to prove both that it first knew and that it first "should have known" about the alleged conduct within six months before the charge was filed. (Phrased differently, the burden on the charging party is to prove both that it did not

know and that it should not have known about the conduct more than six months before the charge was filed.) In the present case, where the charge was filed on January 13, 1995, APSSE has the burden of proving both that it first knew and that it first should have known about the alleged changes on or after July 13, 1994.

At the hearing, APSSE failed to prove that it first knew about the alleged changes on or after July 13, 1994. APSSE Representative Wanda Robinson did testify that it was after she received the Business Reply Mail cards (on or after July 14, 1994, and sometime after July 22, 1994) that she "started calling members and getting more specific information as to the gardening services and the Youth [Services] Civic Center issue." Neither she nor any other witness actually testified, however, that this was the first time that APSSE knew about the alleged changes. Because the burden of proof was on APSSE, the lack of such testimony (or other evidence) precludes a finding that APSSE's charge was timely.

APSSE also failed to prove that it first "should have known" about the alleged changes on or after July 13, 1994. In State of California (Department of Corrections) (1995) PERB Decision No. 1101-S, PERB adopted a dismissal letter stating in part that the six-month limitation period began to run when the conduct constituting the unfair practice was discovered "or could reasonably have been discovered." In that case, the charge was dismissed as untimely because the charging party "failed to

demonstrate why [it] was not aware of the violation" until the six months before the charge was filed.

In cases in which individual employees have filed charges alleging that employee organizations violated the duty of fair representation, PERB has held that the limitation period began to run when the employees "in the exercise of reasonable diligence" knew or should have known that further assistance from the organization was unlikely. (California School Employees Association (LaFountain) (1992) PERB Decision No. 925; International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H.) If individual employees are expected to exercise reasonable diligence, employee organizations should also be expected to exercise reasonable diligence.

It appears from these cases that a charging party must prove that, even with the exercise of reasonable diligence, the charging party could not reasonably have discovered the alleged unfair practice until six months before the charge was filed. Logically, the more obvious the alleged unfair practice, and the longer the period of time before its discovery, the stronger must be the charging party's showing that reasonable diligence still would not have uncovered it.

In the present case, the alleged unfair practices appear to have been relatively obvious, rather than subtle or secret. The addition of gardening duties was announced at one meeting of 30 to 50 plant managers, and possibly other meetings. The reduction of overtime opportunities was described in Memorandum No. 9,

which was distributed to all District schools and offices, and which was listed as a handout at a plant managers' workshop. It appears likely that many or most of the District's 800 plant managers were aware of these changes, and were affected by them, well before the end of the 1992-93 school year.

APSSE must prove that it nonetheless could not reasonably have discovered the changes, even with the exercise of reasonable diligence, earlier than July 13, 1994, over a year after the end of the 1992-93 school year. This APSSE failed to prove. There was no testimony or other evidence that APSSE did mailings or scheduled meetings or otherwise attempted to communicate with plant managers (or other classified supervisors) about changes in their duties or working conditions prior to the spring of 1994. If APSSE, as a reasonably diligent nonexclusive representative, had made such an effort as rarely as once or twice a year, it might reasonably have discovered the changes affecting plant managers prior to July 13, 1994.

Furthermore, it appears that APSSE might at least have discovered the change in duties prior to July 13, 1994, if it had been reasonably diligent in conducting its mailing in the spring of 1994. Plant Manager Richard Bernal, who wrote on the Business Reply Mail card the comment, "We are now doing gardening," mailed the card on June 10, 1994. If the Business Reply Mail card had not borne an old APSSE address, APSSE presumably would have received Bernal's card sometime in June 1994. Sending some 1700

Business Reply Mail cards with an old address does not appear to represent reasonable diligence.

It is therefore concluded that the charge was not timely filed and must be dismissed, because APSSE did not prove that it first knew and first should have known about the alleged unfair practices within six months before the charge was filed.

The Alleged Unilateral Changes

Having concluded that the charge was untimely filed, it is not necessary, nor is it appropriate, to address the lawfulness of the alleged unilateral changes.

Based upon PERB's interpretation of section 3541.5(a), if a charge is not filed within the relevant six-month period, PERB has no jurisdiction over the matter and has no power to decide the substantive issues presented for its determination.

PROPOSED ORDER

Based upon the foregoing findings of fact, the entire record herein, and the conclusions of law set forth above, it is found that the complaint must be dismissed because the Association of Public School Supervisory Employees (APSSE) failed to establish a prima facie case of timeliness of the charge. Thus, the complaint issued against the Los Angeles Unified School District must be DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within

20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, § 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, § 32135; Code Civ. Proc. § 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, §§ 32300, 32305 and 32140.)

THOMAS J. ALLEN
Administrative Law Judge