

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LYNETTE LUCAS,

Charging Party,

v.

RIO TEACHERS ASSOCIATION,

Respondent.

Case No. LA-CO-1418-E

PERB Decision No. 2157

January 21, 2011

Appearances: Lynette Lucas, on her own behalf; California Teachers Association by Michael D. Hersh, Attorney, for Rio Teachers Association.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the partial dismissal of an unfair practice charge filed by Lynette Lucas (Lucas) alleging that the Rio Teachers Association (Association) violated section 3546.5 of the Educational Employment Relations Act (EERA)¹ by failing to provide her with financial reports covering a ten-year period.

The Board has reviewed the partial dismissal and the record in light of Lucas's appeal, the Association's response to the appeal and the relevant law. Based on this review, the Board affirms the partial dismissal of the charge as untimely with respect to the request for financial reports for the periods 2000-2008.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

The relevant underlying facts are uncomplicated. Since 2009, Lucas has been employed by the Rio School District and is a member of the bargaining unit exclusively represented by the Association. In January 2010, Lucas requested that the Association provide her with the financial reports required by EERA section 3546.5 for the current fiscal year as well as for the prior nine years. The Association has not produced the reports. On February 16, 2010, Lucas filed an unfair practice charge seeking an order compelling production of the financial reports. On June 17, 2010, a Board agent issued a partial warning letter advising Lucas that the charge was untimely as to the allegations that the Association failed to provide her with financial reports for years prior to 2009. On July 29, 2010, Lucas filed an amended charge containing arguments why the charge should be considered timely.

BOARD AGENT'S PARTIAL DISMISSAL

The Board agent dismissed as untimely all allegations concerning the Association's failure to provide Lucas with financial reports required by section 3546.5 for the fiscal years 2000-2008. The Board agent found that the continuing violation doctrine did not apply to these allegations.

CHARGING PARTY'S APPEAL

On appeal, Lucas contends that the charge is timely because: (1) the continuing violation doctrine applies to this case; (2) equitable estoppel or equitable tolling prevents the six-month statute of limitations period from barring claims for violations of EERA section 3546.5 occurring prior to fiscal year 2008-2009; (3) the Association has an obligation to keep copies of its annual financial statements; and (4) PERB can and should, independent of the unfair practice charge, compel the Association to produce financial reports for the most recent ten years.

DISCUSSION

Timeliness

EERA section 3546.5 requires recognized employee organizations to prepare and make available to their members (and to the Board) an annual report of their financial transactions.

Section 3546.5 provides:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, signed and certified as to accuracy by its president and treasurer, or corresponding principal officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion.

Prior to 2006, a “petition to compel compliance” pursuant to former PERB Regulation 32125² was the appropriate means of redressing violations of section 3546.5. (See also *Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106 [the appropriate remedy for failure to file financial reports was a petition to compel compliance, not an unfair practice charge].) Under former Regulation 32125(b), a petition to compel compliance had to be filed not later than 12 months following the end of the exclusive representative’s preceding fiscal year. Thus, the regulation effectively meant that an employee could only compel an employee organization to produce a financial report required by section 3546.5 for the immediately preceding fiscal year.

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

Regulation 32125(b) was repealed in 2006 and the appropriate procedure to remedy a failure to comply with section 3546.5 is now a unfair practice charge. (PERB Reg. 32602(a) and (d).)³

Given that alleged violations of section 3546.5 are now processed as unfair practice charges, the statute of limitations applicable to the filing of unfair practice charges apply. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to “any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

A violation of EERA section 3546.5 occurs when a recognized or certified employee organization fails to make available to its members the financial report for the immediately preceding fiscal year. Therefore, to be timely, a charge alleging a violation of section 3546.5 must be filed within six months of when the charging party knew or should have known that the employee organization failed or refused to provide the requested financial report for the

³ PERB Regulation 32602(a) provides:

(a) Alleged violations of the EERA, Ralph C. Dills Act, HEERA, MMBA, TEERA, Article 3 of the Trial Court Act, the Court Interpreter Act, and alleged violations of local rules adopted pursuant to the MMBA, Trial Court Act or Court Interpreter Act, shall be processed as unfair practice charges.

PERB Regulation 32602(d) provides:

(d) A charge alleging that an exclusive representative has failed to comply with Government Code section 3515.7(e), 3546.5, 3584(b), or 3587, or Public Utilities Code Section 99566.3 may only be filed by an affected employee.

immediately preceding fiscal year. Thus, the allegations in the present charge, filed on February 16, 2010, are untimely with respect to the failure to provide financial reports for the 2000-2008 fiscal years.

Continuing Violation Doctrine

Lucas asserts that the charge is timely under the continuing violation doctrine. Under this doctrine, a violation within the statute of limitations period may “revive” an earlier violation of the same type that occurred outside the limitations period. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.) However, the doctrine does not apply where the alleged unlawful conduct outside the limitations period consists of acts that are separate and independent from the timely allegations. (*Los Angeles Unified School District* (2009) PERB Decision No. 2011.)

In this case, each year in which the Association failed to make available the financial report required by EERA section 3546.5 constituted a separate and independent act. Therefore, the timely allegation of a failure to do so in 2009 does not bring the allegations for the prior nine years within the continuing violation doctrine.

Obligations Under EERA Section 3546.5

Even if the charge were considered timely, we would not find the alleged failure to make prior year financial reports available to a current member who was not a member at the time the reports were to have been prepared to constitute a prima facie violation of section 3546.5. The statute requires the employee organization to make its financial report available annually within 60 days after the end of the fiscal year. By the terms of the statute, the duty is owed to the Board and to employees who are members of the employee

organization at that time.⁴ The failure to make such reports available within the statutory time frame is a violation of the statute subject to PERB's unfair practice jurisdiction. Nothing in the statute, however, specifies that the organization has an obligation to keep or make financial reports available to future members on an ongoing basis. Therefore, the alleged failure to provide reports for prior years does not state a prima facie violation of section 3546.5.

Equitable Estoppel/Tolling

Lucas asserts that principles of equitable estoppel or equitable tolling should be applied to toll the statute of limitations based upon the Association's alleged "fraudulent" conduct in "assuring members over the years that there was nothing untoward, illegal or inappropriate going on in the expenditure of union funds." In support of her position, Lucas cites *Bowman v. McPheeters* (1947) 77 Cal.App.2d 795 for the proposition that a defendant who, through "fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong." (*Id.* at p. 799.) Charging party fails to demonstrate, however, that any alleged concealment or misrepresentations by the Association hindered her ability to act within the statutory period. Instead, the fact that Lucas was not employed by the District and was not a member of the Association during the relevant time periods when the prior year financial reports were to have been produced would have barred her from bringing an action to compel compliance. Therefore, equitable estoppel does not apply.

In *Long Beach Community College District* (2009) PERB Decision No. 2002, the Board held that the statute of limitations under EERA is tolled during the period of time the parties

⁴ Although only members have a right to receive the financial reports, the Board has held that agency fee payers also have standing to compel compliance with section 3546.5. (*California Teachers Association and National Education Association (Link)* (1981) PERB Order No. Ad-123.)

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. Because this case does not demonstrate that this matter was subject to a grievance procedure, equitable tolling does not apply.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CO-1418-E is hereby AFFIRMED.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.