

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The unfair practice charge LA-CO-36, filed by Jules Kimmett against the Service Employees International Union, Local 99, AFL-CIO, is hereby DISMISSED with prejudice and without leave to amend.

PER CURIAM

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD



JULES KIMMETT,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 99, AFL-CIO,

Respondent.

Case No. LA-CO-36

DISMISSAL WITHOUT LEAVE
TO AMEND
(6/6/80)

Appearances: Jules Kimmett, in pro. per.; Michael Posner,
Attorney (Geffner & Satzman) for Service Employees International
Union, Local 99.

Before Diane M. Spencer, Hearing Officer

PROCEDURAL HISTORY AND FACTS

On May 27, 1980, the above-captioned matter was scheduled
for the continuation of a formal hearing. The charging party,
Jules Kimmett (hereafter Kimmett) failed to appear.

Respondent Service Employees International Union, Local 99
(hereafter SEIU) moved to dismiss the charge due to Kimmett's
failure to appear. The motion was granted.

After several amendments, this charge is actually a
consolidation by amendment of several unfair practice
charges¹ filed with the Public Employment Relations Board

¹The charges which were consolidated by amendment as
part of LA-CO-36 included LA-CO-31, LA-CO-41, LA-CO-42,
LA-CO-43, LA-CO-45, LA-CO-48, LA-CO-49. At the time of
consolidation, all of the foregoing files except LA-CO-36 were
closed.

(hereafter PERB) between August 29, 1977 and January 10, 1979. The amended charge, filed January 29, 1979, alleges that SEIU discriminated against Kimmitt in violation of section 3543.5(b) of the Educational Employment Relations Act (hereafter EERA) by failing to fairly represent him as required by section 3544.9.²

The first day of formal hearing in this matter was August 6, 1979. Since the hearing was not concluded, it was continued to September 24 and, if necessary, October 29.

On the morning of Monday, September 24, SEIU's attorney called this hearing officer and requested a continuance because he had the flu. The continuance was granted. Kimmitt and his witnesses subsequently arrived and voiced their objections on the record to the continuance and the fact that SEIU's attorney did not call this office until approximately 30-35 minutes prior to the scheduled hearing time.

In response to the objections, Kimmitt was granted the opportunity to select the next hearing date, without input from SEIU, if he wanted one before October 29. Kimmitt stated that he could not proceed before that date because there were too many witnesses to contact. He further said that he didn't want a hearing on October 29 because he wanted time to request

²The EERA is codified at Government Code section 3540 et seq.

that the PERB general counsel take punitive action against SEIU.

This hearing officer ruled that no further punitive action would be taken against SEIU, that formal hearing would continue on October 29 and, if necessary, November 5, and that both of these rulings were nonappealable orders.

On October 15, 1979, this hearing officer sent both parties a letter informing them of PERB regulation 32205 which requires three days written notice of a request for continuance, unless there exists an "unusual circumstance."³

On October 23, Kimmett filed another unfair practice charge against SEIU, PERB case number LA-CO-108, alleging that SEIU's attorney intentionally failed to appear in this matter on September 24 in an attempt to thwart Kimmett's case.

On October 29, the date scheduled for the continuation of the formal hearing in this matter, Kimmett failed to appear. In a telephone conversation placed by this hearing officer to Kimmett that morning, he stated that he would not appear on LA-CO-36 until the issues in LA-CO-108 were resolved. He was

³The regulation is codified at Title 8, Calif. Admin. Code, part III, section 32205. The letter informed both parties that in the case of an "unusual circumstance" on the date of the hearing, the requesting party must first attempt to seek concurrence of the other party and then call the hearing officer who will rule upon the request if they cannot agree.

informed that his refusal to appear could result in the imposition of sanctions on him.

SEIU went on the record briefly that day to move to dismiss the charge based upon Kimmett's refusal to appear. The motion was taken under advisement.

A formal hearing was held in the matter of case number LA-CO-108 on January 14, 1980, before another hearing officer. He subsequently dismissed the charge, finding that this hearing officer's decision to grant a continuance in case number LA-CO-36 on September 24, 1979 was res judicata to the issue of whether SEIU committed an unfair practice by seeking that continuance.

Subsequently, SEIU's motion to dismiss based upon Kimmett's failure to appear in case number LA-CO-36 on October 29 was denied. However, the written dismissal admonished both parties that the charge could be dismissed, could be heard in the absence of one party, or other sanctions taken if either of the parties again failed or refused to appear.

The matter was then scheduled for May 27, 1980, at 10:00 a.m., by notice dated April 18, 1980. At that time, SEIU appeared and was prepared to proceed. Kimmett again failed to appear. This hearing officer telephoned his residence at approximately 10:15 a.m. and 10:55 a.m. on the morning of May 27. His wife said that he was not home but

that he did not say that he was going to a hearing at the PERB. She expected him to return at approximately 12:00 p.m. A message was left both times for Kimmett to call this hearing officer whenever he came in.

After waiting until 11:00 a.m., this hearing officer commenced the hearing. SEIU moved to dismiss LA-CO-36 due to Kimmett's failure to appear. The motion was granted. Kimmett has not communicated with the PERB either verbally or in writing regarding this matter up to the date of this dismissal.

DISCUSSION AND CONCLUSIONS

Section 581(3) of the California Code of Civil Procedure (hereafter C.C.P.) provides for a dismissal within the discretion of a court " . . . when either party fails to appear on the trial and the other party appears and asks for the dismissal " By analogy, this case is dismissed.

The record is undisputed that Kimmett knew of the hearing scheduled for May 27 over one month in advance. He had also been advised of the consequences that could attach for his failure to appear. Both parties were informed of the possibility of sanctions for failing to appear or improperly requesting a continuance by this hearing officer's letter of October 15, 1979 and the written order denying the previous motion to dismiss.

Kimmett's failure to appear on October 29 was excused by this hearing officer even in the face of a motion to dismiss.

