

STATE OF CALIFORNIA
EDUCATIONAL EMPLOYMENT RELATIONS BOARD

ORDER

In the Matter Appealing a Denial of)
Motion to Dismiss)

JIM V. ZAIKOWSKY, BETTY VREBALOVICH,)
NANCY WILEY AND KATHRYN FRANKLIN,)
Charging Party,)

vs.)

WESTMINSTER TEACHERS ASSOCIATION, et. al.,)
Respondent.)

Case No. LA-CE-80, LA-CO-14

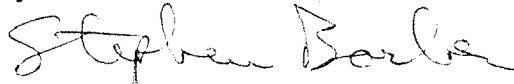
EERB Order No. Ad-10

The ruling of the hearing officer denying appellant's motion to dismiss
the charge in the above-captioned case is sustained by the Board itself.

The Board finds that the appeal is premature.

Educational Employment Relations Board

by



STEPHEN BARBER
Executive Assistant to the Board

6/22/77

Jerilou H. Cossack, Member, concurring:

On February 28, 1977, four staff psychologists of the Westminister School
District filed the captioned unfair practice charges. On May 2, 1977, hearing
officer Perea denied Westminister Teachers Association's (WTA) Motion to Dismiss.
WTA has appealed this denial to us. California Pupil Services Labor Relations,
apparently a party to these proceedings, urges denial of the appeal. No other
party has stated a position on the appeal.

Notwithstanding the status of this appeal under our Rules and Regulations,^{1/} since it appears that a genuine controversy exists, as a general proposition, the parties should have an opportunity to explore the merits of the issues presented. This policy is consistent with the California courts of general jurisdiction in which the cases are uniform in denying appeals taken from refusals to dismiss:

An order of the court refusing to dismiss an action is not itself appealable, and an appeal taken therefrom must be dismissed. ^{2/}

The theory is based upon the sound proposition that piecemeal disposition and multiple appeals in a single action are oppressive and costly, and should be denied pending the final disposition of the case.^{3/}

The Pretrial Rules of Court, applicable by analogy, were designed to channel the courts' energies toward resolving the real and substantial issues in controversy. Baird v. Hodson, 161 Cal.App. 687 (1958). Wishing to similarly utilize our resources, we should not entertain an appeal from the hearing officer's refusal to dismiss at this juncture, but should invite the parties to renew their objection at a later time. The California Rules of Court Rule 218 provides:

A pretrial conference order, and any proceeding to correct or modify such order, may be reviewed on appeal from a final judgment in the case.

^{1/} Cal. Admin. Code, title 8, Sec. 32000 et. seq., hereafter referred to by section number.

^{2/} Forrester v. Lawler, 14 Cal.App. 170, 111 P 284 (1910). See also Parker v. Owen, 83 Cal.App.2d 474, 189 P.2d 81 (1948). Writers Guild of American, West, Inc. v. Superior Court 273 Cal.App.2d 841, 78 Cal.Rptr. 520 (1969). See also Estate of Roberson 114 Cal.App.2d 267, 268, 179 (1952); Perry v. Magneson 207 Cal. 617, 620 (1929).

^{3/} Bank of America Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357 (1942); Brown Memorial Nat. Home Foundation, 158 Cal.App.2d 448, 455 (1958); Murphy v. Fong Shuck, 151 Cal.App.2d 64, 65 (1957); Efron v. Kalmanovitz, 185 Cal.App.2d 149, 154 (1960); Maier Brewing Co. v. Pac. Nat. Fire Ins. Co., 194 Cal.App.2d 494 (1961).

However, the explanation of that section reads:

Since the granting or denying of a motion to correct or modify a pretrial order rests in the sound discretion of the trial court, appellant must show that there has been abuse of discretion, and in so doing, be prepared to demonstrate that the alleged error is prejudicial to him.

For purposes of an appeal of this nature the Board likens its proposed decisions to those of a civil trial court. As an appellate body, this Board, like a court of appeal, applies this standard and requires that the appeal of a motion on a pre-trial order only be entertained when an abuse of discretion has resulted in prejudicial error to the appellant.

A judgment may be appealed before it is final but only upon the express authority of statute.^{4/} The Educational Employment Relations Act (EERA)^{5/} confers such authority but only in limited circumstances. The rules and regulations governing unfair practice proceedings under the EERA give the Board power under Section 35007(b) to review a dismissal. This power is consistent with the enunciated judicial preference for hearing the merits in a doubtful situation and providing the parties their "day in court."

Conspicuously absent from the section is any mention of Board intention to review a denial to dismiss. Reading this section with other procedural provisions it is clear that the Board may have power to rule on such a motion but it is significant that the silence of Section 35007 indicates the Board's adherence to traditional standards favoring full adjudication of substantive issues.

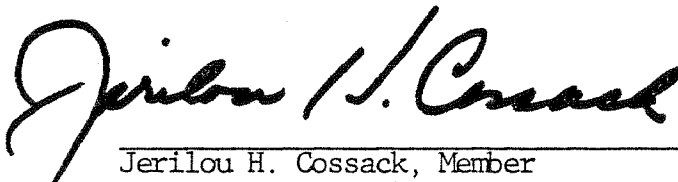
While it is true that Section 35014 provides for appeal from a ruling on a motion, that section should only become operational once a formal hearing has

^{4/} See 6 Witkin, Summary of Cal. Procedure, Appeals, Sec. 63, p 4077 and Deering's Rules of Court, Rule 218, p 120.

^{5/} Gov. Code Sec. 3540 et seq.

commenced. As the Response to Appeal points out, the hearing officer's decision was reached at the informal investigatory stage. Thus the Board should abstain at the prehearing stage in view of the wording of Section 35014, which governs the propriety of this appeal.

It is also clear that even if this appeal had been taken at the formal hearing stage, Section 35014 grants a power of refusal in the board agent. That section provides for only two courses of action open to the board agent: refuse or join in the request. The agent chose not to join in the request. I view his action as a refusal to certify this appeal to the Board. I rely upon the sound discretion of the board agent and limit our acceptance of such appeals to those situations in which the board agent has joined in the parties request for review pursuant to the three requirements enunciated in Section 35014.



Jerilou H. Cossack, Member