

PUBLIC MEETING MINUTES

February 8, 2007

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95814

Chairman Duncan called the meeting to order at 10:02 a.m.

Members Present

John C. Duncan, Chairman
Lilian S. Shek, Member
Sally M. McKeag, Member
Karen L. Neuwald, Member

Staff Present

Tami Bogert, General Counsel
Bernard McMonigle, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer
Les Chisholm, Division Chief, Office of the General Counsel

Call to Order

Chairman Duncan called the Board to order for the continuous open session of the December 14, 2006, Board meeting. He reported that the Board met in continuous closed session to deliberate on cases pending on the Board's docket.

Since that open session in December, the Board has issued PERB Decision Nos. 1817a-H, 1818a-H, 1819a-H, 1820a-H, 1821a-H, 1866-H, 1867-H, 1868-H, 1869-H, 1870-H, 1871-H, 1872, 1873, 1874, 1875, 1876-H, 1877-M, 1878, 1879-M, 1880, 1881-H, 1882, 1883, 1884 and Administrative Appeal Decision No. Ad-358-H. The requests for injunctive relief in I.R. No. 511 (Sacramento County Aircraft Rescue Firefighters Association v. County of Sacramento) and I.R. No. 513 (Fairfield-Suisun Unified Teachers Association v. Fairfield-Suisun Unified School District) were withdrawn and I.R. No. 512 (Michael Menaster v. State of California (Department of Social Services)) was denied by PERB. A document containing a listing of the aforementioned decisions was made available at today's meeting.

Before commencing the February 8, 2007 meeting, Chairman Duncan announced and welcomed Tami Bogert as PERB's new General Counsel. Since 2003, Ms. Bogert has served as a Deputy Legal Affairs Secretary to the Office of Governor Schwarzenegger. From 1999 to 2003, Ms. Bogert was a Director and Supervising Attorney for the Publications Department as well as Attorney for the Violence Against Women Project at the California District Attorneys

Association. She previously served as a member of the legal affairs team for the Office of Governor Gray Davis, Governor Wilson and the California Attorney General's Office.

Motion: Motion by Member McKeag and seconded by Member Shek to close the December 14, 2006, public meeting.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Chairman Duncan opened the meeting of February 8, 2007 and Member Shek led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Neuwald and seconded by Member McKeag that the Board adopt the minutes of the Public Meeting of PERB for December 14, 2006.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Comments From Public Participants

None.

Staff Reports

Before proceeding to the staff reports, Chairman Duncan noted that the PERB Advisory Committee Meeting held on January 25, 2007, was well-attended and well-received by its constituents. Many topics of discussion were touched upon, such as PERB's progress toward its mission, budget issues, and plans for another PERB training conference to be held in the Los Angeles area some time in September 2007.

Member Neuwald once again commended Acting General Counsel Robin Wesley and her staff for upholding the work production in her division while in the absence of a General Counsel.

a. Administrative Report

Chief Administrative Officer Eileen Potter reported that she received positive feedback from the Legislative Analyst's Office regarding PERB's budget change proposals. She will continue to monitor the daily files and keep the Board apprised of when the next PERB budget hearing will be set.

In the area of personnel actions, Ms. Potter reported that the advertising period has been completed for the Sr. Staff Counsel IV and Legal Analyst vacancies in the General Counsel's office and the interview process will begin shortly.

b. Legal Report

General Counsel Tami Bogert reported that the case processing and litigation reports were distributed to the Board for their review. During the month of January 2007, 61 new charges were filed and staff completed investigation in 56 cases. In regards to requests for injunctive relief, there were 3 requests filed, 2 withdrawn and 1 denied. In regards to litigation, there are 13 cases currently active in various litigation stages, 4 of which are essential employee strike cases, pending in the court of appeal. She also reported that on January 19, 2007, PERB filed its opening brief in County of Contra Costa v. California Nurses Association, et al., Docket No. 06-384 and the County's brief is due in March. On January 29, 2007 a petition for writ of review was filed by the California Faculty Association seeking review of Board Decision No. 1876. That matter is pending before the 2nd DCA. CSU appealed Board Decision No. 1823. That case was fully briefed and opening briefs are anticipated in April 2007.

Ms. Bogert formally welcomed new attorney, Yaron Partovi, to the General Counsel staff, effective Mid-December 2006. She also reported as previously mentioned by Ms. Potter, the Staff Counsel IV recruitment is underway and the cut-off date to receive applications was January 31, 2007.

Chief Administrative Law Judge Bernard McMonigle reported that the administrative law judge (ALJ) report was distributed to the Board for their review. He reported that there are currently 5 ALJ's in his division and he looked forward to Robin Wesley joining the ALJ staff. He indicated that in past years, the goal was to schedule a hearing within 60 days, but currently hearings are being set within 90 to 120 days. Currently, there are 13 decisions to write and 72 cases set for formal hearing. The average caseload per ALJ is 14. For this fiscal year, the ALJ's have completed 16 formal hearings and issued 26 proposed decisions. The average time for decision issuance is 89 days. He reported of the active cases that PERB has statewide, approximately 42 percent are in Los Angeles, 37 percent are in Sacramento, and 21 percent are in Oakland.

c. Legislative Report

Division Chief Les Chisholm distributed to the Board the weekly Legislative update on various bills that affect PERB's jurisdiction. He reported that Assembly Bill 163 addressed a very narrow question as to the definition of trial court employee under the Trial Court Act and more specifically, when someone becomes a regular trial court employee in Los Angeles County's Superior Court.

He also reported on a February 14, 2007 Joint Informational Hearing by the Assembly Public Employees Retirement and Social Security Committee and the Senate Public Employment and Retirement Committee. Chairman Duncan will be providing testimony.

Mr. Chisholm reported that on February 5, 2007, PERB staff submitted a notice publication request to the Office of Administrative Law (OAL) for rulemaking concerning PERB regulations relating to proof of support, revocation of proof of support, and other technical

changes to the existing regulations. The submission of such a package was authorized by the Board at the December 14, 2006 public meeting. PERB requested publication by OAL of that notice on Friday, February 16, 2007 and will be mailing out a notice to interested parties on that date. He further stated that the notice, as well as the proposed text of the regulations and initial statement of reasons can be found on the PERB website as of that date. The matter will be set for public hearing at the April 12, 2007 public meeting of the Board.

Motion: Motion by Member Shek and seconded by Member McKeag that the Administrative, Legal Reports (including General Counsel and Chief Administrative Law Judge) and Legislative Reports be received.

Ayes: Duncan, Shek, McKeag and Neuwald.

Motion Carried.

Public Hearing on Proposed Rulemaking

Chairman Duncan opened the public hearing on proposed rulemaking to adopt, amend or repeal various sections of the Board's regulations concerning agency fee pursuant to Government Code section 11346.8. After reviewing all comments, objections and recommendations, the Board will consider the adoption, repeal and amendment of these regulations as described in the Notice of Proposed Rulemaking published in the December 1, 2006, California Regulatory Notice Register. According to the notice, written comments were to be submitted by 5:00 p.m., Monday, February 5 (four written comments have been received and may be found on the PERB website).

Chairman Duncan requested Mr. Chisholm give a presentation and general overview of the Board's proposed regulations.

Mr. Chisholm gave the following historical background regarding agency fee regulations: 1) The Board first adopted agency fee regulations in 1989 in response to Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292 (Hudson). Those regulations have not been revisited substantively since the 1989 regulation process. In 2004, PERB received a request from the California Teachers Association and a number of other unions asking that substantial changes be made to the agency fee regulations. At the direction of the Board, PERB staff engaged in a workshop process regarding agency fee regulations and received positive and valuable feedback from constituents. At the October 12, 2006 PERB public meeting, the Board authorized the staff to commence the rulemaking process with regard to the Board's agency fee regulations. The Notice of Proposed Rulemaking was published by the Office of Administrative Law on December 1, 2006. The proposed revisions, in general, are to update the regulations with respect to developments in decisional law, both in the courts and PERB, since 1989 and to clarify the terms "agency fee objector" and "agency fee challenger."

Chairman Duncan opened the public hearing on proposed rulemaking to interested parties.

Gerald James, representing Professional Engineers in California Government (Unit 9) and California Association of Professional Scientists (Unit 10), suggested two clarifications to proposed regulations 32994(a) and 32994(b)(1). He stated that proposed regulation 32994(a) appeared to be a definition of an agency fee challenger as one who disagrees with the chargeable calculation. He suggested that the definition be amended to reflect that the individual who disagrees must also file a timely challenge. In regard to proposed regulation 32994(b)(1), Mr. James suggested that the section be amended to state that the challenge should be filed with the exclusive representative as reflected in the annual notice. He suggested removing the words “an official” from the proposed text. He also supported the written comments submitted by SEIU Local 1000, IUOE Unit 12, and California Teachers Association (CTA).

Mr. Chisholm responded, with regard to the comments made by Mr. James on his two suggestions and the written comments received from SEIU Local 1000 and IUOE, Unit 12 and CTA that he referenced, PERB staff agrees that the wording in the proposed text of 32994(a) should be corrected to make it more explicit in that it would refer to someone who disagrees and files a timely challenge. Mr. Chisholm also indicated the suggestions made to proposed section 32994(b)(1) would be worthwhile to consider.

Diane Ross, representing California Teachers Association, stated that the proposed regulations contained in the recent rulemaking package are a great improvement in regards to clarity and meeting PERB’s goal of having their regulations be consistent with the Hudson decision. In response to written comments submitted by Milton L. Chappell, Staff Attorney, National Right to Work Legal Defense Foundation, Inc., she stated that he first asked PERB to exceed the 9th Circuit Court’s interpretation of Hudson and proposed requiring audits of all union locals regardless of size. She felt that he misrepresented the opinion Harik v. California Teachers Association (9th Cir. 2003) 326 F.3d 1042, 1049 (Harik) as creating an exemption to Hudson. She further stated that the Ninth Circuit is not authorized to create exemptions to Supreme Court precedent, rather it interpreted Hudson’s reference to an audit to be specific to the facts of that case, which involved a large local union with a large budget. The Ninth Circuit determined that the Supreme Court did not intend to impose an audit requirement on all unions, regardless of size, in part, because the cost of an audit may deplete the financial benefits of having an agency fee in the first place. She felt that the proposed regulations accurately reflected the Hudson decision and should be adopted. She further stated that Mr. Chappell’s second proposal was to eliminate the exhaustion requirement arguing that since the Supreme Court doesn’t require exhaustion, that PERB should not either. This is in the area of challenging the union’s calculation of its chargeable expenditures. She felt this requirement was procedural and not substantive, and allowing access to PERB’s processes without the exhaustion requirement could be an enormous burden for the agency. She went on to state that Mr. Chappell’s third proposal reflected concern that the required escrow accounts be independently managed. She stated that the word “escrow” is described as something in the care of a third party until a certain condition is met. Therefore, she felt the concept of independent management of funds is already inherent in use of the term escrow and to adopt the language that Mr. Chappell proposed is unnecessary. She stated the proposed regulation should remain as written by PERB.

Ms. Ross stated, in regards to escrow amounts in dispute, CTA is proposing to specify that only the amounts “reasonably” in dispute have to be escrowed, to reflect the Supreme Court’s language.

Milton L. Chappell, Staff Attorney, representing National Right to Work Legal Defense Foundation, Inc. stated, in regards to proposed section 32992(b), he objected to PERB following the “Ninth Circuit’s ill-advised” ruling in Harik. He felt the new language, “an unaudited financial report if the exclusive representative’s annual revenues are less than \$50,000...” should be removed and the existing language should remain as written. He went on to state, “In this way, all unions and their affiliates meet the common audit standards required by Hudson and the independent audit is made available to the nonmember. Nothing in Ninth Circuit case law supports deleting the existing requirement that the audit report be made available to the nonmember and if implemented, should be done across the board.”

Mr. Chappell basically agreed with the language proposed in section 32994 regarding the clarity of what the terms “objector” and “challenger” mean. In regards to proposed section 32994(b)(1), he suggested it be clarified as stated in SEIU’s written comments. Mr. Chappell supported proposed section 32995(b) and (c) and felt that there was a need for new language, “an independently controlled escrow account” in an independent financial institution, all agency fee amounts “reasonably” in dispute. He also basically supported proposed section 32995(d). Mr. Chappell was in support of SEIU’s and IUOE’s written comments to proposed section 32996 in that it should be changed to “most recent annual notice” and additionally suggested that the language be changed to “annual written notice” to be consistent with the language in proposed section 32992. In regards to the proposed provisions on “exhaustion,” Mr. Chappell stated that a nonmember should not be required to exhaust an arbitration procedure before coming to PERB, consistent with the Supreme Court decision in Air Line Pilots Association v. Miller (1998) 523 U.S. 866, 876-77. Mr. Chappell appreciated PERB’s involvement in protecting all parties involved in the agency fee process.

Mr. Chisholm disagreed with Mr. Chappell’s comment on proposed section 32992(b) regarding the audit requirement and whether to incorporate the standard adopted by the court in the Harik decision, thus allowing for a different method of independent verification for unions that are at or below a certain threshold of size or revenue. Mr. Chisholm stated that the Board followed Harik in previous Board decisions, and recommended that the proposed language that followed the Harik decision be adopted. In response to Mr. Chappell’s concern in proposed section 32994(a) regarding PERB’s exhaustion requirement, PERB agrees that the courts have held that there is no exhaustion requirement in order to bring a claim to the courts, but PERB believes requiring exhaustion before utilizing the unfair practice charge process is good public policy and he recommended not changing the proposed language.

In response to Mr. Chappell’s concern in proposed section 32995, Mr. Chisholm agreed with him in adding more specific language to subsections (b) and (c) to provide clarity in terms of the escrowed amount being placed “in an independently controlled escrow account, in an independent financial institution.” Mr. Chisholm disagreed with Mr. Chappell’s comment to proposed section 32996 and felt it unnecessary to add the specific word “written” in that context.

Mr. Chisholm responded to the written comments received from Mr. Jeffrey B. Demain, on behalf of SEIU and IUOE regarding proposed section 32995(d). It was argued that interest paid by exclusive representatives on fees earlier escrowed and then rebated, should be at the rate actually earned by the union and not the “vague and unclear” prevailing rate. Mr. Chisholm disagreed that the language should require only the rate actually earned, as the union could obviously place the money in an account earning far less than the “prevailing rate” and thus deny to employees the full use and earning power of money due to them. He found no PERB cases where “prevailing rate” or even “interest rate” was at issue concerning agency fee disputes. As Mr. Chisholm recalled, the rate of interest itself has never been an issue of disputes. In one Board decision, the Board ordered payment of 10 percent interest on rebated fees, while other agency fee decisions used a standard of 7 percent, which is consistent with what the Board orders in back pay cases. Mr. Chisholm therefore recommended that the Board not make any change to the proposed section 32995(d).

With respect to proposed section 32996, Mr. Chisholm agreed that the terminology in the proposed title and text needed to be conformed as suggested. In regard to proposed section 32995(c), Mr. Chisholm is in agreement with CTA and Mr. Chappell that the word “reasonably” should be included with respect to the amount that must be in escrow.

In closing, Mr. Chisholm stated that PERB staff are recommending further changes and modifications to the proposed regulation package, specifically to sections 32994(a), 32994(b)(1), 32995(b), (c) and 32996. These proposed modifications are characterized as substantive changes, therefore subject to an additional 15 day written notice of the proposed modifications. Another public hearing would not be necessary, but there would be an opportunity for written comment. There is nothing that would preclude, at the next public meeting when the subject is addressed, further modifications with another 15 day notice of those modifications. If proposed language to be deleted is not accepted, that may be done without further notice. The Board can always decline to accept a recommended change in the regulations without giving further notice. The Board may hold the entire package over until the next public meeting. There is a one year period from the start date to complete action on the rulemaking package.

Motion: Motion by Member Neuwald and seconded by Member McKeag to close the public hearing on proposed rulemaking regarding agency fee.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Chairman Duncan stated that proposed changes to initial proposals for rulemaking fall into three categories: (1) nonsubstantial, (2) substantial and sufficiently related, or (3) substantial and not sufficiently related. The third category (substantial and not sufficiently related) cannot be acted upon without starting over with a notice of proposed rulemaking, public comment and public hearing. Nonsubstantial changes can be incorporated into the final, approved text without additional notice to or comment by interested parties. Where the changes are substantial and sufficiently related, at least 15 days notice to interested parties and an

opportunity for written comment (on the changes only) must be provided before the changes may be adopted. A second public hearing is not required.

Chairman Duncan requested Mr. Chisholm give an overview of the proposed modifications prepared in response to the written comments and subject to the additional comments received at today's hearing. Mr. Chisholm distributed a copy of the proposed modifications to the Board and interested parties in attendance.

With regard to the comments concerning section 32994(a), Mr. Chisholm stated that in editing the language of the current regulation, the placement of the reference to "agency fee challenger" in the middle of the sentence arguably can lead to a different interpretation of the meaning of the phrase than was intended. The language revisions proposed by the unions are not inconsistent with the intent of the initial proposal and he recommended adopting this further change in the interest of greater clarity. Further, inclusion of the "timely" requirement for a challenge is consistent with the intent of the provision. While disputes may arise and need to be adjudicated as to whether a challenge was timely, it seems logical that the union would not be obligated to escrow funds for someone who did not file a timely challenge.

Regarding section 32994(b)(1), Mr. Chisholm noted there are objections to the reference to "an official of the exclusive representative who has authority to resolve agency fee challenges." He also noted that the language objected to has been a part of the regulations since 1989, without any confusion caused by that language. Nevertheless, Mr. Chisholm agreed that the language could be made clearer, and recommended a change that would instead reference the official designated by the union in its notice to nonmembers.

In section 32995(c), Mr. Chisholm recommended that the language be amended to clarify that only agency fee amounts "reasonably" in dispute are subject to the escrow requirement, consistent with the case law in this area. In addition, Mr. Chisholm recommended, following the comments by Mr. Chappell and the Board's San Ramon decision, that the escrow language require that the escrowed amount be placed "in an independently controlled escrow account, in an independent financial institution." Mr. Chisholm also noted that the latter amendment should also be made in section 32995(b), which was omitted from the written recommendations circulated earlier.

Mr. Chisholm also acknowledged that interested parties had correctly pointed out that section 32996, in both its title and text, refer to the term "Agency Fee Appeal Procedure," a term that would no longer be found in the regulations as amended. The references elsewhere in the regulations are revised to read the "Exclusive Representative's Objection Procedure" (section 32993) or the "Exclusive Representative's Challenge Procedure" (section 32994). Mr. Chisholm disagreed with suggestions that the section refer to "the most recent annual notice," as a dispute before the Board may relate back to an earlier fiscal year. Thus, Mr. Chisholm recommended that the section title be changed to "Filing of Notice and Agency Fee Appeal Procedures," and provide that the Board may require the filing of an annual notice, Objection Procedure and/or Challenge Procedure with the Board.

In regards to the proposed regulation on the requirement of payment of interest at the prevailing rate, Mr. Chisholm stated if the Board were to decide to amend that requirement, it would then be necessary to specify that the escrow account be interest bearing. He recommended maintaining the current language with respect to the requirement that rebated fees be returned with interest at the prevailing rate. He also stated that the “prevailing rate” is not a “vague and unclear” standard and recommended no change be made as suggested by the unions. With respect to the Harik decision, the Board has followed the holding and he feels it is consistent with PERB’s general goal to update the regulations to conform to court and Board decisional law to specify that an alternative to the audit requirement applies to those unions at or below the threshold level of revenue as specified in the proposed text. In regards to language concerning the issue of “audits,” Mr. Chisholm will explore that issue more thoroughly and make a recommendation at the next public meeting.

Motion: Motion by Member Neuwald and seconded by Member McKeag to move the regulatory package forward with the following instructions: to provide notice of proposed modifications to interested parties, as recommended by staff, including revision recommended for proposed section 32995(b) consistent with the language revision recommended for proposed section 32995(c), and to consider the rulemaking package at the next meeting, including recommendations concerning whether any change needed to be made to the language of the notice to the nonmember, and whether the word “written” needs to be added for consistency.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Chairman Duncan stated that an additional 15-day notice will be applied to the proposed modifications and those issues will be addressed again at the next public meeting. The notice and any written comments received will be posted on the PERB website.

Old Business

None.

New Business

Mr. Chisholm stated that there is a requirement that each state agency, every two years, report to the Fair Political Practices Commission that they have reviewed their conflict of interest code and whether substantive or non-substantive changes needed to be made to that code. He indicated it was not necessary to take any action to update PERB’s Conflict of Interest Code (codified at PERB Regulation 31100) at this time.

General Discussion

There being no further business, the meeting is recessed to continuous closed session.

The Board will meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through April 12, 2007 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Member Shek that there being no further business, the meeting be recessed to continuous closed session.

Ayes: Duncan, Shek, McKeag and Neuwald.

Motion Carried.

Respectfully submitted,

Chris Wong, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

John C. Duncan, Chairman