STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN KALKO AND DAVID RUGER, Charging Parties, v. STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION), Respondent.	Case No. S-CE-667-S Administrative Appeal PERB Order No. Ad-260-S August 31, 1994

Appearance: State of California (Department of Personnel Administration) by Linda A. Mayhew, Labor Relations Counsel, for State of California (Department of Parks and Recreation).

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Parks and Recreation) (State) to the March 31, 1994 decision of an administrative law judge (ALJ) denying its motion to dismiss the complaint. The State claimed that the subject matter of the complaint should be dismissed and deferred to binding arbitration as contained in the collective bargaining agreement between the parties.

Based upon a review of the record and the facts of this case the Board finds the State's appeal untimely and therefore denies its appeal.

PROCEDURAL HISTORY

On December 10, 1993, the subject case was first noticed for a hearing on March 3, 1994, with a telephonic prehearing conference scheduled for February 24, 1994.

On January 25, 1994, David Ruger (Ruger) filed a request for continuance which was granted with concurrences of John Kalko (Kalko) and the State. Accordingly, the hearing was rescheduled for March 31, 1994.

During the prehearing conference on February 24, a timetable was agreed upon concerning the State's soon-to-be-filed motion to dismiss the complaint for lack of jurisdiction due to the failure of Kalko to exhaust the contractual grievance procedure. The ALJ indicated that with the hearing set for March 31, an oral ruling on the record at the beginning of the hearing would be issued. Neither side objected to this process.

At the hearing on March 31, 1994, the motion by the State was denied. Thereafter, the hearing proceeded and Ruger and Kalko concluded their case-in-chief. The hearing was recessed and scheduled to reconvene for the State's case-in-chief and conclusion on June 9, 1994. On April 20, 1994, the State requested a continuance of the hearing. The request was granted, with the concurrence of Ruger and Kalko, and the hearing was scheduled to reconvene on July 7, 1994.

On May 20, 1994, the State requested a second continuance. With the concurrence once again of Ruger and Kalko, a second

continuance was granted and the matter was rescheduled for hearing on July 21, 1994.

Thereafter, on June 22, 1994, Kalko requested a continuance. With all parties concurring, the request was granted and the hearing is now set to reconvene on September 8, 1994.

The State filed its "Appeal of Denial of Respondent's Motion to Dismiss and Defer to Binding Arbitration, PERB Regulation 32646; Request for Stay of Activity PERB Regulation 32370," on July 8, 1994, 98 days after the ALJ's oral ruling denying the State's motion to dismiss and 78 days following service of the hearing transcript.[1]

DISCUSSION

The issue of deferral to binding arbitration has been determined by the Board to be jurisdictional (Lake Elsinore School District (1987) PERB Decision No. 646). However, this does not allow a party an unfettered right to raise the issue at any time that it deems appropriate without following PERB regulations. In bringing this matter to the Board, the State relies on PERB Regulation 32646(b)[2] which allows a party to appeal to the Board a denial of a Board agent's motion to defer. PERB Regulation 32646(b), states in part:

> The Board agent's denial of respondent's motion to defer an unfair practice charge to final and binding arbitration may be appealed

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[1]The record indicates that the March 31, 1994 hearing transcript was served on the parties on April 21, 1994.

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

> to the Board itself in accordance with the appeal procedures set forth in section 32635.

Therefore, any appeal by the State must conform with PERB Regulation 32635 which states, in part:

> 32635. Review of Dismissals.
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> (a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Except as provided in section 32162, service and proof of service of the appeal on the respondent pursuant to section 32140 are required.

Under Regulation 32635, the State had 20 days to appeal the ALJ's refusal to dismiss the complaint. The ALJ made her ruling from the bench on March 31, 1994. The State was served with a copy of the transcript on April 21, 1994. The State did not file the instant motion until July 8, 1994 which is well outside the 20-day time limit counting from either the date of the ruling or service of the transcript. Therefore, the State has failed to timely file its appeal.[3]

However, the State is not without recourse in this matter. It still has the right to bring the deferral to arbitration matter before the ALJ and thus the Board at later stages of this case. Finally, to allow the State to succeed in this motion would have allowed one party the opportunity of delaying a

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[3]The Board notes for the record that although there would be some obvious advantages, PERB Regulation 32635 does not require that a decision denying a motion to dismiss and defer to binding arbitration be reduced to a written order.

hearing at its own discretion. Such an allowance would do nothing but foster mistrust among the parties and would not promote the Board's goal of judicial economy.

ORDER

The Board AFFIRMS the ALJ's order denying the motion to dismiss the complaint, and REMANDS this case to the Chief administrative law judge to be processed in accordance with PERB regulations. Accordingly, the request for stay of the proceedings in Case No. S-CE-667-S is also DENIED.

Chair Blair and Member Garcia joined in this Decision.