STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HOWARD O. WATTS, Complainant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-PN-37 PERB Decision No. 331 August 15, 1983

Appearances: Howard O. Watts, representing himself; Robert J. Henry, Attorney for Los Angeles Community College District.

Before Tovar, Jaeger and Burt, Members.

DECISION AND ORDER

JAEGER, Member: Howard O. Watts has appealed the hearing officer's dismissal of his public notice complaint, in which he alleged that the Los Angeles Community College District violated Government Code subsection 3547(b) of the Educational Employment Relations Act.[1]

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[1]Subsection 3547(b) of the California Government Code provides:

> . . . . . .
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> (b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

Watts argues that the hearing officer's dismissal of his complaint in this case is a denial of procedural due process, as he has a right to a hearing once the regional director has issued a complaint and set a date for a hearing. After considering the entire record in light of the appeal, the Board affirms the hearing officer's findings and conclusions of law (attached hereto) and ORDERS the complaint DISMISSED without leave to amend. [2]

Members Tovar and Burt joined in this Decision.

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[2]This case arises from the same factual situation as PERB Decision No. 330. Watts alleges that at the May 20, 1981, meeting of the Los Angeles Community College District (District), the District's five-minute time limit policy interfered with the public's right to have an opportunity to address the collective bargaining issues on the District's agenda. (The five-minute restriction has been found not to be a per se violation of subsection 3547(b) by the Board in Los Angeles Community College District (12/31/80) PERB Decision No. 153). Exhibits offered by Watts with his amended complaint indicate that the collective bargaining items which he wished to address were on the agenda for public discussion on May 6, 1981. He makes no allegation that the public was not given a sufficient opportunity at that time to "express itself regarding the proposal at a meeting of the public school employer" (subsection 3547(b)). Thus, after receiving a motion to dismiss from the District for lack of a prima facie case, and allowing time for submission and consideration of Watts' arguments, the hearing officer ruled in favor of the District and dismissed the complaint.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

HOWARD O. WATTS, Complainant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-PN-37 ORDER GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND

Appearances: Howard O. Watts, representing himself; Mary Dowell, representing Los Angeles Community College District.

Before: Robert R. Bergeson, Hearing Officer.

This case presents the procedural question of whether a complainant is entitled to a hearing once the regional director has determined his complaint states, in part, a prima facie case. It also presents the question of whether a five minute speaking limitation may violate the public notice provisions of the Educational Employment Relations Act (EERA or Act).[1]

PROCEDURAL HISTORY

The instant public notice complaint was filed with the Public Employment Relations Board (PERB or Board) on June 18, 1981 alleging numerous violations of section 3547 (a), (b), (c), (d) and (e) of the Act by the Los Angeles Community

[1]The EERA is codified at Government Code section 3540 et seq. All section references are to the Government Code unless otherwise stated.

College District (LACCD or District). On August 10, 1981, the Los Angeles regional director of PERB dismissed the complaint with leave to amend.

An amendment to the complaint was filed on August 20, 1981. Thereafter, on October 13, 1981, a Board agent, acting on behalf of the regional director, dismissed the majority of the complaint without leave to amend but:

> . . . determined that the following portions of the complaint state a prima facie violation of Government Code section 3547:
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> Allegations (1) and (2): The contention that the District's five minute rule interfered with complainant's right to express his views on the District's initial proposal for the College Safety and Police Service Unit, and on its Proposed Amendments to the Maintenance and Operations Unit, Unit 2, Agreement and to the Technical Clerical Unit, Unit No. 1, Agreement, since all of these items were on the May 20, 1981 agenda meeting and he was allowed only five minutes total speaking time.

Dismissal in Part Without Leave to Amend, p. 3.

An informal settlement conference conducted by the regional director on July 9, 1982 failed to resolve the complaint and the case was thereafter assigned to the undersigned Board agent by the PERB director of representation.

Prior to commencement of the formal hearing (calendared for August 31, 1982), the District moved to dismiss the case August 4, 1982 on the grounds that the complaint failed to state a prima facie violation of section 3547. On August 20, 1982, the Complainant, Howard O. Watts, after having been granted an

extension of time to do so, responded to the motion by supporting the determination of the regional director that he had stated a prima facie case. Further, the complainant's position was that once the regional director had determined that his case stated a prima facie violation and a notice of hearing had been issued, it would be a denial of due process and a violation of PERB regulations not to afford him the opportunity of a hearing. On this basis, the complainant requests the motion be denied.

DISCUSSION

Hearing Officer's Authority to Grant Motion to Dismiss

As the District suggests, in Los Angeles Community College District (6/16/80) PERB Dec. No. Ad-91 and Los Angeles Community College District (12/31/80), PERB Dec. No. 153, the Board itself affirmed on appeal the regional director's dismissal of a complaint subsequent to the conduct of an informal conference and the setting of a formal hearing. However, the instant case is factually distinguishable in that in neither of the just-cited cases had the regional director previously determined that a prima facie case had been stated, nor did the Complainant assert on appeal that his due process rights and PERB regulations required a hearing. To that extent, the instant case appears to be one of first impression for the PERB.

In Sweetwater Union High School District (11/23/76) EERB Dec. No. 4,[2] the Board, citing Firefighters Union v. City of Vallejo (1974) 12 C.3d 608, said that in interpreting the EERA, cognizance should be taken of decisions of other governmental agencies which administer statutes identical or similar to the EERA. In the absence of on-point PERB case law regarding the instant procedural issue, the undersigned Board agent will follow this direction.

Though California's public notice laws are unique,[3] the processing of a public notice complaint by PERB is similar to the processing of an unfair labor practice charge by the National Labor Relations Board (NLRB). An NLRB employee, acting as an agent of the regional director, screens incoming unfair labor practice charges and:

> . . . if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge. . .
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> Section 102.15. Rules and Regulations of the National Labor Relations Board.

2The PERB was formerly referred to as the Educational Employment Relations Board.

3Similar provisions exist only in two other statutes administered by PERB: the Higher Education Employer-Employee Relations Act (Gov't Code section 3595) and the State Employer-Employee Relations Act (section 3523).

The administrative law judge is assigned by the chief administrative law judge in performing adjudicatory functions for the NLRB, while the charging party is represented at the hearing by an agent of the general counsel's office.

Public notice complaints filed with PERB are initially screened by a Board agent acting for the regional director. Similar to NLRB procedures, if a prima facie violation is found to exist and the complaint has not been settled or withdrawn, a hearing is set before a hearing officer assigned by the director of representation. PERB regulations 37030-37070.[4]

The only substantive differences between the two procedures are that PERB's regulations provide for the possibility of an informal settlement conference prior to hearing and the NLRB charging party is represented by an agent of the general counsel's office once a prima facie violation is determined. Case processing is, then, substantially similar.

There exists a long line of NLRB decisions upholding the right of a hearing officer to dismiss complaints deemed to be prima facie by the general counsel. In the seminal case, Cherry Rivet Company (1951) 97 NLRB No. 212, 29 LRRM 1237, the general counsel had issued a complaint on an unfair labor practice charge by the United Auto Workers International Union, CIO, against the employer. Subsequent to the general counsel's presentation of the charging party's evidence, the trial

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4PERB rules are codified at California Administrative Code, title 8, section 31000 et seq.

examiner (now referred to as an administrative law judge), upon motion of the respondent, dismissed certain allegations of the complaint for failing to state a prima facie case. The general counsel and the union filed exceptions to the ruling with the full board on the grounds that the trial examiner had no power to dismiss any part of the complaint prior to both sides' presentation of their cases (once the general counsel had ruled that a prima facie violation had been stated). The board, after agreeing with the trial examiner's decision on the merits, went on to say the following about the procedural issue:

> . . . we find nothing in either the Administrative Procedure Act or our own Rules and Regulations which prevents the Trial Examiner from dismissing a complaint under such circumstances. Such dismissals are well established judicial and administrative practice, and are in the interest of speedy administration of law.

Cherry Rivet Company, supra, at p. 1304 (footnote 1).

Applying the same logic, in AAUP v. Penn. Labor Relations Board (CtComPls, 1974) 87 LRRM 3114, a Pennsylvania court upheld the right of that state's Labor Relations Board to dismiss a case prior to commencement of a hearing despite the fact that the secretary to the board had determined that the complaint stated a prima facie violation of the pertinent statute.

California civil procedure can also be looked to for guidance. The District's motion to dismiss is properly in the form of a motion for judgment on the pleadings. Witkin, California Procedure (2d ed. 1970) at p. 2816. There appears

to be no case law restriction regarding the timing of filing of such a motion with a California court. Id at p. 2820.

Finally, it is a basic precept of administrative law that a "trial" (i.e. hearing) is required only when material facts are in dispute. Davis, Administrative Law Text (3rd ed. 1972) pp. 157, 159. Where, as here, the issue is one of law only, due process is served where the parties have been granted the right of "argument" (i.e. written brief). Ibid. In the instant case, this requirement has been met.

Relative to PERB's internal regulations, the Complainant paraphrases PERB regulation 37070 as providing that "[a] hearing must be called on the Complaint" (if the complaint is not withdrawn by the complainant or is not dismissed by the regional director) and the District's Motion to Dismiss is "illegal" because it was not made until the case was set for hearing. However, regulation 37070 says that the complaint ". . . shall be resolved through the hearing procedures described in Division I, Chapter 3 (commencing with Section 32165) of [the PERB's] regulations." The District's motion was filed pursuant to PERB regulation 32190(a) of Division I, Chapter 3. It is therefore found to be a proper motion and, as such, can be ruled upon by the hearing officer.

For the foregoing reasons, it is determined that the motion is procedurally proper and the hearing officer does have authority to grant the District's motion to dismiss

irrespective of a prior finding by the regional director that certain parts of the complaint state a prima facie violation.

Whether Complaint States a Prima Facie Violation

An agent for the Los Angeles regional director of the PERB has previously ruled that those parts of the instant complaint which allege that the District's five minute speaking rule "interfered" with his right to express himself constitute a prima facie violation of section 3547. See page 2, supra.

Although the complainant, Howard O. Watts, alleges violation of section 3547, subsections (a) through (e), only subsection (b) provides for the public's ability to respond to submission of initial proposals. Therefore, subsections (a), (c), (d) and (e) could not have been violated by the District under the facts alleged by the complaint. Those parts of the complaint which have not already been dismissed that allege violations of these subsections of section 3547 are therefore DISMISSED WITHOUT LEAVE TO AMEND.

Subsection (b) provides in pertinent part as follows:

> (b) Meeting and negotiating shall not take place on any proposal until . . . the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

The complainant alleges that the District's rule limiting speakers to five minutes time to speak to all agenda items "interfered" with his ability to express himself on certain collective bargaining proposals on the agenda of the May 20, 1981 LACCD board of trustees meeting.

However, Exhibit No. 2 of Mr. Watt's amended complaint indicates that the initial subjects of meeting and negotiating which he spoke to on May 20, 1981 had already been placed on the board agenda on May 6, 1981 for public response. Exhibit No. 2 indicates that they were on the May 20 agenda for board adoption pursuant to section 3547(c), not for public response in accordance with section 3547(b).

Subsection (b) mandates only that initial proposals be agendaed for public response at "a" (i.e. one) meeting of the public school employer. This was done. As the District's motion points out, when initial proposals are being agendaed for board adoption (such as at the District's May 20 meeting) the EERA does not obligate the public school employer to allow members of the public to speak at all. Whether Mr. Watts' rights were "interfered" with by limiting him to five minutes is thus irrelevant. Therefore, it is found that the complaint does not state a prima facie violation of section 3547(b), nor can it be amended to do so.

District Request for Attorney's Fees and Cease and Desist Order

The Board has previously upheld the decision of the regional director to dismiss with leave to amend allegations similar to that made in the instant case relative to LACCD's five-minute speaking limitation. Los Angeles Community College District (4/29/81), PERB Dec. No. 150a. In Los Angeles Unified School District (2/22/82), PERB Dec. No. 181a, the Board admonished Mr. Watts to ". . . cease and desist from filing complaints which merely raise facts and questions of law which the Board has already fully considered" and warned Mr. Watts

that if he persisted in so doing the Board would consider compelling him to pay the respondent's legal expenses. Accordingly, the District asks for attorneys' fees and a cease and desist order against the Complainant. However, the instant complaint was filed prior to the issuance of PERB Dec. No. 181a. Further, the existing portions of the complaint were previously determined by the Los Angeles regional office of the PERB to state a prima facie case. It would therefore be unfair to the Complainant to subject him to the District's requested remedy at this point in the processing of the complaint.

CONCLUSION

The instant complaint does not state a prima facie violation of the Act. It cannot be amended to do so. Hence, the Motion to Dismiss is granted and the complaint is DISMISSED WITHOUT LEAVE TO AMEND. The hearing set for August 31, 1982 is therefore hereby cancelled.

An appeal of this decision may be made to the Board itself within 10 (ten) calendar days following the date of service of this decision by filing a statement of the facts upon which the appeal is based with the Executive Assistant to the Board at 1031 18th Street, Sacramento, California 95814. Service and proof of service of the appeal are required pursuant to PERB regulation 32140.

Dated: August 26, 1982

Robert R. Bergeson
Hearing Officer