STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-58-S
v.	)	PERB Decision No. 302-S
STATE OF CALIFORNIA, DEPARTMENT OF GENERAL SERVICES,	)	April 8, 1983
Respondent.	)	

Appearances; M. Jeffrey Fine, Attorney for California State Employees' Association; Barbara T. Stuart, Attorney for State of California, Department of General Services.

Before Tovar, Jaeger and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) based on an appeal filed by the California State Employees' Association (Association) from the Administrative Law Judge's Notice of Refusal to Issue Complaint and Dismissal Without Leave to Amend pursuant to PERB regulation, section 32630(a).[1] The Administrative Law Judge

[1]PERB Rules and Regulations are codified at California Administrative Code, title 8, section 31000 et seq.; section 32630(a) states:

> (a) The Board may refuse to issue a complaint on its own motion or a motion filed by a party. Refusal to issue a complaint shall constitute dismissal of the charge. The refusal may be issued with or

(ALJ) found that while the charge may state a prima facie violation of the State Employer-Employee Relations Act (hereafter SEERA), the Public Employment Relations Board has found that "no useful purpose would be served by reviewing the issue."

We have reviewed the ALJ's reasons for dismissal as well as the Association's appeal and the State of California, Department of General Services (State or Department) response thereto. We conclude that the ALJ erred in refusing to issue a complaint in this matter for the reasons discussed below.

DISCUSSION

The Allegations of the Charge.

On May 19, 1981, the Association filed the instant charge complaining that the Department violated sections 3516.5 and 3517 of the SEERA.[2] The Association alleged that the State

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> without leave to amend the charge and shall be served upon all parties with a copy of the charge if the charge has not previously been served. The refusal shall be in writing and include a statement of the grounds for refusal including the grounds for denial of leave to amend.

[2]SEERA is codified at Government Code section 3512 et seq. Subsection 3516.5 states:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of

made numerous unilateral changes in terms and conditions of employment without notifying or providing the nonexclusive

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> representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
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> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

SEERA subsection 3517 states:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to

representative the opportunity to meet and discuss the changes. The unilateral actions alleged to have occurred include: (1) changes in the duties of printing trades assistants II in the press room as of May 4, 1981, including increase in workload; (2) changes in the procedure for notifying eligible printing trades assistants listed on the printing trades assistants II reemployment list; (3) changes in the time base of printing trades assistants II and offset press assistants from permanent full-time to permanent intermittent status effective May 19, 1981; (4) transferring printing trades assistants I from the bindery room to the press room contrary to the policy of the State Personnel Board; (5) changes in the policy used to determine the appropriateness of the use of permanent intermittent employees; and (6) changes in the past practice of granting red circle rates for demoted employees. The charge further alleges that the State refused to supply data regarding workload and the need for layoff, and refused to attend a meeting scheduled to meet and discuss the above changes.[3]

> the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

[3]On June 10, 1981, the Association was ordered, pursuant to title 8, California Administrative Code, section 32650 to particularize its charge. On July 2, 1981, the Association complied with the order and provided a detailed statement containing the substance of these allegations.

Standard of Review.

In considering a motion to dismiss PERB has held that the Board will assume, for purposes of ruling on the motion, that the essential facts alleged in the charge are true. San Juan Unified School District (3/10/77) EERB Decision No. 12.4

Thus we assume that the allegations of unilateral changes without meeting and discussing are true, and conclude that the Association has stated a prima facie case within the meaning of PERB regulation, section 32630.

The Refusal To Issue A Complaint And The Dismissal Without Leave To Amend

The ALJ concluded that pursuant to the Board's holding in Marin Community College District (4/3/81) PERB Decision No. 161, the charge should be dismissed. He found that no useful purpose would be served by litigating the matter because, as in Marin, the enforceable but more limited rights of the nonexclusive representative merged into the broader rights of the exclusive representative when the Association was certified as the exclusive representative. We do not agree.

In Professional Engineers in California Government (PECG) (3/19/80) PERB Decision No. 118-S, the Board found that sections 3515 and 3515.5 of SEERA require the employer to provide notice and the opportunity to meet and discuss subjects

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[4]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

basic to the employment relationship with nonexclusive employee representatives prior to taking action on a policy. Thus, the charge before us alleges matters sufficiently basic to the employment relationship to meet the Board's test in PECG, supra.

In Marin, however, the Board reviewed the dismissal of an allegation of a single unilateral change, which was filed and dismissed prior to a unit determination or the selection of an exclusive representative. When the matter finally reached the Board, approximately four years had passed and the charging party had become the exclusive representative. The Board concluded that no useful purpose would be served by reviewing the single issue in dispute because of the passage of time and the distinctive factual circumstances of the case.[5]

The charge before the Board today is dissimilar from Marin. The events at issue allegedly occurred or took effect during May and June of 1981. The allegations include six unilateral changes in the status quo and two refusals to meet and discuss and/or provide information. In addition to the quantity and severity of the unfair practices alleged the timing involved is significant in that, during the period

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[5]In Marin, the ALJ's dismissal of the charge was based on the Board's holding in San Dieguito Union High School District (9/2/77) EERB Decision No. 22, that a nonexclusive representative did not have meet and discuss rights. The Board reversed San Dieguito when it issued Los Angeles Unified School District (2/17/83) PERB Decision No. 285, Petition for Writ of Review filed 3/21/83, Court of Appeal, Second Appellate District, Case No. 68167.

between the time the charge was filed and the date on which it was dismissed, a representation election occurred and the Association became the exclusive representative of these employees.[6] The ALJ's conclusion that this event formed the basis for dismissal of the charge is erroneous because it misconstrues the Board's reasoning in Marin. This case is distinguishable from Marin because an election campaign was in progress at the time these alleged unfairs occurred, in Marin, no unit had been determined and no election was scheduled. Further, in this case the charging party became the exclusive representative subsequent to the dismissal of the charge but prior to the Board's review of the dismissal. Thus no significant lapse of time or material change in the parties' legal relationship had occurred since the dismissal was issued.

We therefore conclude that the charge should not have been dismissed and order that a complaint be filed and the matter remanded for trial.

ORDER

Upon the foregoing Decision and the record as a whole, the Public Employment Relations Board ORDERS that the Administrative Law Judge's Refusal to Issue Complaint and

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[6]Official notice is hereby taken of the fact that the Association became the exclusive representative for printing trades employees on July 10, 1981. A memorandum of understanding was negotiated effective July 1, 1982 to June 3, 1984. The charge was filed in May 1981.

Dismissal Without Leave to Amend is reversed. The matter is remanded to the Chief Administrative Law Judge who is ORDERED to issue the Complaint and set the matter for hearing pursuant to PERB Rules and Regulations.

Member Burt joined in this Decision.

Member Tovar's dissent begins on page 9.

Tovar, dissenting: I would affirm the hearing officer's dismissal for the following reasons:

The majority opinion of my colleagues implies a knee-jerk approach to the application of SEERA and related PERB regulations. If a prima facie case has been established, then the majority would automatically issue a complaint. Granted, PERB regulation subsection 32652(a) provides that a complaint shall issue if a prima facie case is established; however, such a regulation must be read in conjunction with the Act and does not supersede the Act's mandate.

Section 3514.5 and subsection 3514.5(c) states that:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board . . . .
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> . . . . . .
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> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Further, PERB regulation section 32630(a) provides that "the Board may refuse to issue a complaint on its own motion or a motion filed by a party. . . . The refusal may be issued with or without leave to amend the charge . . ."

Clearly, the Board has the discretion to refuse to issue a complaint and to dismiss without leave to amend. Unlike a court, which has no discretion to withhold jurisdiction where a violation of law has been charged, the Board is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act. Even CSEA acknowledges that administrative convenience or necessity may dictate, from time to time, the exercise of discretion.

The discretionary decision of the Board's agent to refuse to issue a complaint was appropriate in the instant case. The majority attempts to distinguish Marin by reciting a list of factual differences without substantively explaining how those factual differences warrant a different outcome. The majority fails to explain what useful purpose would be served in issuing a complaint in this case.

Of concern to me is whether, and to what extent, the negotiating position of the charging party is significantly jeopardized by the dismissal of the allegations. On the one hand, the employer has the obligation to meet and consult with the non-exclusive representative over issues fundamental to the employment relationship, such as wages and fringe benefits. PECG, supra; California State University, Sacramento (4/30/82) PERB Decision No. 211-H; Los Angeles Unified School District (2/17/83) PERB Decision No. 285.

However, assuming, arguendo, that we were to find that the Department failed to meet and discuss the matters involved here, the Department is still under no obligation to adopt any of the charging party's recommendations. This is so because the meet and discuss process is not a binding bilateral process as is the duty to meet and negotiate in good faith. Since the charging party now enjoys the status of exclusive representative, no useful purpose would be served by reviewing the issue of the meet and discuss obligation which existed during the earlier non-exclusive relationship without a further showing of harm.

I, therefore, do not feel it is administratively prudent to reverse the administrative law judge and allow a complaint to be issued in the instant case. The charging party's negotiating position is much stronger now, and a finding in favor of the charging party would not significantly add to its negotiating posture. In fact, I take administrative notice of the fact that the charging party has entered into a memorandum of understanding with the state employer which runs from July 1, 1982 to June 3, 1984. Under the particular circumstances of this case, it is clear to me that dismissal is the appropriate action.[1]

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[1]My dissent in this instant case in no way diminishes my previous and continued position on the rights which have been afforded to non-exclusive representatives. See Los Angeles Unified School District, supra.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, V. STATE OF CALIFORNIA, DEPARTMENT OF GENERAL SERVICES, Respondent.	Case No. S-CE-58-S NOTICE OF REFUSAL TO ISSUE COMPLAINT AND DISMISSAL WITHOUT LEAVE TO AMEND (10/7/81)

Notice is hereby given that no complaint will be issued in the above captioned unfair practice charge and that it is hereby dismissed without leave to amend. This action is taken on the ground that while the charge may state a prima facie violation of the State Employer-Employee Relations Act (hereafter SEERA), the Public Employment Relations Board has found that "no useful purpose would be served by reviewing the issue" in similar cases and declines to take jurisdiction over the case.[1]

BACKGROUND

The Charging Party, California State Employees Association (hereafter CSEA) filed this unfair practice charge with the

[1]SEERA is cited at Government Code section 3512 et seq. All statutory references herein are to SEERA unless otherwise noted.

Public Employment Relations Board (hereafter PERB) on May 19, 1981. An order to particularize was issued by PERB on June 10, 1981. A particularization was filed on July 3. An answer to the particularization and a motion to dismiss was filed on July 21.

The particularized charge and accompanying documents may be summarized as follows: the Respondent, State of California, Department of General Services has violated sections 3516.5 and 3517[2] of SEERA by making numerous unilateral changes in the

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[2]Section 3516.5:

> Except in cases of emergency as provided in this section, the State, its agencies, departments, commissions, or boards or its representatives as may be properly designated by law, shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the state . . . .
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> . . . . . .

Section 3517:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith" means that the Governor or such representatives as the

terms and conditions of employment of State Print Plant employees without notifying or providing an opportunity for the nonexclusive representative employee organization to meet and discuss such changes. The alleged unilateral changes may be summarized as: (1) changes in the duties of printing trades assistants II in the press room as of May 4, 1981 including increase in workload; *(2)* changes in the procedure of notifying eligible printing trades assistants listed on the printing trades assistants II reemployment list; *(3)* changes in the time base of printing trades assistants II and offset press assistants from permanent full-time to permanent intermittent status affective May 19, 1981; (4) transferring printing trades assistants I from the bindery room to the press room contrary to policy of the State Personnel Board; (5) change in the policy used to determine the appropriateness of use of permanent intermittent employees; *(6)* refusal to supply data showing workload and the need for layoff; (7) refusal of management to attend a meeting scheduled to meet and discuss

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Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate" time for the resolution of impasses.

one or more of the above changes; *(8)* change in the past practice of granting red circle rates for demoted employees.

Official notice is taken of the fact that the Charging Party, CSEA, was certified by PERB on July 10, 1981, as the exclusive representative of Printing Trades Employees (Unit 14) for purposes of negotiations under SEERA.

DISCUSSION

CSEA has alleged that its rights as a nonexclusive employee organization to meet and discuss proposed changes in working conditions with the employer prior to the selection of an exclusive representative is protected by sections 3516.5 and 3517 of SEERA. The sections are incorrectly cited. It will be assumed that the facts alleged request a violation of section 3515.5 to be found.[3]

The facts asserted by CSEA are assumed to be true for purposes of this ruling.[4]

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[3]Both sections 3516.5 and 3517 refer to the rights of exclusive representative employee organizations. Section 3515.5 reads:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. . . .

[4]San Juan Unified School District (3/10/77) EERB Decision No. *12.* The facts are not restated in detail because of the nature of this ruling.

PERB has found that employees have the right to be represented by nonexclusive representatives prior to the selection of an exclusive representative. In Professional Engineers in California Government v. State of California (3/19/80) PERB Decision No. 118-S, the Board found that sections 3515 and 3515.5 require the state employer to provide a reasonable opportunity to meet and discuss subjects basic to the employment relationship with nonexclusive representative employee organizations prior to reaching or taking action on a policy decision.

At the time of filing of the unfair practice charge CSEA was a nonexclusive representative of printing trade employees within the Department of General Services. During the pendency of the charge CSEA was selected by the appropriate unit as its bargaining agent and was certified by PERB to be the exclusive representative. Under the Board's test established in PECG v. State cited above the charge of CSEA generally would state a prima facie case. However, in United Professors of Marin v. Marin Community College District (4/3/81) PERB Decision No. 161, the Board dismissed a similar prima facie unfair practice charge under the Educational Employment Relations Act[5] (hereafter EERA) on the basis that the enforceable

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[5]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. The statute governs collective bargaining for public schools and community colleges.

rights of a nonexclusive representative had merged into the rights of an exclusive representative. The Board stated,

> . . . the record indicates that now the charging party is certified as the exclusive representative of the employees on whose behalf it sought to meet and consult. As a result of this development, the employer now clearly has the duty to meet and negotiate with charging party. The Board therefore finds that no useful purpose would be served by reviewing the issue of whether, on June 29, 1977 the employer should have met and consulted with UPM prior to the complained of actions. (Emphasis added.)

The employer has cited Marin Community College District decision as a basis for its motion to dismiss. The motion indicates that section 3543.1(a) of EERA granting rights to nonexclusive representatives reads substantially the same as section 3515.5 of SEERA. In State of California v. Department of Corrections (5/5/80) PERB Decision No. 127-S, the Board indicated that while it is not bound to apply decisions issued under EERA to SEERA cases, the similarity of language and purpose between the Acts allows for applying similar rationale.

Having found the relevant provisions between the two Acts to be similar and finding no factual distinctions indicated in the Marin decision to limit its impact, it is found that the Board precedent in Marin must apply here. The precedent appears to be that the Board has chosen to decline taking jurisdiction to adjudicate retroactively the more limited

rights of a nonexclusive representative after that organization is granted the more extensive rights of an exclusive representative.[6] CSEA apparently argues that the Marin case cannot be applied to SEERA because PERB chose not to overrule a previous decision (San Dieguito Union High School District (9/22/77) EERB Decision No. 22) denying any "meet and discuss" rights to nonexclusive representatives under EERA when it granted such rights to nonexclusive employee organizations under SEERA in the Professional Engineers, supra, decision. Thus, it might be argued that the Board in Marin, supra, decided not to establish less than full bargaining rights retroactively under EERA whereas a different result should occur under SEERA. The Marin decision makes no such distinction on its face, and thus its precedent will be applied to SEERA until further clarified by the Board itself. This refusal to issue a complaint and dismissal without leave to amend is authorized pursuant to the Board's discretion under section 3541.3(i):

> To investigate unfair practice charges . . . and take such action and make such determinations in respect of such charges or

[6]CSEA made no argument that unlawful changes in working conditions made by the employer while the organization was a nonexclusive representative could not adequately be remedied following its selection as an exclusive representative. While it is plausible that statute of limitation restrictions or changes in the previous status quo could restrict the ability of an exclusive representative to remedy prior wrongdoing, these issues are not considered here.

> alleged violations as the board deems necessary to effectuate the policies of this chapter.

Included within such discretion is the authority to determine that issues are moot or that no remedy should be given or administrative action taken upon a charge which otherwise states a prima facie case. The authority for this discretion is taken from a substantial history of similar authority in other labor relations agencies such as the National Labor Relations Board (hereafter NLRB). The NLRB and the courts have consistently adhered to the principle that the agency is not a court whose jurisdictions over violations must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the applicable Act. See Guss v. Utah, 353 U.S. at 13; NLRB v. Denver Building Trades Council (1951) 341 U.S. 675, 684 [28 LRRM 2108] . Thus the NLRB has refused to exercise jurisdiction or process unfair charges over many types of cases where it could have granted a remedy. Additionally it has found violations "de minimus" in cases where a prima facie case was stated.

The Charging Party may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this notice. (PERB Regulation 32630(b).) Such appeal must be actually received by the executive assistant to the Board before the close of business

(5:00 p.m.) on October 27, 1981 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, signed by the party or his agent, and contain facts and arguments upon which the appeal is based. (Section 32630(b).) The appeal must be accompanied by proof and service and all parties (PERB Regulation 32135, 32142, 32630(b)).

Dated: October 7, 1981

William P. Smith
Chief Administrative Law Judge

By:

Terry Filliman
Hearing Officer