STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTINE L. FELICIJAN, Charging Party, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4939-E PERB Decision No. 2514 February 8, 2017

Appearances: Christine L. Felicijan, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Anthony P. De Marco, Attorney, for Santa Ana Unified School District.

Before Winslow, Banks, and Gregersen, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on what purport to be exceptions by Christine L. Felicijan (Felicijan) to a proposed decision dismissing the PERB complaint and Felicijan's unfair practice charge. The complaint alleged that in or about June 2005, Felicijan's former employer, the Santa Ana Unified School District (District), violated the Educational Employment Relations Act (EERA)[1] by refusing to alter Felicijan's work environment to accommodate her health concerns in retaliation for her service as a union safety committee chairperson.

The decision under review, dated January 31, 2014, was designated a "Proposed Decision" and the parties have styled their papers in accordance with PERB's procedures

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

governing exceptions to a proposed decision. (PERB Regs. 32300, subd. (a), 32310.)[2] However, because the case was dismissed without a formal hearing or stipulated record, there was no "record" on which to base a "Proposed Decision" as required by PERB Regulations and decisional law. (PERB Regs. 32207, 32215; 32176; see also *City of Santa Clara* (2016) PERB Decision No. 2476-M, pp. 9-10; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 10-11.) We therefore regard the decision and order under review as a dismissal (Dismissal) and treat Felicijan's filing as an appeal from dismissal, pursuant to PERB Regulation 32635, subdivision (a).[3] Regardless of how it is designated, Felicijan's filing seeks Board review of a decision and order by a PERB administrative law judge (ALJ) granting a pre-hearing motion to dismiss for Felicijan's alleged failure to prosecute/proceed to hearing within a reasonable time.[4]

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

[3] Compare PERB's cases involving review of dismissal on a pre-hearing motion, such as *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S (*CSEA (Parisi)*) and *State of California, Department of Personnel Administration* (1989) PERB Decision No. 739-S (*DPA*), at pages 2-3, 5, with cases in which the Board reviewed a *proposed decision* to dismiss a complaint after the charging party had failed or refused to appear at a duly noticed hearing. (See, e.g., *Coachella Valley Teachers Association (Abrahamian)* (2015) PERB Decision No. 2446 (*Coachella Valley*) and *Teamsters Clerical, Local 2010* (*Polk*) PERB Decision No. 2489-H (*Local 2010 (Polk)*).) In the latter category of cases, the previously-scheduled hearing was convened in the charging party's absence and an evidentiary record developed in support of the respondent's motion to dismiss for failure to prosecute.

[4] Felicijan's appeal also argues that the ALJ erred in refusing to consider her September 24, 2013 motion to amend the complaint to encompass adverse actions by other District administrators/agents, based on evidence disclosed for the first time in declarations filed by the District in 2013.

For the reasons discussed below, we agree with Felicijan that dismissal was improper in the absence of a hearing to resolve disputed material facts underlying the District's motion to dismiss and without ruling on Felicijan's pre-hearing motion to amend the complaint, pursuant to PERB Regulation 32647. We therefore reverse the Dismissal and remand to the Office of Administrative Law with directions to consider any pre-hearing motions, as the ALJ deems appropriate, and/or to give notice and convene a formal hearing consistent with PERB Regulations and any documented medical restrictions of the parties and/or witnesses to these proceedings. (PERB Reg. 32170, subs. (a), (d), (f), (m).)[5]

FACTUAL AND PROCEDURAL BACKGROUND[6]

On March 10, 2006, Felicijan filed an unfair practice charge with PERB. On March 30, 2006, the District filed a position statement urging that no complaint issue and that the charge be dismissed for lack of jurisdiction.[7] On May 31, 2006, Felicijan filed an amended charge.

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[5] Nothing precludes the hearing officer from convening another pre-trial conference with the parties, either on or off the record, to determine how to proceed to hearing and what, if any, reasonable accommodations are necessary under the circumstances, or to resolve any other case management issues. (PERB Reg. 32170, subd. (e); see also *Los Angeles Unified School District* (1984) PERB Decision No. 464 (*Los Angeles*), pp. 2-3.)

[6] Because we are precluded from resolving factual disputes or making credibility determinations in the absence of a formal hearing or stipulated record, we summarize the undisputed matters contained in the case file, including the parties' sworn declarations and the Reporter's Transcript (R.T.) of the pre-trial conferences, and we note, without attempting to resolve, the parties' conflicting factual allegations.

[7] The District asserts that, unless otherwise agreed during the course of PERB's investigation, its position statement and any attachments thereto are "confidential," pursuant to PERB Regulation 32162. However, PERB Regulation 32620, subdivision (c), expressly requires that a respondent's position statement be served on the charging party and the District cites no statutory or decisional authority designating a respondent's position statement "confidential" or otherwise exempting it from disclosure as a public record under the California Public Records Act (CPRA). (CPRA, § 6254; the CPRA is codified at § 6250 et seq.)

On June 12, 2006, PERB's Office of the General Counsel issued a complaint alleging, in relevant part, that the District through its agent, then Executive Director of Human Resources Archie Polanco (Polanco), had refused to grant or consider Felicijan's request for a reasonable accommodation in retaliation for her service as the chairperson of her union's safety committee. On July 5, 2006, the District answered the complaint by denying the material allegations and asserting various affirmative defenses.

From July 5, 2006 to December 4, 2006, the Board agent assigned to the case convened two in-person and three telephonic informal settlement conferences.[8] Although the dispute was not resolved, for reasons that are not apparent from the case file, no formal hearing was scheduled.

On September 19, 2008, almost two years after the complaint had issued, ALJ Allen, who was then assigned to the case, notified the parties that a formal hearing was scheduled for February 2-6, 2009.

On December 14, 2008, Felicijan requested that the hearing be delayed until after July 1, 2009 because she was scheduled to undergo surgery on January 30, 2009, which would require five to six months' recovery time.

On or about January 8, 2009, the District filed its opposition to Felicijan's request and urged ALJ Allen to require Felicijan to submit proof of her pending surgery and anticipated five- to six-month recovery period and/or to verify the statements made in her request under

[8] According to the contents of PERB's case file, three more dates were scheduled for telephonic informal settlement conferences but then cancelled. The file does not indicate whether these dates were cancelled at the request of one party, by agreement, or by the Board agent. In their pleadings and at the pre-hearing conferences, each party has accused the other of cancelling settlement conferences or hearing dates and employing various other delaying tactics. We decline to make any factual findings as to these assertions.

oath.[9] The District also moved to have the matter dismissed for failure to prosecute, asserting that Felicijan's delay in bringing the matter to hearing had compromised the District's defense because necessary witnesses were no longer employed by the District.[10] In the alternative, the District's opposition and motion to dismiss requested that the hearing not be scheduled during July or August 2009 because witnesses employed by the District would be unavailable due to summer vacation.

On January 9, 2009, ALJ Allen placed the case in abeyance due to Felicijan's medical condition. ALJ Allen directed Felicijan to provide written medical verification to support the abeyance and also ordered that the case would remain in abeyance "until such time as Felicijan provides written medical verification of her ability to proceed to hearing." ALJ Allen's notice of abeyance also stated that "[i]f Felicijan does not provide these verifications within reasonable periods of time, a motion to dismiss for failure to prosecute will be entertained."

On August 24, 2012, the ALJ notified the parties that the case had been transferred to him due to the impending retirement of ALJ Allen. The ALJ's correspondence stated that, because no communications from the parties had been received since ALJ Allen's January 9,

[9] Unlike the statement of a charge or a respondent's position statement, PERB Regulation 32205 does not require that a request for continuance state the grounds for the request under oath nor require medical documentation to support a continuance requested as a reasonable accommodation for a disability. We hold that whether to require such documentation is a matter best left to the discretion of the hearing officer in the circumstances of each case. (PERB Reg. 32170, subd. (d).)

[10] Felicijan's appeal makes much of the fact that the District's motion asserted only that witnesses were no longer employed by the District and did not specifically disclose that Polanco had suffered a loss of memory, as it later asserted in sworn declarations. However, PERB Regulations do not provide for pre-hearing discovery (*King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision No. 197 (*King City*), p. 26) and Felicijan cites no authority suggesting that the District had a duty to disclose information about what witnesses or other evidence it planned to use at an, as yet, unscheduled hearing in this matter.

2009 notice of abeyance,[11] the ALJ was requesting a status update by September 7, 2012. The ALJ also advised the parties that, in the absence of a timely response, the case could either be scheduled for a formal hearing or subject to a motion to dismiss for failure to prosecute.

On September 4, 2012, Felicijan advised the ALJ that her health had continued to decline, that she could not proceed to hearing at this time and, consequently, that ALJ Allen's abeyance order should remain in effect.[12]

On or about September 10, 2012, the District filed a status update and renewed its January 2009 motion to dismiss the matter for failure to prosecute, arguing that, despite the passage of more than six years since the complaint had issued, Felicijan had not advanced the matter to hearing and was now requesting to continue the matter indefinitely. The District's motion reasserted that Felicijan's delay in bringing the matter to hearing had compromised its ability to defend itself because necessary witnesses would no longer be available. (R.T., Vol. II, p. 23.) The District's renewed motion argued that it would be unfair and prejudicial for PERB to allow the matter to proceed to hearing because Felicijan had sat on her rights for more than three and one-half years, and because any remedy sought by Felicijan would now be moot, given Felicijan's retirement from District employment.

[11] The parties dispute, and the case file does not indicate, whether Felicijan provided medical documentation in response to the January 9, 2009 request from ALJ Allen. It also includes no indication that ALJ Allen ever notified the parties that Felicijan had failed to provide medical documentation or had otherwise contravened his abeyance order.

[12] Felicijan's response to the request for status update, also offered to provide "further medical information," if necessary, but "only on the condition that [the District] representatives receive no personal information regarding [her] medical condition."

On September 21, 2012, Felicijan filed an opposition to the District's renewed motion to dismiss, in which she disputed several of the District's assertions.[13] Felicijan argued that the District had failed to show how it was prejudiced by any delay in this case. She requested that the case remain in abeyance and that she be allowed to proceed to hearing when her health permits.

On November 2, 2012, the ALJ served a "Notice of Formal Hearing" scheduled for January 31, 2013 to consider whether this case should continue in abeyance, be set for formal hearing on the merits, or be dismissed for failure to prosecute.[14]

On January 23, 2013, Felicijan filed a sworn declaration in support of her request for continuance and in opposition to the District's motion to dismiss. Felicijan's declaration asserted that she had timely responded to ALJ Allen's January 9, 2009 order of abeyance by providing documentation of her medical condition and limitations. Paragraphs 6, 8 and 11 of the declaration further assert that ALJ Allen acknowledged receipt of this information and that he deemed the information sufficient to support the abeyance order. According to Felicijan's declaration, ALJ Allen also acknowledged that Felicijan's medical documentation was privacy-protected and agreed to her request that it not be disclosed to the District.

On January 31, 2013, the ALJ convened a pre-trial conference. Warren Hetman (Hetman) appeared as Felicijan's representative and attorneys from the Law Offices of Eric

[13] Unless otherwise noted, the District's various motions to dismiss and Felicijan's oppositions thereto were unverified and included no sworn declarations in support of their respective factual assertions.

[14] Notwithstanding the caption on the ALJ's correspondence, in his subsequent remarks to the parties and in the proposed decision, he characterized the January 31, 2013 "hearing" and similar proceedings on August 29, 2013, not as "formal hearing[s]" at which to take testimony or receive other evidence, but as "pre-trial conference[s]" for determining how or whether to proceed to a formal hearing.

Bathen represented the District. According to Hetman, Felicijan was not present because she was in the hospital undergoing a medical procedure. (Dismissal, p. 5.) No witnesses were sworn or oral testimony taken. The ALJ disclosed that Felicijan's declaration of January 23, 2013 had been served on the District but without various attachments documenting her medical conditions, including a sworn declaration dated January 16, 2013 from Dr. Charles Moon (Moon), Felicijan's treating physician. Moon's declaration asserted that Felicijan's surgery had been rescheduled to January 29, 2013, due to post-operative complications and insurance issues, and that Moon anticipated her full recovery would take "8 months or longer." Counsel for the District waived any right to review the information provided ex parte to the ALJ. (R.T., Vol. I, p. 6.)

The ALJ expressed concern about witnesses' faded memories because of the period of time in which this case had remained in abeyance and also stated his view that, as in civil litigation, a PERB unfair practice complaint may be dismissed under the equitable doctrine of laches, if not brought to hearing within a reasonable period of time and if the delay has prejudiced other parties. The ALJ asked Hetman to provide further information on Felicijan's availability for hearing as it became available, and asked the District to provide declarations in support of its previous, unverified representations that certain witnesses essential to the District's defense were now either unavailable or incompetent to testify. The ALJ concluded the pre-trial conference by advising the parties' representatives that in approximately four months he would schedule another conference to determine whether the case should remain in abeyance, be set for hearing, or be dismissed for failure to prosecute.

In early February 2013, the District switched counsel from the Law Offices of Eric Bathen to the law firm Atkinson, Andelson, Loya, Ruud & Romo.[15]

On February 15, 2013, the ALJ served the parties with notice of a second pre-trial conference, to be held on May 20, 2013, on whether this case should remain in abeyance, be set for formal hearing on the merits, or be dismissed for failure to prosecute. By letter dated May 9, 2013, the ALJ reminded the parties that Felicijan or her representative should provide an update as to her availability for hearing and that the District was to provide sworn declarations as to the unavailability or incapacity of its witnesses before the next pre-trial conference.

On May 20, 2013, the ALJ sent notice that, at the District's request, the pre-trial conference set for the same day had been rescheduled for August 29, 2013 to allow the District additional time to prepare declarations in support of its motion to dismiss.

On July 29, 2013, the District filed six declarations from four declarants in support of its motion to dismiss. The declarations included one each by Polanco and Associate Superintendent of Human Resources Winston Best (Best), in which they testified generally as to their physical limitations and/or lack of memory of events, and two declarations each by then Assistant Superintendent of Personnel Services Chad Hammitt (Hammitt) and Executive Secretary Nora Rodriguez (Rodriguez), in which they recounted, among other things, their interactions with and observations of Polanco during his employment with the District and since his retirement. The District's declarants offer significantly different dates for Polanco's

[15] Felicijan's appeal argues that, because she was never served with a substitution of attorney form, the District's substitution of counsel was never effective. It appears, however, that she had constructive notice of the District's change in counsel and, because she has not demonstrated how she was prejudiced by any defective service of the District's substitution of counsel, we find it unnecessary to address the issue. (*Fremont Unified School District* (2003) PERB Decision No. 1528, pp. 2-3.)

memory loss. Rodriguez estimates that it was 2005-2006, Polanco states that it was 2008 but gives no further details and Hammitt estimates that it occurred in approximately 2011.[16]

In correspondence dated July 30, 2013, the ALJ acknowledged receipt of the District's declarations and directed Felicijan to provide any response by August 15, 2013. The ALJ also asked that Felicijan or her representative provide an update as to her availability for hearing.

On August 12, 2013, Felicijan submitted her opposition to the District's motion to dismiss, which included evidentiary objections and a motion to strike the District's declarations on various grounds. Felicijan challenged the relevance of the various declarants' testimony, arguing that it failed to establish that the District had suffered prejudice as a result of any delay caused by Felicijan. Felicijan noted that Polanco's declaration admitted that he had suffered memory loss months or even years before Felicijan had requested, and ALJ Allen had ordered, that the case be placed in medical abeyance. Felicijan also objected to the other declarants' testimony as failing to establish any personal knowledge of the events alleged in the complaint. The ALJ understood most of Felicijan's objections as challenging the weight or credibility of the District's evidence but also acknowledged that Felicijan challenged Polanco's competence to testify as to his own memory loss. (Dismissal, pp. 7-8.)

Felicijan also submitted a sworn declaration in opposition to the District's motion. Felicijan's declaration disputes Polanco's asserted significance as the sole person from the District responsible for considering and deciding Felicijan's reasonable accommodation request. Whereas Polanco's declaration indicates that he may have met with Felicijan seven or eight times but includes no factual detail to support this assertion, Felicijan asserts that she met with Polanco only once, that the meeting was conducted by Polanco's supervisor Juan Lopez

[16] Other inconsistencies and problems with the reliability of the District's declarations are discussed below.

(Lopez), and that Polanco said little, if anything, during the meeting other than to introduce himself.

On August 15, August 26, and September 9, 2013, Felicijan communicated ex parte with the ALJ to provide medical documentation in support of her request to keep this matter in abeyance. On August 16 and September 10, 2013, the ALJ disclosed the nature of these communications to the District, admonished Felicijan to cease communicating ex parte, and advised the parties that, pursuant to PERB Regulations, he would not consider any communication or declaration, unless made available to all parties. At the ALJ's suggestion, the parties eventually agreed to use a redacted version of a declaration by Felicijan's treating physician for the purposes of deciding Felicijan's request to extend the abeyance order and the District's motion to dismiss.

On August 29, 2013, the ALJ convened a second pre-trial conference to consider the District's motion to dismiss, Felicijan's objections and motion to strike, and the admissibility of the redacted Moon declaration submitted ex parte. As with the January 31, 2013 pre-trial conference, no witnesses were sworn or testimony taken, though, as discussed below, the ALJ made several evidentiary rulings concerning the admissibility and reliability of the parties' declarations. Felicijan appeared for part of the proceedings, because, according to the ALJ, she was afraid that the complaint would be dismissed if she did not appear. (Dismissal, p. 8.) According to the Dismissal, she was confined to a wheelchair and "was in pain, could only speak for limited periods of time and needed an ice pack to help her with numbness in her leg." (*Ibid*.)

At the pre-trial conference, the ALJ overruled Felicijan's objections and admitted all of the District's declarations. Specifically, he ruled that Polanco was competent to testify as to his current memory or lack of memory of past events. (Dismissal, p. 8.)

After some discussion, the parties agreed to admit a declaration provided by Felicijan's physician, with diagnoses and descriptions of medical procedures redacted. Moon's redacted declaration, dated September 9, 2013, states that Felicijan had been his patient for ten years, that due to her medical condition, Felicijan has only limited ability to work, sit, walk, stand, or travel in a car for more than one hour at a time; that her surgery had been delayed through no fault of her own; that previous surgery had not solved her problems; that her surgery and recovery time had been complicated by medical and insurance issues; and, that her anticipated recovery time would be "at least 10 months or longer." (Dismissal, pp. 8-10, 12.)

By letter dated September 17, 2013, the District confirmed that it had no objection to consideration of a redacted version of Moon's declaration but argued that Moon's testimony failed to support Felicijan's assertion that she is unable to participate in a hearing. The District's correspondence focused on a statement in Moon's declaration that Felicijan "cannot work," but did not address the other restrictions mentioned by Moon or whether a hearing schedule could be modified to accommodate Felicijan's restrictions.

On September 24, 2013, Felicijan moved to amend the complaint to allege that Polanco "and several other agents" of the District had taken adverse actions against Felicijan by refusing to consult with her to develop an accommodation plan. Felicijan's motion argues that her proposed amendment is based on newly-disclosed information in the District's declarations, including testimony that Polanco retired from employment with the District on or about October 2005, more than eight months before Felicijan filed her charge in this case. Felicijan's motion to amend the complaint also includes what purports to be her correspondence with Polanco, dated October 3, 2005, in which she references a meeting with Lopez before the end of the 2004-2005 schoolyear regarding her request for an accommodation. (Dismissal, p. 10.)

On October 14, 2013, the District filed its opposition to Felicijan's motion to amend the complaint, arguing that, notwithstanding Felicijan's claim to have met with Lopez, her correspondence identified Polanco as the decisionmaker and no witness other than Polanco was available to testify as to Felicijan's request for accommodations.

On January 31, 2014, the ALJ issued his decision which granted the District's motion to dismiss for failure to prosecute and determined that the complaint was barred by the equitable doctrine of laches. Although not specifically identified as factual findings, the Dismissal found that, because the case had remained in abeyance for more than five years, during which time Felicijan had not been medically cleared to attend a formal evidentiary hearing, Felicijan had unreasonably delayed bringing the case to a hearing. (Dismissal, p. 12.) The ALJ also found that that the District was prejudiced as a result of Felicijan's unreasonable delay because Polanco, the sole decisionmaker identified in the complaint, had suffered a loss of memory and was unable to testify on the District's behalf. Because the ALJ granted the District's motion to dismiss, he deemed it unnecessary to address Felicijan's motion to amend the complaint to add other District administrators or agents.

On February 12, 2014, Felicijan requested "at least two months" to prepare and file her statement of exceptions and supporting brief. Felicijan's request was not based on her medical conditions and, indeed, she has routinely filed lengthy and detailed motions, oppositions and other papers as part of the proceedings before the ALJ. Rather, her request indicated that, because she had not previously requested the Reporter's Transcripts, she had only received them on February 2, 2014 and, as a layperson representing herself, she needed more time to review the record and prepare her exceptions.

On February 13, 2014, PERB's Appeals Assistant notified the parties that Felicijan had been granted a 20-day extension to appeal the "proposed decision." The following day, PERB received correspondence from the District stating its opposition to Felicijan's request for additional time.

On March 4, 2014, Felicijan filed a "Statement of Exceptions" and a supporting brief, which we treat as an appeal from dismissal without hearing, and on March 31, 2014, the District filed its response to Felicijan's appeal.

On April 14, 2014, Felicijan filed a reply to the District's response, accompanied by declarations by Felicijan and Hetman.[17]

THE DISMISSAL

The ALJ found that Felicijan had delayed prosecuting her charge and the complaint for more than seven years by failing to proceed to hearing. He noted that more than five years had lapsed since ALJ Allen had placed the case in abeyance and that, based on the redacted declaration of her treating physician, Felicijan had not established her medical availability to participate in the hearing. According to the Dismissal, Polanco, the District's primary

[17] PERB Regulations do not provide for filing reply briefs in an appeal from dismissal (PERB Reg. 32635) and the Board has generally refused to consider such filings where not specifically authorized by the Regulations. (*County of Santa Clara* (2012) PERB Decision No. 2267-M, p. 2, fn. 3.) In appropriate circumstances, as when one party has raised new issues in its cross-exceptions or response to exceptions, the Board has given other parties notice and an opportunity to brief the newly-raised issues. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408, pp. 4-5.) However, the District's opposition raises no new issues and we therefore decline to consider Felicijan's reply brief. (*Los Rios Community College District* (1991) PERB Decision No. 875, pp. 11-12.)

In support of her reply brief, Felicijan has also submitted sworn declarations executed by Felicijan and Hetman in early April 2014. Absent good cause, a charging party may not present on appeal new allegations or new supporting evidence. (PERB Reg. 32635, subd. (b).) Because Felicijan has not shown good cause, we also decline to consider the declarations and exhibits which accompany Felician's reply brief.

decisionmaker in the adverse action alleged in the complaint, and thus its key witness in any future hearing, suffered a stroke and became unable to recall the events of the case.

The ALJ determined that the seven-year delay was unreasonable "as a matter of law," by borrowing from analogous statutes of limitations governing dismissal of civil actions for failure to prosecute. He also found that the loss of Polanco's memory in 2008 established that the District has been prejudiced as a result of Felicijan's failure to bring the case to a hearing. Based on his findings that Felicijan had unreasonably delayed bringing her case to hearing and that the District had suffered prejudice caused by Felicijan's delay, the ALJ dismissed the complaint and underlying unfair practice charge.

ISSUES ON APPEAL

Felicijan asserts several evidentiary, procedural and legal errors which, in her view, undermine the ALJ's finding of laches in this case. Felicijan argues that the ALJ improperly borrowed timelines from the Code of Civil Procedure which require that a civil action "shall be brought to trial within five years after the action is commenced against the defendant." (Code Civ. Proc., § 583.310; see also Code Civ. Proc., §§ 583.310, 583.410, subd. (a), and 583.420, subd. (a)(2)(A).) [18] Felicijan generally asserts that these statutes of limitations are inapplicable, here as they pertain to civil cases, not unfair practice proceedings. (See, e.g., *Coachella Valley*

[18] Code of Civil Procedure section 583.410, subdivision (a), provides that *a court* "may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case."

Code of Civil Procedure section 583.420, subdivision (a)(2)(A), provides that a court "may not dismiss an action pursuant to this article for delay in prosecution except after … [t]he action is not brought to trial within … [t]hree years after the action is commenced against the defendant," subject to other circumstances not at issue here.

Mosquito and Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1088.)

Additionally, Felicijan notes that Code of Civil Procedure section 583.340 provides for tolling the five-year limitations period when bringing the matter to trial would be impractical or impossible.[19] Felicijan argues that the ALJ's calculation of time for unreasonable delay should not have included time when her case was in abeyance for Felicijan's medical problems. According to Felicijan, the tolling language in section 583.340 *precludes* application of the five-year statute of limitations in the present circumstances because ALJ Allen's medical abeyance order effectively ruled that a hearing would have been impossible or impractical in light of Felicijan's surgery and estimated recovery time.

She also argues that, under state and federal laws prohibiting discrimination by public entities on the basis of disability, PERB cannot dismiss an unfair case while it is in abeyance for documented medical reasons. (Felicijan Supporting Brief, p. 35.)

Felicijan also takes issue with several of the ALJ's findings in support of the second element of laches, i.e., that the District suffered prejudice as a result of her delay in bringing the case to hearing. Felicijan challenges the ALJ's finding that the District was prejudiced because Polanco, its agent and presumably chief witness in this matter, suffered a stroke and loss of memory in 2008 and can no longer assist the District in preparing its defense. Felicijan argues

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[19] Section 583.340 provides:

> In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
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> (a) The jurisdiction of the court to try the action was suspended.
> (b) Prosecution or trial of the action was stayed or enjoined.
> (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

that Polanco was only peripherally involved in Felicijan's request for reasonable accommodation and that he has little personal knowledge of the matters alleged in the complaint. She argues that Polanco's admitted loss of memory makes him incompetent to testify to any matters in this case, including as to his own loss of memory.

She also argues that ALJ Allen's order to place the case in medical abeyance was not the cause of any prejudice suffered by the District, including any loss of evidence, faded memories or unavailability of witnesses, because, by his own account, any memory loss Polanco suffered occurred before the case was placed in abeyance. Moreover, Polanco admits that his memory has improved rather than faded with the passage of time, further undermining the District's assertion of that it has suffered prejudice as a result of this case remaining in abeyance for several years.

The District asserts that Felicijan's appeal and supporting brief fail to comply with the requirements of PERB Regulation 32300 governing exceptions to a proposed decision. The District argues that Felicijan has not identified the specific issues of procedure, fact, law, or rationale to which her appeal is based, that she fails to cite to the record, and that she relies on previously unalleged violations and references matters not included in the record.[20]

[20] As noted above, the parties have styled and briefed their issues in accordance with PERB's Regulations governing exceptions to a proposed decision, rather than the Regulations governing appeals from dismissal. However, the essence of the District's argument is that Felicijan's filing fails to identify and explain the grounds for reversal or cite to the record so as to place the Board and other parties on notice of the issues on appeal. In this respect, the standard for exceptions to a proposed decision and an appeal from dismissal is substantially identical. (See, for example, *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485 (*Petaluma*), p. 16 [appeal from dismissal]; *Ventura County Community College District* (1980) PERB Decision No. 139, pp. 2-3 [exceptions to proposed decision].)

The District also argues that the Board must defer to the ALJ's credibility determinations and factual findings and urges the Board to reject Felicijan's appeal and adopt the Dismissal. According to the District, the lapse of more than seven years since issuance of a complaint without a hearing and the memory loss in 2008 by its key witness support the ALJ's findings of laches and his decision to dismiss the case for failure to prosecute. It also argues that Felicijan failed to provide medical verifications for her asserted medical impairments in accordance with ALJ Allen's January 2009 order, further demonstrating that her delay in bringing this case to hearing was unreasonable.

The District also contends that the ALJ's evidentiary rulings, including his decision to consider the District's declarations, was proper. It argues that PERB Regulation 32170, subdivisions (a), (f) and (h), and applicable decisional law authorized the ALJ's decision to admit the Polanco declaration and to deem Polanco competent to testify to his own incapacity to testify.

DISCUSSION

Compliance with PERB Regulations Governing Appeal from Dismissal

We first address the District's contention that the Board should refuse to consider Felicijan's filing for non-compliance with PERB Regulations. Much of Felicijan's filing is concerned with arguing the underlying merits of her case and other matters not alleged in the complaint, rather than addressing the issues raised by the District's motion to dismiss.[21]

[21] These include newly-discovered evidence and allegations which are the subject of Felicijan's motion to amend the complaint, whether the District properly served notice of its decision to substitute one law firm for another as its attorneys of record in this matter, whether the District engaged in good-faith negotiations during the numerous informal settlement conferences convened by PERB, and whether the District had a duty to disclose in advance of a hearing who among its agents was responsible for deciding reasonable accommodation requests during the relevant time period covered by the complaint.

Additionally, Felicijan's presentation of the issues is often repetitive and difficult to follow. Nevertheless, she asserts various factual, legal and procedural errors, explains the grounds for reversal, and provides points and authorities in support of her arguments. We conclude that Felicijan's filing substantially complies with the requirement that an appeal "place the Board and the respondent on notice of the issues," by identifying the substance of the Dismissal and the specific errors of fact, law, or application of law to fact which she claims warrant reversal. (PERB Reg. 32635, subd. (a); *Petaluma, supra,* PERB Decision No. 2485, pp. 15-16.)

We next turn to the pertinent regulatory and decisional authority governing dismissal for failure to prosecute an unfair practice case and pre-hearing motions to dismiss, before proceeding to the issues raised by Felicijan's appeal.

Agency Authority to Dismiss for Failure to Prosecute Before Hearing

Since the repeal of former PERB Regulation 32652 in 1989, PERB has had no fixed timeline for bringing an unfair practice complaint to hearing. (*Los Rios College Federation of Teachers, Local 2279 (Deglow)* (2008) PERB Decision No. 1990 (*Local 2279 (Deglow)*), p. 4, fn. 1; *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S (*Department of Corrections*), p. 5.) In several decisions, however, the Board has held that after a complaint has issued and settlement efforts have failed, the charging party must prosecute the case in a timely manner. (*Local 2279 (Deglow), supra,* at pp. 4-5; *Department of Corrections, supra*, at p. 6.) Analogizing to the Code of Civil Procedure and/or relying on judicial decisions recognizing the inherent power of a tribunal to manage its caseload and

resources effectively,[22] PERB has held that a Board agent may, either on a motion by the respondent or with notice and on the agency's own motion, dismiss an unfair practice charge and complaint for failure to prosecute absent a showing of good cause. (*Local 2279 (Deglow), supra,* at pp. 5-6; *Service Employees International Union, Local 99, AFL-CIO (Kimmett)* (1981) PERB Decision No. 163 (*Local 99 (Kimmett)*), adopting proposed decision at pp. 5-6; *Los Angeles, supra,* PERB Decision No. 464, adopting proposed decision at pp. 13-15, 17-18, 19-20.) PERB's good cause analysis weighs the charging party's asserted reasons for the delays in the case against the length of the delays and the potential for prejudice to the respondent. (*Local 2010 (Polk), supra*, PERB Decision No. 2489-H, adopting proposed decision at p. 15; *Department of Corrections, supra,* at pp. 7-9.)

With few exceptions, PERB's failure to prosecute cases have involved a charging party who fails or refuses to appear at a duly noticed hearing and then, by way of an order to show cause, is given notice and opportunity to explain why the case should not be dismissed. (*Local 99 (Kimmett), supra*, PERB Decision No. 163, proposed decision at pp. 3-5; *Los Angeles, supra,* PERB Decision No. 464, adopting proposed decision at pp. 4, 13-14, 19-20; *California School Employees Association (Petrich)* (1989) PERB Decision No. 758, adopting proposed decision at pp. 3-4; see also *Department of Corrections, supra,* PERB Decision No. 1806-S, p. 6.) In *Local 99 (Kimmett), supra,* PERB Decision No. 163, for

[22] *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546; see also *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284. In addition to a tribunal's inherent power to manage its caseload effectively, *Department of Corrections, supra*, PERB Decision No. 1806-S suggested, at pages 5-6, that PERB Regulations also vest a Board agent with authority to dismiss a complaint for failure to prosecute. However, because an agency's rules or regulations cannot expand the scope of its powers beyond what has already been authorized by the enabling statute, our Regulations may specify *the procedures* whereby PERB will carry out its mission, but we do not regard the Regulations themselves as *the source* of authority for dismissing a complaint or taking other action. (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209, pp. 10-11; *City of Torrance* (2009) PERB Decision No. 2004-M, p. 11.)

example, the Board adopted the dismissal of an unfair practice case in which the charging party had refused to appear at hearing to protest opposing counsel's last-minute cancellation of a previous hearing date. The hearing officer analogized to Code of Civil Procedure section 581, which grants trial courts discretion to dismiss a civil case when one party fails to appear and another party appears and requests dismissal. (*Id*., proposed decision at p. 5.)[23]

Local 99 (Kimmett) and other "failure to appear" cases present no novel issues or procedural problems. Opening the hearing and receiving evidence in support of the respondent's motion to dismiss creates a clear record on which a proposed decision can be based. (PERB Regs. 32170, subd. (a), 32178, 32215.) Requiring the absent charging party to show cause why the case should not be dismissed also provides adequate notice and opportunity to respond before terminating the action. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, adopting proposed decision at p. 2.) Even where no order to show cause issues, a charging party's refusal to appear at hearing will likely result in dismissal, because, without appearing at the hearing, the charging party will likely fail to meet its burden of proving the complaint allegations by a preponderance of the evidence. (PERB Reg. 32178; *Coachella Valley, supra,* PERB Decision No. 2446, adopting proposed decision at p. 4.)

Recently, in *City of Inglewood* (2015) PERB Decision No. 2424-M, the Board similarly dismissed a complaint alleging a bargaining violation by a public agency after the charging party employee organization withdrew from the case one week before the hearing. The Board explained that because the only possible charging party with standing to bring a bargaining

[23] Code of Civil Procedure section 581 provides in relevant part that an action may be dismissed "by the court, without prejudice, when either party fails to appear on the trial and the other party appears and asks for dismissal." (Code Civ. Proc., § 581, subd. (b)(5).)

charge against an employer failed to appear at the hearing, its withdrawal from the case was equivalent to a failure to prosecute. (*Id*. at p. 13, fn. 23.)

The present case differs from the above cases, and those cited in the Dismissal, in several respects. First, unlike *Local 99 (Kimmett), supra,* PERB Decision No. 163 and other cases in which the charging party has failed to appear at a duly noticed hearing, Felicijan's case was dismissed on a pre-hearing motion asserting laches.[24] As applied in unfair practice proceedings, laches requires a respondent to show: (1) the charging party has unreasonably delayed in prosecuting its case, and (2) either the charging party has acquiesced in the acts about which it complains or the respondent has suffered prejudice as a result of the charging party's unreasonable delay. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd*. (1989) 210 Cal.App.3d 178, 188; see also *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 719, and *Santa Monica Mun. Employees Assn. v. City of Santa Monica* (1987) 191 Cal.App.3d 1538, 1546-1547.) Because there was no order to show cause, the District, as both the moving party and the party asserting laches, had the burden to plead and prove the elements of its affirmative defense. (*Mt. San Antonio CCD v. PERB, supra,* 210 Cal.App.3d 178, 189.)

Additionally, because no hearing occurred, there was no opportunity to resolve disputed facts raised by the District's motion and Felicijan's opposition. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 29.) We have located only two cases - *Department of Corrections, supra,* PERB Decision No. 1806-S and *Local 2279 (Deglow), supra*, PERB Decision No. 1990 - in which PERB has dismissed an unfair practice complaint

[24] According to Anthony De Marco, counsel for the District, the thrust of the District's motion was that, whether through Ms. Felicijan's fault or otherwise, the passage of several years since the events alleged in the complaint has prejudiced the District's case because competent witnesses necessary for its defense are no longer available. (R.T., Vol. II, p. 23.)

and charge on a pre-hearing motion for the charging party's failure to bring the matter to hearing.[25] However, neither case is instructive for the present facts and procedural posture.[26] *Local 2279 (Deglow)* involved dismissal of a complaint and unfair practice charge for the charging party's failure to bring the matter to hearing within a reasonable time. The proposed decision, which was adopted by the Board, indicates that, in fact, a hearing was convened to resolve "several factual disputes" raised by the respondent's motion to dismiss and the charging party's assertion that a Board agent had authorized an agreement to continue the matter in abeyance. (*Id*. at pp. 2-3.)

Department of Corrections is also distinguishable. In that case, a hearing for one of the charging party's unfair practice cases was postponed and the matter placed in abeyance at the charging party's request, pending the outcome of another unfair practice case that eventually resulted in a proposed decision. For 18 months after the proposed decision issued, the charging party took no action to remove his other case from abeyance or set a hearing date. He also failed to return inquiries from the presiding ALJ about scheduling a hearing. After being ordered to show cause, the charging party failed to offer any credible or reasonable explanation of how his inaction was the result of circumstances that were unanticipated or beyond his control, and, consequently, the complaint was dismissed. (*Id*. at pp. 2-4.) While *Department of*

[25] Although *Regents of the University of California* (1983) PERB Decision No. 365-H also involved a pre-hearing dismissal for failure to prosecute, the decision was based on former PERB Regulation 32652 and therefore offers no guidance here. (*Id*. at pp. 2-3, 7.)

[26] Felicijan argues that *Department of Corrections* and *Local 2279 (Deglow)* are also distinguishable because in both cases, the charging party either had no medical or other valid excuse for failing to bring the case to hearing or provided no medical documentation to support a request to continue the case in abeyance, whereas Felicijan has provided medical documentation, whenever requested. The District disputes Felicijan's claim to have provided medical documentation to ALJ Allen in 2009 and we make no attempt to resolve this factual dispute in the current procedural posture. To the extent it affects issues on remand, we discuss Felicijan's documented medical restrictions below.

Corrections is not, strictly speaking, a failure to appear case because no hearing was ever noticed, the charging party's failure to return the ALJ's phone messages or respond to written communications is analogous and thus, the ALJ's order to show cause why the case should not be dismissed was appropriate.

Here, the case file contents indicate that Felicijan or her representative has attended all pre-trial conferences, has responded to all communications from PERB and the District, including the ALJ's requests for status updates, and has timely filed briefs and other papers arguing her position.[27] Thus, *Department of Corrections* is distinguishable on its factual and procedural history, regardless of the legal standard under which it was decided.

We next turn to the procedural posture in which Felicijan's case was dismissed.

Dismissal is Not Appropriate on a Pre-Hearing Motion Whose Material Facts are Disputed

PERB Regulations do not expressly provide for dismissal of an unfair practice complaint on a pre-hearing motion.[28] Since the earliest days of the agency, however,

[27] Felicijan's appeal also notes that, at the August 29, 2013 pre-hearing conference, her representative asked the ALJ about having the matter tried on a written record. While this inquiry does demonstrate that Felicijan has not abandoned this case, as discussed below with respect to PERB Regulation 32207 and the residuum rule, the ALJ rightly declined to pursue this suggestion.

[28] Although *Los Angeles Community College District* (1983) PERB Decision No. 331 (*Los Angeles CCD)*, adopting order granting motion to dismiss without leave to amend, at p. 7, referenced PERB Regulation 32190 as authorizing a pre-hearing motion to dismiss, the language of the Regulation and the surrounding context indicate that its purpose is limited to *interlocutory* matters, such as a decision *denying* a motion to dismiss but not one *granting* a motion to dismiss and effectively ending the action. Pursuant to subdivision (f), a motion brought under Regulation 32190 is appealable *only* as specified in Regulations 32200 and 32360. Neither of these regulations provides an adequate process for reviewing the dismissal of an unfair practice charge or complaint. Regulation 32360 is expressly limited to appeals from *administrative determinations* which, by definition, do not include an appeal from dismissal of an unfair practice charge. (See Reg. 32350, subd. (a)(2.).) Similarly, Regulation 32300 provides for Board review of rulings on motions brought under Regulation 32190, but *only at the discretion* of the Board agent who issued the ruling. Given

PERB decisional law has recognized that, after a complaint has issued, a respondent may bring a pre-hearing motion to dismiss and have such motion considered by the Board agent assigned to the case. (*DPA, supra,* PERB Decision No. 739-S, pp. 2-3; *CSEA (Parisi), supra,* PERB Decision No. 733-S, adopting order dismissing complaint at pp. 7-8; *Los Angeles CCD, supra,* PERB Decision No. 331, adopting order granting motion to dismiss without leave to amend at pp. 7-8; *Westminster School District* (1977) EERB[29] Order No. Ad-10, p. 1.) A hearing officer's authority to consider a pre-hearing motion to dismiss includes the discretion to rule on the motion before proceeding to the merits, or to take the motion under submission and then address the issues in a proposed decision following a hearing on the merits. (PERB Reg. 32170, subds. (a), (d), (f), see also subd. (m); *Local 2010 (Polk), supra*, PERB Decision No. 2489-H, adopting proposed decision at pp. 4, 6; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 8; *County of Orange* (2006) PERB Decision No. 1868-M, adopting proposed decision at p. 2; *California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479-S, adopting proposed decision at pp. 3, 9; *Regents of the University of California* (1999) PERB Decision No. 1316-H, adopting proposed decision at pp. 3-4.)

The Board has variously compared pre-hearing motions to dismiss in unfair practice cases to motions for judgment on the pleadings or motions for summary judgment in civil litigation. (*CSEA (Parisi), supra,* PERB Decision No. 733-S, adopting order dismissing

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that a charging party is entitled, as a matter of right, to Board review when the Office of the General Counsel *refuses to issue* a complaint (PERB Reg. 32635), it is inconceivable that, *after a complaint has issued*, Board review is purely discretionary. We therefore disavow any reading of *Los Angeles CCD* which suggests that a decision to grant a motion to dismiss is subject to the appellate limitations of Regulation 32190.

[29] Until January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

complaint at pp. 7-8; *Los Angeles CCD, supra*, PERB Decision No. 331, order granting motion to dismiss at pp. 6-7.) For example, in California civil procedure, a motion for judgment on the pleadings may be brought by a defendant on the ground that the "court has no jurisdiction of the subject of the cause of action alleged in the complaint" or when the complaint (or any cause of action therein) "does not state facts sufficient to constitute a cause of action against that defendant." (Code Civ. Proc., § 438(c)(1)(B)(i), (ii).) A motion for judgment on the pleadings lies where the complaint shows on its face that the plaintiff lacks standing or that the matter is barred by the applicable statute of limitations, and therefore does not state facts sufficient to constitute a cause of action. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440.) When considering a motion for judgment on the pleadings, all facts alleged in the complaint are assumed to be true and must be read in the light most favorable to the non-moving party. Matters extrinsic to the complaint, including any defenses or other matters pleaded in the defendant's answer, are ***not*** considered in a motion for judgment on the pleadings. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.)

While a motion for judgment on the pleadings tests the sufficiency of the complaint, a summary judgment motion tests the sufficiency of the evidence. (Code Civ. Proc., § 437c, subd. (a)(1).)[30] In civil procedure, the papers supporting a summary judgment motion must include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. The opposition papers also must include a separate statement which responds to each of the material facts contended by the moving party to be

[30] Code of Civil Procedure section 437c, subdivision (a)(1), provides: "A party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed, and setting forth plainly and concisely any other material facts the opposing party contends are disputed. While PERB has not adopted the procedural formalities of motions for summary judgment from California civil procedure, it has nonetheless analogized to such motions for situations in which the undisputed facts demonstrate that the charging party cannot prevail as a matter of law. (*San Diego Unified School District* (1987) PERB Decision No. 610 (*San Diego*), pp. 2-5.)[31]

However, regardless of the appropriate analog in California civil procedure, or the format in which a motion to dismiss is presented, PERB precedents are unanimous that granting a pre-hearing motion to dismiss is only appropriate when the material facts are not in dispute. Thus, where a pre-hearing motion to dismiss contends that the allegations in the complaint, along with any matters that are subject to administrative notice, establish a lack of jurisdiction or standing or the absence of one or more essential elements of the charging party's prima facie case, the Board agent must assume the truth of all facts alleged in the complaint and consider them in a manner most favorable to the charging party and disregard any matters raised in the respondent's answer. (*State of California (State Personnel Board)* (2002) PERB Decision No. 1491-S, pp. 9-10; *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S, pp. 2, 3-4.) Alternatively, where a motion to dismiss turns on matters outside the complaint, similar to a summary judgment motion, the moving party

[31] In *San Bernardino County Superior Court* (2014) PERB Decision No. 2392-C (*San Bernardino*), we noted that PERB has not generally followed the summary judgment procedure utilized by California state courts. (*Id*. at pp. 7-8.) Thus, when the material facts are not in dispute, as they were not in *San Bernardino*, a matter may be deemed submitted on the record based on stipulated facts, briefs and responsive arguments, regardless of whether they are set forth in the format of a separate statement of undisputed facts or responses thereto. (*Id*. at p. 8, fn. 11; PERB Reg. 32207.)

must demonstrate that no material facts are in dispute and that it is entitled to judgment as a matter of law. (*CSEA (Parisi), supra,* PERB Decision No. 733-S, order dismissing complaint at pp. 7-8; *San Diego Unified School District* (1987) PERB Decision No. 610, pp. 1-2.)

Stated differently, the Board's well established standard governing the *pre-complaint* investigation of an unfair charge also governs consideration of a pre-hearing motion to dismiss. (*Inglewood Unified School District* (1991) PERB Order No. Ad-222, p. 7; *San Juan Unified School District* (1977) EERB Decision No. 12, p. 4; see also *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*), pp. 6-7; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.) In the absence of a hearing, a Board agent is not authorized to resolve factual disputes or make credibility determinations to dismiss an unfair practice case, whether the dismissal occurs during the pre-complaint investigation, or after a complaint has issued but before hearing. (PERB Reg. 32207; *San Bernardino, supra,* PERB Decision No. 2392-C, p. 8, fn. 11; *DPA, supra*, PERB Decision No. 739-S, p. 3, fn. 2; *Inglewood, supra,* PERB Order No. Ad-222, p. 7; *CSEA (Parisi), supra*, PERB Decision No. 733-S, adopting order dismissing complaint at pp. 7-8.)

There are several reasons why this is so. First, when the material facts underlying a motion to dismiss are in dispute, a formal hearing is required to ensure the minimum standards of due process and fair proceedings required by statutory, regulatory and decisional law. (Administrative Procedure Act (APA),[32] § 11425.10, subd. (a)(1)-(9); PERB Reg. 32180; *Eastside, supra*, PERB Decision No. 464, pp. 6-7.) Consistent with a hearing officer's power to regulate the course and conduct of a hearing and to manage evidentiary and other matters in an effective manner, the hearing may be limited to material factual disputes underlying the

[32] The APA is codified at section 11340 et seq.

motion itself, rather than convening a full hearing on the merits of the case. (PERB Reg. 32170, subd. (d).) Thus, in *Local 2279 (Deglow), supra,* PERB Decision No. 1990, the complaint and unfair practice charge were dismissed for the charging party's failure to bring the matter to hearing within a reasonable time, but not until a hearing was convened to resolve "several factual disputes" underlying the motion to dismiss itself. (*Id*. at p. 2.)

Additionally, neither the controlling provisions of the Administrative Procedure Act's Adjudicative Bill of Rights nor PERB's Regulations and decisional law permit resolution of material factual disputes without a hearing. (APA, § 11425.10, subd. (a)(1)-(9); PERB Reg. 32207; *San Bernardino, supra,* PERB Decision No. 2392-C, p. 8, fn. 11; *City of Santa Clara, supra,* PERB Decision No. 2476-M, pp. 9-10.) As a practical matter, the Board has also recognized that a formal hearing is the most effective way to test witness credibility and resolve factual disputes. (PERB Regs. 32207; *City of Santa Clara, supra*, at p. 10, fn. 7; *Anaheim City School District* (1984) PERB Decision No. 364a, pp. 3-4; see also *Eastside, supra,* PERB Decision No. 466, pp. 6-7.) Although the Board itself is the ultimate finder of fact in unfair practice cases, because it only reviews the written record, a hearing officer who has observed the testimony of witnesses under oath is better positioned than the Board itself to make credibility determinations based on observational factors, such as the demeanor, manner, or attitude of witness. (APA, §§ 11425.10, subd. a)(6), 11425.50, subds. (a),(b)[33]; *State of*

[33] Section 11425.10, which incorporates by reference section 11425.50, sets forth the mandatory minimum requirements for administrative adjudicative proceedings in California, including notice, an evidentiary hearing, a written decision based on the record, and so forth. While administrative agencies may opt in or out of other portions of the APA, the Administrative Adjudication Bill of Rights set forth in section 11425.10 is mandatory for all agency adjudicative proceedings, including PERB unfair practice proceedings. (*City of Torrance, supra,* PERB Decision No. 2004-M, pp. 5-6.)

California (Board of Equalization) (2012) PERB Decision No. 2237-S, pp. 2-3; *Los Angeles Community College District* (1995) PERB Decision No. 1091, p. 10.)

Conducting a hearing to resolve factual disputes regarding a dispositive pre-hearing motion is also consistent with other PERB Regulations and procedures for adjudicating unfair practice cases. PERB's regulations provide that, before a hearing begins, a Board agent or the Board itself may issue subpoenas at the request of any party but, by regulation, their scope is limited to attendance of witnesses or production of documents *at the hearing*. (PERB Reg. 32150, subd. (a).) Because PERB has no formal procedures for obtaining pre-hearing discovery (*King City, supra,* PERB Decision No. 197, p. 26), its practice of deferring judgment on the merits of disputed material facts at the pre-complaint stage of a charge is no less applicable during the period after a compliant has issued but before the matter goes to hearing. Thus, in *San Bernardino, supra,* PERB Decision No. 2392-C, the Board declined to grant even an *unopposed* pre-trial motion to dismiss because, in light of other pleadings filed in the case, the moving party had not met its burden of proving that no disputed issue of fact existed and that it was entitled to judgment as a matter of law. (*Id*. at p. 8, fn. 11; see also *San Diego, supra,* PERB Decision No. 610, pp. 1-5; and *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, p. 6-8 [respondent's sworn declaration not sufficient basis for dismissing charge without formal hearing to resolve disputed facts].) In sum, where a material factual dispute exists, a hearing is necessary to resolve the dispute before the matter may be properly dismissed.

PERB's fact-finding ability at the pre-hearing stage is also limited by the residuum rule governing unfair practice cases. Unless subject to an exception, any statement not made by a witness testifying before the factfinder constitutes hearsay evidence when offered for its truth.

(Evid. Code, § 1200, subd. (a); *Scott S. v. Superior Court* (2012) 204 Cal.App.4th 326, 342; *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 9, review denied April 20, 2015, Case No. B257852.) The essence of the hearsay rule is that such evidence is unreliable, because the declarant is not at the tribunal and subject to cross-examination and the trier of fact is therefore unable to assess his or her credibility. (*Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, p. 11, citing *People v. Bob* (1946) 29 Cal.2d 321, 325.) Thus, in the absence of some corroborating, non-hearsay evidence, typically in the form of live testimony, the parties' declarations are insufficient to support a factual finding in unfair practice proceedings. (PERB Reg. 32176; *City of Santa Clara, supra,* PERB Decision No. 2476-M, pp. 9-10; *Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959-962.)

Here, internal inconsistencies and factual discrepancies in the District's declarations required the ALJ to make credibility determinations and resolve factual disputes on material issues underlying the District's motion. However, without a hearing, the ALJ could rely only on the parties' unverified pleadings or uncorroborated and disputed hearsay testimony to make factual findings.

The Dismissal of Felicijan's Case Required Resolution of Material Factual Disputes

In granting the District's motion, the ALJ made various credibility determinations and resolved several material factual disputes based on the case file contents, the parties' representations at pre-trial conferences, their mostly unverified pleadings, and several declarations containing uncorroborated and unreliable hearsay testimony.[34] To establish the

[34] Although not specifically labeled as "factual findings," we treat them as such. The alternative leads to the same result, i.e., that the "Proposed Decision" included no factual

first element of the District's laches defense, i.e., that Felicijan has caused unreasonable delay in prosecuting her case, the ALJ found that Felicijan had unreasonably delayed bringing the case to hearing because, at Felicijan's request, ALJ Allen had placed the matter in abeyance in January 2009, where it remained five years later, when it was dismissed. According to the Dismissal, "[a]t some point in time, the District, especially in light of Polanco's failed memory, has a right to closure" and "[t]hat time is now." (Dismissal, p. 12.) The parties do not dispute that ALJ Allen's order of abeyance was granted as a reasonable accommodation for Felicijan's medical condition, though they do dispute whether Felicijan provided sufficient medical documentation to support the initial abeyance order and/or to justify maintaining the case in abeyance.[35]

They also dispute whether Felicijan's medical restrictions, as set forth in the partially redacted declaration by her treating physician preclude her from attending and participating in a formal hearing or other PERB proceedings. The parties' briefs also raise a mixed question of law and fact of whether some or all of the time when this case has been in abeyance should be tolled from a laches defense, i.e., whether delay that results from a reasonable accommodation for a medical condition can nonetheless be "unreasonable" for proving laches. Without

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findings and is void as a matter of law. (APA, §§ 11425.10, subd. (a)(6); *Lucas v. Board of Education of the Ft. Bragg Unified School Dist.* (1975) 13 Cal.3d 674.)

[35] Some of their disagreement on this issue appears to stem from Felicijan's ex parte communications with ALJ Allen and her asserted right to privacy to medical documentation allegedly submitted in support of her request to continue the hearing. While we take no issue with her right to maintain confidentiality of diagnoses, treatments and other medical information, we agree with the ALJ that she has no right to keep information "confidential" from the District, if such information is to be used as the basis for a decision affecting this case, including whether to place the matter in abeyance. (*State of California (Department of Developmental Services)* (1985) PERB Order No. Ad-145-S, p. 10; see also *Mathew Zaheri Corp. v. New Motor Vehicle Bd., supra,* (1997) 55 Cal.App.4th 1305, 1319.)

mentioning or addressing these reasonable accommodation issues directly, by dismissing the case, the ALJ effectively resolved some or all of these factual disputes by implication.

For the second element of laches, the ALJ made various credibility determinations and resolved several factual disputes, including inconsistencies among the District's own declarants, to find that the District had suffered prejudice caused by Felicijan's delay. Central to this "finding" was the District's contention that, in or about 2008, Polanco suffered a stroke[36] and substantial memory loss as to any events alleged in the complaint. In making this finding, the ALJ credited Polanco's account and rejected the accounts offered by other District witnesses, who dated Polanco's memory loss to 2005-2006 (Rodriguez) or 2011 (Hammitt).

As Felicijan's appeal correctly points out, this disagreement among the District's witnesses as to the date of Polanco's memory loss and the ALJ's decision to credit Polanco's account over those of other witnesses are problematic for several reasons. Generally, unreasonable delay, by itself, does not establish prejudice for the purpose of laches. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) Rather, the respondent's reliance on such delay must have been detrimental in some respect and the detrimental change must have been *caused by* or at least *occurred during* the period of the unreasonable delay. (*Pennel v. Pond Union School Dist*. (1973) 29 Cal.App.3d 832, 840-841; *Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29, 36.) Because Felicijan requested that the case

[36] Hammitt's declaration attributes Polanco's memory loss to a stroke (¶ 3.) Polanco's declaration states that he suffered a heart attack. (¶ 2.) According to the Dismissal, the District's declarations "established that Polanco had a heart attack approximately five years from the date of [his] declaration," i.e., in or about 2008. (Dismissal, pp. 7, fn. 6, 14.) However, the Dismissal then repeatedly attributes Polanco's memory loss to a "stroke." (*Id*. at pp. 7, 14.) The ALJ resolved the factual discrepancy over the date of Polanco's stroke (or heart attack) in favor of Polanco's declaration, reasoning that "such a traumatic incident would be more memorable" to Polanco than to another witness. (Dismissal, p. 7, fn. 6.) The Dismissal does not explain why Polanco is more reliable than other witnesses as to the date of his memory loss, but apparently not more reliable than other witnesses as to its medical cause.

be placed in medical abeyance in January 2009, *before* Polanco's heart attack or stroke, Felicijan argues that any prejudice suffered by the District as a result of Polanco's memory loss was not caused by Felicijan's delay.

Felicijan also takes issue with the ALJ's finding that Polanco's heart attack or stroke and resulting memory loss occurred in 2008, rather than 2005 or 2006, as stated in the Rodriguez declaration. She argues that Rodriguez is more credible on this issue, because she worked with Polanco on a daily basis and knew him well, while the very purpose of Polanco's declaration, to demonstrate his incapacity to testify due to memory loss, necessarily makes his account suspect, or at least less credible. We agree that these are precisely the kinds of factual disputes and credibility issues that are best resolved through observational factors, such as witness demeanor, manner and attitude, which are only possible through live testimony and cross-examination or a videographically recorded deposition.

However, as Felicijan also notes, there is another, more fundamental, problem in relying on Polanco's account here. Even if the 2008 date asserted by Polanco is credited, it does not support a finding that Felicijan's delay prejudiced the District because, whether Polanco's memory loss occurred in 2005, 2006 or 2008, it *pre-dated* Felicijan's request in 2009 that the case be placed in abeyance. Thus, even aside from the procedural and evidentiary problems of making credibility determinations and factual findings based solely on declarations, a finding that Polanco suffered memory loss in 2008 does not support the "ultimate fact" raised by the District's motion, *i.e.*, that it suffered prejudice *as a result of* Felicijan's delay in bringing the case to hearing. (*Pennel v. Pond Union School Dist*., *supra*, 29 Cal.App.3d at pp. 840-841.) Moreover, to the extent Polanco is deemed competent to testify about his own memory loss, his declaration suggests that with the passage of time and

rehabilitation, his memory has *improved* since suffering the stroke. (See *Field v. Bank of America Nat. Trust & Sav. Assn.* (1950) 100 Cal.App.2d 311, 313-314 [no prejudice shown where plaintiff's delay benefited defendant by its accrual of trustee fees during the delay].)

In addition to the date of Polanco's memory loss, the parties also dispute his significance to the underlying merits of Felicijan's case and thus whether the District suffered prejudice because of his memory loss. Felicijan contends that the dates and duties of Polanco's employment with the District, as set forth in Polanco's declaration, do not support a finding that, but for his memory loss, Polanco would be the District's sole or primary witness with "critical" testimony on events alleged in the complaint. Her sworn declaration asserts that she only met with Polanco once, that the meeting was conducted by Lopez, and that Polanco said little, if anything, other than to introduce himself.

The Dismissal acknowledges this factual dispute and related questions over whether, and to what extent, Lopez was involved in deciding Felicijan's request for accommodations. (Dismissal, pp. 9, 14.) As a practical matter, the ALJ effectively "resolved" these disputed issues by granting the District's motion to dismiss and by refusing to consider Felicijan's motion to amend the complaint to allege that other District agents were involved in the decision to deny her request for workplace accommodations. However, the Dismissal does not explain *how* these factual disputes were resolved, including what competent and reliable evidence supported the ALJ's implied finding that Polanco was the District's sole or primary decisionmaker for Felicijan's request for accommodations. Given these material factual disputes and credibility issues, the proper course of action was to give notice and convene a formal hearing. Even assuming a full hearing on the merits was impractical or impossible because of Felicijan's medical condition, at minimum, a hearing on the disputed facts

underlying the District's motion and its laches defense was necessary before dismissing the case. (*Local 2279 (Deglow), supra*, PERB Decision No. 1990, pp. 2-5.)

Alternatively, a Board agent may order that any person, including a party or material witness who is unable to attend a hearing because of illness or infirmity, be deposed to ensure that oral testimony is subject to cross examination. (EERA, § 3541.3, subd. (h); PERB Regs. 32169, subd. (a), 32170, subds. (a), (b), (h), (i).) However, because no hearing was held or depositions taken, the limited and unreliable evidence presented in support of the District's motion was insufficient to support the ALJ's factual findings. (PERB Reg. 32176; *Regents of the University of California (San Francisco), supra,* PERB Decision No. 2370-H, p. 11.) Unsworn representations by the parties' representatives and unverified pleadings do not comprise an evidentiary record on which to base a proposed decision. (PERB Reg. 32175, subd. (a); *City of Clovis* (2009) PERB Decision No. 2074-M, p. 5; see also Code Civ. Proc., § 1878; *Mathew Zaheri Corp. v. New Motor Vehicle Bd., supra,* 55 Cal.App.4th 1305, 1313; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159.)[37]

The District's contention that the Board must defer to an ALJ's credibility determinations ignores the procedural posture of this case and the absence of a sufficient record on which findings may be made. As discussed above, a pre-hearing motion to dismiss is generally not appropriate for resolving disputed material facts, particularly without a hearing on disputed issues raised by the motion.

Likewise, under the residuum rule, the hearsay testimony contained in the District's declarations may supplement, explain or corroborate other, non-hearsay evidence, but only if the hearsay evidence is "the sort of evidence on which responsible persons are accustomed to

[37] PERB Regulation 32176 similarly provides that oral evidence in unfair practice proceedings shall be taken only on oath or affirmation.

rely in the conduct of serious affairs." (*Marlo v. State Board of Medical Examiners of Department of Professional Standards* (1952) 112 Cal.App.2d 276, 281-282.) Certain circumstances may make hearsay evidence unreliable, even if admissible as supplemental or corroborating evidence. (*County of Orange* (2013) PERB Decision No. 2350-M, pp. 8, fn. 10, 19-20.) Because the hearsay declarations were *the only* evidence on disputed matters, including the date and circumstances of Polanco's asserted incapacity to testify, they were insufficient to support the ALJ's findings that Felicijan caused "unreasonable" delay and that the District suffered prejudice as a result thereof. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16; *Utility Reform Network v. PUC, supra,* 223 Cal.App.4th 945, 959-962.)

Additionally, even assuming the ALJ was authorized to make credibility determinations and factual findings in deciding the District's pre-hearing motion, the District overstates the degree of deference afforded such determinations and findings. The Board applies a de novo standard of review and is required to consider the entire record. As the ultimate finder of fact, it is free to draw its own findings and conclusions from the record, even where they are contrary to those of an ALJ. (PERB Reg. 32300; *McPherson v. Public Employment Relations Bd*. (1987) 189 Cal.App.3d 293; *Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 12.) An ALJ who has presided over a hearing is in a much better position than the Board to make credibility determinations based on the ALJ's observation of witness demeanor, attitude and, consequently, the Board will normally defer to an ALJ's factual findings based on credibility determinations unless they are unsupported by the record as a whole. (*Anaheim City School District, supra,* PERB Decision No. 364a, pp. 3-4; *Palo Verde Unified School District*

(2013) PERB Decision No. 2337, pp. 25-29.) However, where, as here, the record contains no live testimony, the Board owes no deference to the ALJ's findings or credibility determinations.

For all the above reasons, we think the ALJ erred by making credibility determinations and resolving material factual disputes raised by the District's motion to dismiss without convening a formal evidentiary hearing and by refusing to consider Felicijan's motion to amend the complaint.

The ALJ's Finding That Felicijan is Medically Unavailable is Not Supported by the Record

Although the above discussion indicates the need for a hearing, there remains the issue of whether the ALJ could properly direct Felicijan to proceed to hearing, because of her medical restrictions and PERB's obligations to comply with reasonable accommodation laws. Here, we disagree with the ALJ's findings that "Felicijan has not been able to demonstrate her medical availability" and that, "there is no certainty that Felicijan will ever recover and become available for formal hearing." (Dismissal, p. 12.) As the District points out in its response to Felicijan's statement of exceptions, the only evidence considered on this issue, the declaration by Felicijan's treating physician and the ALJ's observations at the August 29, 2013 pre-trial conference, do not support a finding that Felicijan is unable to attend or participate in any hearing.[38] According to Moon's declaration, Felicijan has several medical restrictions that would require modifying the schedule of a hearing, for example, by taking frequent breaks, so that she is not required to sit or stand for more than one hour at a time. However, such modifications are not inherently unreasonable, nor unprecedented in other PERB proceedings,

[38] Even assuming we treat the ALJ's observations at a pre-hearing conference as corroborating, non-hearsay "evidence" sufficient to support a finding that Felicijan is medically unavailable for hearing, the Dismissal does not explain why Felicijan could not be deposed pursuant to EERA and PERB Regulations.

where it was necessary to accommodate a party's medical condition. (*County of Santa Clara*, *supra*, PERB Decision No. 2267-M, p. 4.)

Although we reverse the dismissal, contrary to Felicijan's argument, the District is not precluded from renewing its motion to dismiss for failure to prosecute. Additionally, because we do not understand Felicijan's current medical restrictions to prohibit her from attending a hearing conducted on an appropriately modified schedule, we need not address her argument that application of laches is barred by the important public policy of eliminating discrimination on the basis of disability, as set forth in the Americans with Disabilities Act[39] sections 12131–12165, the Fair Employment and Housing Act,[40] and other applicable law. (*In re Marriage of James M.C. and Christine J.C.* (2008) 158 Cal.App.4th 1261, 1273, 1274, fn. 4.)

ORDER

The dismissal of the complaint and unfair practice charge in Case No. LA-CE-4939-E is hereby REVERSED and the matter REMANDED to the Public Employment Relations Board (PERB), Division of Administrative Law, for further proceedings in accordance with this decision, including consideration of any pre-hearing motions, as the administrative law judge deems appropriate, and/or to give notice and convene a formal hearing, consistent with PERB Regulations and any documented medical restrictions of the parties and/or witnesses to these proceedings.

Members Winslow and Gregersen joined in this Decision.

[39] Codified at 42 U.S.C. section 12101 et seq.

[40] Codified at section 12900 et seq.