STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMITTEE OF INTERNS & RESIDENTS/SERVICE EMPLOYEES INTERNATIONAL UNION, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-469-M PERB Decision No. 2176-M March 29, 2011

Appearances: Schwartz, Steinsapir, Dohrmann & Sommers by Tamra M. Boyd, Attorney, for Committee of Interns & Residents/Service Employees International Union; The Zappia Law Firm by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Riverside (County), and on cross-exceptions filed by the Committee of Interns & Residents/Service Employees International Union (CIR/SEIU), to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] when it denied CIR/SEIU's petition to register as an employee organization under the County's Employee Relations Resolution (ERR) and be recognized as the exclusive representative of resident physicians employed at the Riverside County Regional Medical Center. The ALJ ruled that the County unreasonably refused to register CIR/SEIU as an employee organization.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Board has reviewed the proposed decision and the record in light of the County's exceptions and CIR/SEIU's cross-exceptions, the responses thereto, and the relevant law.[2] Based on this review, the Board reverses the proposed decision for the reasons discussed below.

FACTUAL BACKGROUND

The parties, through their respective counsel of record, stipulated that the following facts are true and correct:[3]

1. The Charging Party, the Committee of Interns and Residents/Service Employees International Union (CIR/SEIU), filed the unfair practice charge that is the subject of this hearing against Respondent County of Riverside (County) on July 14, 2008. On September 30, 2008, PERB issued a complaint in response to CIR/SEIU's unfair practice charge.

2. CIR/SEIU is an employee organization under Government Code section 3501(a) and Riverside County Employee Relations Resolution, Section 3(h).

3. The term "resident physician," as used herein, refers to an individual who has graduated from medical school and who is employed through a residency program at a hospital or other medical facility, in order to obtain the experience and training required to become a

[2] The County requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the County's request for oral argument is denied.

[3] Attached to the County's post-hearing brief were documents from a superior court action between the parties. Because it was not a joint amendment to the stipulated facts, the ALJ did not consider the documents in his proposed decision. Accordingly, the Board will not consider the documents on appeal.

fully-licensed physician. Residency programs typically range from three to seven years, depending on the particular field of medicine.

4. The County is a subdivision of the State of California, established pursuant to the Constitution of the State of California and subject to suit in its name. The County is governed by the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., which regulates labor relations between public entities such as the County, the employees of such entities, and the labor organizations that seek to represent such employees. Pursuant to its rulemaking authority under Government Code section 3507(a), the County's Board of Supervisors in 1999 passed the Riverside County Employee Relations Resolution, Resolution No. 99-379 (Resolution).

5. The County employs resident physicians at the Riverside County Regional Medical Center. The County's resident physicians are not currently covered by any existing memorandum of understanding (MOU) and, to the parties' knowledge, have never been covered by an MOU. To the parties' knowledge, no employee organization other than CIR/SEIU has ever sought recognition from the County as the bargaining representative of the County's resident physicians.

6. On December 17, 2007, CIR/SEIU presented the County with a letter requesting, pursuant to the County's Employee Relations Resolution, (1) registration with the County as an employee organization[4] and (2) majority recognition as the authorized bargaining representative of the County's resident physicians. Attached as exhibits to CIR/SEIU's December 17, 2007 letter were the following documents:

[4] ERR Section 3(q) defines "registered employee organization" as "an employee organization which has been acknowledged by the County as an employee organization that represents employees of the County." Under ERR Section 9, only a registered employee organization may file a petition to become the majority or exclusive representative of a County bargaining unit.

a. A petition signed by 35 resident physicians then employed by the County which stated, in part: "We the undersigned interns, residents and fellows employed by (Riverside County Regional Medical Center) designate the Committee of Interns and Residents/SEIU, as our exclusive bargaining representative for the purposes of negotiating wages, benefits and other terms and conditions of employment."

b. A copy of CIR/SEIU's Constitution and Bylaws.

7. On December 17, 2007, the County employed approximately 57 resident physicians.

8. By letter dated December 19, 2007, the County responded to CIR/SEIU's letter, stating that it would not register CIR/SEIU as an employee organization.

9. On January 10, 2008, CIR/SEIU's counsel wrote the County to request clarification of the County's position.

10. By letter dated January 14, 2008, the County responded to CIR/SEIU's counsel by reiterating its refusal to register CIR/SEIU as an employee organization.

11. Thereafter, CIR/SEIU requested a meeting with the County to discuss CIR/SEIU's request for registration and its desire to represent the County's resident physicians. This meeting occurred on February 5, 2008 and was attended by Amy Hall and Jazmin Ochoa of CIR/SEIU, one of the resident physicians employed by the County, CIR/SEIU's counsel, Tom Prescott, Human Resources Division Manager for the County's Employee Relations Division, and another employee of the County. At this meeting, Mr. Prescott indicated that CIR/SEIU was not eligible for registration as an employee organization under the Resolution because CIR/SEIU had not shown that it had members in an existing

bargaining unit. In addition, the parties stipulate that the following persons, if called as witnesses, would testify as follows about this meeting:

a. Tom Prescott would testify that he advised CIR/SEIU's representatives that CIR/SEIU could satisfy the County's registration requirements by obtaining authorization cards from at least two County employees in one or more of the bargaining units already recognized by the County.

b. Amy Hall, West Coast Director of CIR/SEIU, would testify that Mr. Prescott indicated that CIR/SEIU could satisfy the County's registration requirements by obtaining authorization cards from at least two County employees represented by another employee organization already registered with the County, such as SEIU Local 721, which represents other County employees employed at the Riverside County Regional Medical Center.

12. On May 30, 2008, CIR/SEIU filed a petition for writ of mandate against the County in Riverside County Superior Court, challenging the County's refusal to register CIR/SEIU as an employee organization pursuant to the Resolution and the MMBA. On September 12, 2008, the Court denied CIR/SEIU's petition for writ of mandate on the ground that PERB has exclusive jurisdiction over the dispute.

DISCUSSION

The complaint alleged that the County denied CIR/SEIU's request for registration on three separate occasions: the December 19, 2007 letter, the January 14, 2008 letter, and during the February 5, 2008 meeting. In its post-hearing brief, the County argued that the charge was untimely because it was filed on July 14, 2008, more than six months after the County's first denial of registration. The ALJ ruled that the charge was timely because the County's

continued refusal to register CIR/SEIU within the statute of limitations period constituted a continuing violation. For the following reasons, we disagree and hold that the charge must be dismissed as untimely.

PERB is prohibited 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. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) 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.)[5] A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

1. Continuing Violation

Under the continuing violation doctrine, a violation within the statute of limitations period may revive an earlier violation of the same type that occurred outside of the limitations period. (*Compton Community College District* (1991) PERB Decision No. 915.) For the doctrine to apply, the violation within the limitations period must constitute an independent unfair practice without reference to the prior violation. (*El Dorado Union High School District* (1984) PERB Decision No. 382.)

A continuing violation is not found when the respondent's action during the limitations period merely confirms or reiterates the position it took and communicated to the charging party outside of the limitations period. (*UCLA Labor Relations Division* (1989) PERB Decision No. 735-H.) For example, in *Fresno County Office of Education* (1993) PERB

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Decision No. 978, the Board found no continuing violation when the only act by the employer within the limitations period was its continued insistence that it would only recognize one site representative, a position it had communicated to the exclusive representative more than six months before the charge was filed. Similarly, in *Compton Unified School District* (2009) PERB Decision No. 2015, the Board held that the school district's maintenance of its position that the charging parties were exempt employees did not constitute a continuing violation when the employees knew at least four years before they filed the charge that the district deemed them exempt employees.

In a case similar to this one, *UCLA Labor Relations Division*, *supra*, PERB Decision No. 735-H, an exclusive representative filed a grievance challenging a unit member's termination. During the grievance process, the employee retained private counsel, who then filed an identical grievance on the employee's behalf. The university returned the second grievance to the employee's counsel on November 3, 1987. The university accepted the exclusive representative's withdrawal of the original grievance on November 30, 1987. On December 21, 1987, the employee's counsel sent a letter to the university objecting to its actions on the grievances; the university defended its actions by letter dated January 8, 1988. The Board held that the charge, filed on July 8, 1988, was untimely because the employee knew in November, more than six months before the charge was filed, that the university had refused to process his grievances. In so holding, the Board found that the university's January 8 letter did not constitute an independent unfair practice because it merely reiterated the position the university took in November 1987.

Here, the County informed CIR/SEIU by letter dated December 19, 2007 that it would not register CIR/SEIU as an employee organization because, in the County's view, CIR/SEIU

had not satisfied the requirements for registration in ERR Section 9. The stipulated facts state, in relevant part:

> 9. On January 10, 2008, CIR/SEIU's counsel wrote the County to request clarification of the County's position.
>
> 10. By letter dated January 14, 2008, the County responded to CIR/SEIU's counsel by reiterating its refusal to register CIR/SEIU as an employee organization.

On February 5, 2008, CIR/SEIU and the County met to discuss the County's refusal to register CIR/SEIU. During the meeting, the County restated its position that CIR/SEIU had not complied with the requirements of ERR Section 9.

The record establishes that between December 19, 2007 and February 5, 2008, the County consistently maintained that CIR/SEIU's request for registration failed to comply with ERR Section 9. Therefore, the County's January 14, 2008 letter and statements by its representative during the February 5, 2008 meeting were merely reiterations of the position the County took on December 19, 2007. Consequently, we find no continuing violation in this case.[6]

CIR/SEIU nonetheless argues that the December 19, 2007 letter "was far too vague to put CIR/SEIU on notice that an unfair practice had occurred" because it "provided only a cursory explanation of its rationale for refusing to register CIR/SEIU." In support of this argument, CIR/SEIU cites *The Regents of the University of California* (1983) PERB Decision No. 359-H (vacated on other grounds), in which the Board held that rumors and tentative discussions about a change in the university's policy for reemploying lecturers were

[6] This finding is consistent with PERB case law holding that, once the limitations period begins to run, a charging party "cannot cause it to begin anew by making the same request over and over again" because "such a result would eviscerate the purpose of the statute of limitations." (*California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC (Sutton)* (2003) PERB Decision No. 1553-S.)

insufficient to give the exclusive representative notice that the university had actually changed the policy. Here, even though the December 19, 2007 letter did not explain the County's rationale for denying CIR/SEIU's registration request in great detail, it nonetheless clearly stated that the request was denied because it failed to comply with ERR Section 9. Consequently, CIR/SEIU knew of the conduct underlying the charge when it received the December 19, 2007 letter, even if it did not learn the County's exact reasons for the denial until later. (See *Empire Union School District* (2004) PERB Decision No. 1650 [the charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing].)

CIR/SEIU also contends that the County's reiterations of its position constitute a continuing violation under National Labor Relations Board (NLRB) case law. The NLRB decisions cited by CIR/SEIU do not support its argument, however, because all involve an independent violation by the employer within the statute of limitations period. For example, in *Goodyear Tire & Rubber Co.* (1972) 195 NLRB 767, the NLRB held that employees at the employer's newly opened warehouse were members of the existing bargaining unit and therefore the employer's refusal to bargain with the certified union as the representative of the warehouse employees, both before and during the limitations period, was an unfair labor practice. In *HLH Products* (1967) 164 NLRB 325, also cited by CIR/SEIU, the NLRB refused to rely on the continuing nature of the employer's refusal to recognize and bargain with the union, as had the ALJ, because it found the employer had instituted a discriminatory recall policy during the limitations period that constituted an independent refusal to bargain. Thus, as the Board recognized in *San Dieguito Union High School District* (1982) PERB Decision No. 194, an employer's refusal to bargain may constitute a continuing violation even if the refusals before and during the limitations period were based on the same rationale when, as in

the cases cited by CIR/SEIU as well as under long-established PERB case law, the employer's refusal during the limitations period constitutes a violation without reference to the refusal outside of the limitations period. As found above, the County's reiterations of its position on January 14 and February 5, 2008 did not constitute an independent unfair practice and therefore the NLRB decisions cited by CIR/SEIU are inapposite.

2. Equitable Tolling

CIR/SEIU also contends in its response to the County's exceptions that the statute of limitations was equitably tolled while it pursued a remedy in superior court. According to the stipulated facts:

> On May 30, 2008, CIR/SEIU filed a petition for writ of mandate against the County in Riverside County Superior Court, challenging the County's refusal to register CIR/SEIU as an employee organization pursuant to the Resolution and the MMBA. On September 12, 2008, the Court denied CIR/SEIU's petition for writ of mandate on the ground that PERB has exclusive jurisdiction over the dispute.

CIR/SEIU argues on appeal that the statute of limitations was tolled from May 30 through September 12, 2008, thereby making its charge timely.

The doctrine of equitable tolling applies in cases arising under the MMBA. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.) Under this doctrine,

> "the statute of limitations is tolled during the period of time the parties 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."

(*Long Beach Community College District, supra*, PERB Decision No. 2002.)

The doctrine of equitable tolling does not apply any time a charging party pursues an alternative remedy; rather, the doctrine applies only when the charging party has used mutually negotiated dispute resolution procedures contained in a written agreement. (See *City of Alhambra* (2009) PERB Decision No. 2036-M [no equitable tolling for *Skelly*[7] due process proceedings]; *Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H [no equitable tolling for State Personnel Board proceedings]; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S [no equitable tolling for impasse mediation required by the Ralph C. Dills Act].) The superior court action certainly was not a mutually negotiated procedure for resolving disputes between CIR/SEIU and the County. Thus, equitable tolling does not apply in this case.

In sum, CIR/SEIU first learned of the conduct underlying this unfair practice charge on December 19, 2007, when the County denied CIR/SEIU's request for registration as an employee organization under the County's ERR. CIR/SEIU filed this charge on July 14, 2008, almost seven months after the denial. Because neither the continuing violation doctrine nor equitable tolling apply in this case, CIR/SEIU's charge was untimely and must be dismissed.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-469-M are hereby DISMISSED.

Members McKeag and Miner joined in this Decision.

[7] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.