

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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| LON SPIEGELMAN, |) | |
| |) | |
| Charging Party, |) | Case No. LA-CO-267 |
| |) | |
| v. |) | PERB Decision No. 400 |
| |) | |
| CALIFORNIA SCHOOL EMPLOYEES |) | August 23, 1984 |
| ASSOCIATION, |) | |
| |) | |
| Respondent. |) | |
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Appearances; D. Ronald Applegate, Attorney for Lon Spiegelman.
Before Jaeger, Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (Board) on Charging Party Lon Spiegelman's appeal of the attached regional office dismissal of charges as untimely. The charges alleged that the California School Employees Association (CSEA) breached its duty of fair representation, thereby violating subsections 3543.6(a), (b) and (c) and 3544.9 of the Educational Employment Relations Act (EERA).¹

After a review of the entire record in this matter, the Board adopts the attached dismissal as the decision of the Board itself.

¹The EERA is codified at Government Code section 3540 et seq.

We reject the dissent's suggestion that the time for filing the charge in this case should begin to run from a later date by virtue of Spiegelman's complaint to CSEA about the representation he received. In the Ninth Circuit language quoted by the dissent, the time when the charge accrues is "the point at which any injury to [the union member] allegedly caused by the union became fixed and reasonably certain." In this case, that point occurred in August when Spiegelman knew that he was dissatisfied with CSEA's representation. Spiegelman's subsequent complaint to CSEA about the representation he had received, and the CSEA's vague response about what action it would or could make, does not alter the fact that the representation problem which allegedly cost Spiegelman his job was well known to him in August.

The analogy to the exhaustion of internal union remedies sometimes required in actions for breach of contract and breach of the duty of fair representation under section 301 of the Labor Management Relations Act is not applicable here. Exhaustion is required in those cases, if at all, if the internal union procedures are adequate to give the employee the final result sought in the 301 action, i.e., reinstatement, etc. Here, by his letter to CSEA, Spiegelman was apparently complaining about the representation he received rather than seeking to compel CSEA to process further his claim against the employer, and Spiegelman makes no argument to the contrary.

The cases relied upon in the dissent are also inapposite, since each concerns a court action in which the union involved failed to process grievances against the employer, and the court allowed the applicable statute of limitations to be tolled during the time that the plaintiff union member did not know, and could not have known, that the union was not proceeding on his or her behalf. Here, Spiegelman was quite aware that CSEA's representation was faulty in his view, yet he waited nine months before so alleging. In these circumstances, we find that the six-month limitation prescribed by EERA was neither tolled nor extended, and we therefore dismiss the charges as untimely.

ORDER

Upon the foregoing Decision and the entire record in this matter, the unfair practice charges in Case No. LA-CO-267 are hereby DISMISSED without leave to amend.

Member Jaeger joined in this Decision.

Member Morgenstern's dissent begins on page 4.

Morgenstern, Member, dissenting: The majority affirms the regional attorney's opinion that the only duty of fair representation (DFR) violation alleged in Spiegelman's charge accrued at the time that CSEA representative Marge Kantrowe appeared on his behalf at the administrative review in August 1982. In my view, the factual allegations clearly establish that Spiegelman's DFR claim against CSEA went beyond and encompassed far more than that one event.

The charge itself and the numerous exhibits attached thereto clearly make reference to conduct subsequent to the administrative review and, most importantly, detail a continuing effort by Spiegelman to be recompensed for the alleged breach of the DFR. The allegations before us demonstrate that Spiegelman began his correspondence with the CSEA State President shortly after the negative decision of August 10 was received and was promptly advised by President Nancy Brasmer on August 17, 1982 that his letter was being forwarded to the Director of Field Operations for "a complete investigation," that it was the Director's opinion that the investigation "should be complete by early September," and that the Field Director from the Los Angeles office, John Cantrall, would contact Spiegelman "to provide assistance."

As Brasmer promised, Cantrall did indeed contact Spiegelman and arranged for a meeting on October 7. According to the pleadings, at that meeting, Spiegelman told Cantrall that CSEA representative Kantrowe had not fairly represented him and was

continuing to fail to represent him. Spiegelman received no communication from Cantrall and, on November 16, wrote to Cantrall to advise him that, because of his failure to convey the results of the investigation, it was "very frustrating to be left in limbo" Recounting the meeting of October 7, Spiegelman stated:

. . . I asked you what the union could do for me now and you said that you didn't know. You told me that you had to review my case first.

In this communication, Spiegelman again raised his claim that Kantrowe had not satisfied her representational role.

In relation to the [administrative review], you said that it was your understanding that the union representative wanted to go one way with my case and that I wanted to go another. I believe that I informed you that this was not the case and that the union representative didn't appear to want to go in any direction. It seemed to me that her presence was merely an extension of management.

Spiegelman concluded by advising Cantrall that he felt "more than sufficient time" has passed for CSEA to complete its investigation.

Again, according to the undisputed facts, Spiegelman received no response to this letter. Finally, on April 18, 1983, he once again wrote to CSEA State President Brasmer. In that document, Spiegelman advised that he was

still waiting for a reply from CSEA concerning the outcome of the investigation. . . . I feel like a beggar writing to you, but I don't know what else to do . . .

please write to me with the results of your investigation so that I know where I stand

Assuming these facts to be true as is appropriate in the context of an appeal of a dismissal, my first dispute with the majority challenges its view that the only breach of the DFR alleged herein accrued at the time of the administrative review. A cursory review of the relevant case law lends unquestionable support to the contrary conclusion. As summarized by the Ninth Circuit in Archer v. Airline Pilots Ass'n (9th Cir. 1979) 609 F.2d 934 [102 LRRM 2827] cert, denied (1980) 446 U.S. 953 [104 LRRM 2302], where a breach of the DFR is alleged:

To identify the time of accrual, courts look to (1) the date on which the last "action by the union of any consequence occurred"; and (2) "the point at which any injury to [the union member] allegedly caused by the union became fixed and reasonably certain."¹

Even more instructive is the court's application of this accrual test. In that case, it found the union's "last official act" to be its post-investigation decision that no action would be taken on the plaintiff's claim, and its "final action of any consequence" to be the date when, after inquiries on the plaintiff's behalf, a union official decided that the union considered the case closed.

¹This quotation from the Archer decision references the decision in Price v. Southern Pacific Transportation Co. (9th Cir. 1978) 586 F.2d 750 [100 LRRM 2671].

Applying the accrual test to the instant case, I can only conclude that Spiegelman's charge was clearly not time-barred since there are no facts on the record which suggest that Spiegelman was ever advised of CSEA's post-investigative intentions. The majority's view, which links the statutory time period to Spiegelman's dissatisfaction with CSEA's representation at the August administrative review, loses sight of the fact that it is CSEA's conduct, rather than the employer's, which forms the basis of this charge. As noted in Brown v. College of Medicine (NJ Sup.Ct. 1979) 101 LRRM 3019:

. . . although the plaintiff was discharged more than two years before filing her lawsuit against the union, plaintiff has testified she was advised by the union her grievance was pending. If the trier of fact determines plaintiff's allegation to be true, her cause of action would not arise until she knew or should have known that the union was not processing her grievance. It was not until that date that her cause of action accrued. (Emphasis supplied.)

Again, in the context of the instant case, since the pleadings are replete with references to CSEA's failure to advise Spiegelman of the status of its investigation, the case fits squarely within the rule of law as set forth above and compels the conclusion that the six-month statute of limitations did not begin to run at the time of the administrative review.

I am also unable to join in my colleagues' conclusion that Spiegelman slept on his rights and thus failed to file his charge within the six-month statutory time period. One need

not question whether it was reasonable for Spiegelman to pursue his DFR claim through the internal investigation process when the undisputed facts implicate the CSEA officers as those responsible for perpetuating that impression. Moreover, I find it hard not to view CSEA's failure to in any way respond to a dismissed employee's letters as an independent violation of the DFR.

Finally, by summarily affirming the regional attorney's determination that the equitable tolling doctrine is inapplicable, the majority necessarily adopts his express conclusion that the internal investigative process does not rise to the status of an alternative legal remedy. Unlike the majority, I am unable to conclude that, as a matter of law, utilizing CSEA's internal investigative process falls outside the Board's equitable tolling doctrine. Without benefit of any factual information describing that process, the majority can in no way be certain as to the significance of Spiegelman's pursuit of his DFR claim through the investigative process. Indeed, where federal precedent has gone so far as to require the exhaustion of internal union complaint procedures prior to entertaining section 301 breach of contract suits in federal courts (see Morris, The Developing Labor Law, Sec. Ed., Vol. II, p. 1299 et seq.), the liberty the majority takes with its factual assumptions is most disturbing.

In sum, when I review the factual allegations that are before the Board, it is clear that Spiegelman persisted in his

claim that he was denied representation and that he did not file this charge at an earlier date only because of CSEA's assurances that an investigation would be forthcoming and would involve some assessment of Kantrowe's representation. The majority's summary affirmance perpetuates an error of law and regrettably denies Spiegelman any opportunity for redress.

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, California 95814
(916) 322-3088



August 24, 1983

Ronald Appelgate

Wally Blice, Executive Director
California School Employees Association
2350 Paragon Drive
San Jose, CA 95106

Re: Lon Spiegelman v. California School Employees Association;
Charge No. LA-CO-267

Dear Parties;

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).¹ The reasoning which underlies this decision follows.

On May 13, 1983, Mr. Spiegelman filed with the Los Angeles PERB office an unfair practice charge against the California School Employees Association (CSEA) alleging violation of EERA sections 3543.6 (a), (b), and (c) and 3544.9. Mr. Spiegelman alleged that CSEA breached its duty of fair representation by failing to represent him adequately in an administrative review of his request to return to work at the conclusion of an extensive illness leave of absence.

My investigation of the charge revealed the following. Mr. Spiegelman was an employee of the Los Angeles CCD (District). He was on leave of absence to June 25, 1982. In June of 1982, through his Worker's Compensation attorney, he

¹References to the EERA are to Government Code section 3540 et seq. PERB regulations are codified at California Administrative Code, Title 8.

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advised the District that he was ready to return to work. On June 24, the District advised him that he would be required "to clear through our Employee Health procedures. . . ." On July 20, 1982, the District advised Mr. Spiegelman that his request to return to work was denied.

On July 24, 1982, he requested an administrative review of this denial. He also contacted CSEA and requested that they represent him. The administrative hearing was set for August 3, 1982. Between these dates Mr. Spiegelman met with Ms. Marge Kantrowe, the assigned CSEA representative, and discussed the case. Mr. Spiegelman provided Ms. Kantrowe with two letters which he believed set forth the pertinent issues and facts. It appears that there was already a conflict over the issue to be addressed and the strategy to be used.

On the day of the hearing, this conflict became readily apparent. As a result, Mr. Spiegelman said he would attempt to present his own case. Ms. Kantrowe wrote out a "release", which Mr. Spiegelman signed, relieving Ms. Kantrowe of the duty of representing him.

On August 7, Mr. Spiegelman wrote to Ms. Kantrowe and explained "the reasons for my dismissing you." He stated that, "I signed your letter under duress based on your threat of continued representation, which in my opinion, would have been a serious detriment to my future employment."

On August 10, Mr. Spiegelman was notified that the denial of his request to return to work was upheld. On the same date, Mr. Spiegelman wrote to the state president of CSEA "expressing his concern about Ms. Kantrowe's representation on this matter as well as a previous matter which occurred sometime earlier."

Mr. Spiegelman subsequently exchanged letters and had meetings with CSEA representatives in an attempt to have his case investigated and to receive representation.

On the basis of these facts, I conclude that the breach, if any, of the duty to fairly represent occurred on or before August 3, 1982 and that Mr. Spiegelman was aware of the breach as early as August 3, certainly by August 10, 1982.

Section 3541.5(a) (1) states that PERB shall not:

issue a complaint in respect to any charge
based upon an alleged unfair practice

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occurring more than six months prior to the filing of the charge . . .

The charge was filed on May 13, 1983* As a result, any breach of the duty of fair representation which occurred prior to November 3, 1982, is time-barred by the statute.

In this type of case, PERB has applied the doctrine of "equitable tolling" where the charging party has resorted, in good faith, to alternative legal remedies. San Dieguito Union High School District (2/25/82) PERB Decision No. 194; State of California, Department of Water Resources, et al. (12/29/81) PERB Decision No. Ad-122-S; State of California (Department of Health Services) (12/22/82) PERB Decision No. 269-S.

While it appears from the charge that Mr. Spiegelman sent letters to CSEA in an attempt to resolve his case, these efforts do not rise to the status of alternative "legal remedies", capable of tolling the statutory six-month period. State of California (Department of Health Services), supra. The charge was, therefore, not filed in a timely manner and PERB is barred from issuing a complaint. As a result, it is not necessary to address the sufficiency of CSEA's representation nor the effect of Mr. Spiegelman's "release".

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on September 13, 1983, or sent by telegraph or certified United States mail postmarked not later than September 13, 1983 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN

Robert Kingsley
Regional Attorney