

## **PUBLIC MEETING MINUTES**

August 16, 2007

PUBLIC EMPLOYMENT RELATIONS BOARD  
1031 18th Street  
Sacramento, CA 95811

Chair Neuwald called the meeting to order at 10:00 a.m.

### **Members Present**

Karen L. Neuwald, Chair  
Lilian S. Shek, Member  
Sally M. McKeag, Member  
Robin W. Wesley, Member  
Tiffany Rystrom, Member

### **Staff Present**

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

### **Call to Order**

Chair Neuwald called the Board to order for a return to the open session of the June 7, 2007, Board meeting. She reported that the Board met in continuous closed session to deliberate on pending cases on the Board's docket, pending requests for injunctive relief, and pending litigation, as appropriate.

Since that open session in June, the Board has issued PERB Decision Nos. 1909-M, 1910-M, 1911, 1912-H, 1913-M, 1914-S, 1915-M, 1916-M, 1917-M, 1918-S, 1919-M, 1920-M and 1921, Administrative Appeal Decision Nos. Ad-365 and Ad-366. In request for injunctive relief (I.R.) No. 524 (County of Riverside v. SEIU Local 721) the request was withdrawn, I.R. 525 (Ira Eisenberg v. State of California (Employment Development Department)) the request was denied, and I.R. 526 (Sacramento County Deputy Sheriffs Association v. County of Sacramento) PERB staff was directed to expeditiously process the underlying unfair practice charge in this matter; and the Board reserved its decision-making authority regarding this request for injunctive relief pending the conduct of a prompt informal settlement conference and, if appropriate, formal hearing before a PERB Administrative Law Judge. A document containing a listing of the aforementioned decisions was made available at today's meeting.

**Motion:** Motion by Member McKeag and seconded by Member Shek to close the June 7, 2007, public meeting.

**Ayes:** Neuwald, Shek, McKeag, Wesley and Rystrom.

**Motion Carried.**

Chair Neuwald opened the meeting of August 16, 2007, and Member McKeag led in the Pledge of Allegiance to the Flag.

As a first order of business Chair Neuwald reported on the following news items.

Chair Neuwald announced her appointment as Chair upon the recent appointment of John Duncan as the Director of the Department of Industrial Relations (DIR) by Governor Schwarzenegger. He had been with PERB as the Chair of the Board from 2004 to the present. Chair Neuwald stated that Mr. Duncan was returning to DIR, a department he was very familiar with and had served in many capacities. He was deputy communications director, chief deputy of DIR, acting director and director. Mr. Duncan served in these various capacities at DIR during the Wilson administration. Prior to that time Mr. Duncan served in the federal government with the Secretary of Defense from 1983-1987. Chair Neuwald expressed recognition and appreciation of Mr. Duncan's service to PERB. Chair Neuwald further expressed the pleasure of working with Mr. Duncan during his employment at PERB and extended to him well wishes in his new position as Director at DIR.

Chair Neuwald continued by stating that on Monday of this week, she was designated as the Chair at PERB. She expressed it is a sincere honor to be designated as Chair, also that it has been an honor to sit as a Member of the Board, and expressed delight to be able to continue her service at PERB and work with PERB constituents as Chair.

In addition to the changes with Mr. Duncan and herself, Chair Neuwald announced the appointment of two new Board Members.

Chair Neuwald formally introduced Robin W. Wesley as a Member of the Board. She acknowledged constituent familiarity with Member Wesley with probably no need for formal introduction. However, we will acknowledge Robin Wesley's appointment to the Board. Member Wesley was appointed to the Board by Governor Schwarzenegger in early July. She has served at PERB in various capacities for sixteen years, most recently as an administrative law judge. She was the acting general counsel, a senior regional attorney and a legal adviser to PERB Board Members. Before coming to PERB, Member Wesley was the deputy director of the Governor's Office of Planning and Research from 1983-1991. Chair Neuwald, along with the full Board, expressed sincere pleasure to have Member Wesley serving as a Member of the Board and as a valuable asset at PERB in this capacity.

Member Wesley thanked the Board and expressed that she was honored to serve as a Member of the Board at this time.

Chair Neuwald also announced the appointment by the Governor of a new Board Member, Tiffany Rystrom. Member Rystrom since 2001 has been of counsel with the law firm Carroll, Burdick and McDonough. From 1983-2000, she was a partner in the law firm of Franchetti & Rystrom, a civil litigation and lobbying firm. Prior to that service, Member Rystrom worked in the public sector for the California Attorney General's office as a deputy attorney general from 1980-1983, and a deputy district attorney for the Marin County District Attorney's Office from 1978-1979. Immediately after graduating from law school in 1977, Member Rystrom served as a law clerk in Division One of the First District California Court of Appeal. Chair Neuwald and the full Board welcomed Member Rystrom to PERB.

Member Rystrom thanked the Board and expressed her delight with her appointment to PERB and to be able to work on the issues that will be presented here.

### **Minutes**

**Motion:** Motion by Member Shek and seconded by Member Wesley that the Board adopt the minutes of the Public Meeting of PERB for June 7, 2007.

**Ayes:** Neuwald, Shek, McKeag, Wesley and Rystrom.

**Motion Carried.**

### **Comments From Public Participants**

None.

### **Staff Reports**

#### a. Administrative Report

Before commencing the Administrative Report, Chief Administrative Officer Eileen Potter acknowledged the sustained superior accomplishments of one of the members of her staff. For the sixth consecutive year, Paula Crouch, PERB's senior account officer, has received the State Controller's Office achievement of excellence and financial reporting award for her work in maintaining the integrity of PERB's financial records. Ms. Potter stated that this was a direct reflection of Ms. Crouch's dedication to PERB and her outstanding work ethic. Ms. Potter acknowledged and commended Ms. Crouch, who was in attendance at the meeting.

Chair Neuwald joined in the acknowledgement stating her appreciation for the timely completion of work by Ms. Crouch in a competent manner.

Member Shek expressed her pleasure in working with Ms. Crouch on the PERB staff, noting her professionalism and the many talents she brings with her in doing her job.

Ms. Potter reported on the status of lease negotiations for PERB's office in Los Angeles. Ms. Potter briefly reported the facts surrounding PERB's quest to find a location in the Southern California area. In 2005 PERB submitted a request to the Department of General Services (DGS), Real Estate and Design Services, to open negotiations with PERB's present landlord to extend the lease at its current location, 3530 Wilshire. Ms. Potter reported that the lease expires August 31, 2008. About six weeks ago, General Services informed her that further negotiations with the landlord would be pointless since there are serious ADA issues with PERB's present location, labeling the landlord unresponsive. With input from the staff of the Los Angeles office, a site search was begun for new space. Within the parameters that were provided by DGS, which was in and around PERB's current location (that is, in and around Union Station, the Financial District, Glendale and the Pasadena area), the locations available were double PERB's present rent. The Department of Finance instructed PERB to find space closer to the rent that is currently paid. With that directive, DGS expanded the site search to the Arcadia, Monrovia area and has found three buildings for PERB staff to visit. It is anticipated that these visits will occur the week of August 20. Ms. Potter reported that she would be traveling with DGS staff for the visits, and would also be accompanied by a member of staff from each of PERB's General Counsel and Administrative Law divisions. Ms. Potter expected that she would be able to report back within the next couple of weeks on those visits and the choices could be narrowed down. In conclusion, she reported that PERB would have to take action fairly quickly because any site found would have to be built to specification prior to the impending expiration of PERB's present lease in August 2008.

Chair Neuwald amplified Ms. Potter's report regarding State agencies that are in the leasing market, especially in the Southern California area. She talked about the difficulty in finding spaces to lease due to seismic safety and ADA requirements. She further went on to state that although some might call the requirements rigorous, they are necessary to ensure safe places for people to work and also for the constituents who come to PERB. She indicated the need to inform constituents of the steps and progress PERB is taking in securing suitable office space for its regional office located in Southern California.

b. Legal Report

General Counsel Tami Bogert reported that the case processing and litigation reports had been distributed to the Board for their review. During the months of June and July, 114 new unfair practice charges were filed, 126 charge investigations were completed and 50 informal settlement conferences in total were conducted. Also, during that same two-month period, two requests for injunctive relief were filed. One was in June and it was withdrawn. The second was in July and it was denied by the Board. With regard to litigation, Ms. Bogert reported four developments of note. First, a petition for review was filed in the California Supreme Court in the case of City and County of San Francisco v. Operating Engineers Local 39 (California Supreme Court Case No. 5154253). This is the case where in May of this year, the First District Court of

Appeal affirmed PERB's jurisdiction over alleged charter violations pertaining to employer-employee relations. She reported that PERB was awaiting word from the Court as to whether it will or will not review this case. Chair Neuwald asked whether the Court had any deadlines in responding in this case. Ms. Bogert responded that PERB might expect to hear from the Court within 60 days, although the Court does not have a fixed timeframe within which to respond.

Ms. Bogert continued and reported on the second litigation matter stating that briefing was complete in all four of the essential employee strike cases. At this time PERB was awaiting word from each of the appellate courts as to whether, and if so when, oral argument might occur.

In the third litigation matter, California Faculty Association (Court of Appeal, Third Appellate District, Case No. C054725), Ms. Bogert reported that briefing was underway. This case is pending in the Third District Court of Appeal and pertains to Board Decision No. 1876-H, relative to whether parking location as opposed to parking fees falls within the scope of representation. She reported on the final litigation matter, California State University (California Court of Appeal, Second Appellate District, Case No. B189869), that oral argument has been set for September 21. This case, pending in the Second District Court of Appeal, pertains to Board Decision No. 1823-H relative to an arbitrator's authority to decide tenure for university faculty.

Relative to staffing, Ms. Bogert reported that the General Counsel's Office was advertising to fill three positions. The first is in Sacramento and is a Senior Public Employment Relations Counsel position. The other two are statewide advertisements, Staff Counsel positions, and are contingent upon the Governor's budget. The final filing date for all three of the positions is August 27, and the information is posted on PERB's as well as the State Personnel Board's (SPB) website.

Before proceeding with his report, Chief Administrative Law Judge Bernard McMonigle welcomed and congratulated the new Members and congratulated the Chair on her appointment. Mr. McMonigle reported that the June, the 2006-2007 fiscal year, and the July reports were distributed to the Board for their review. During fiscal year 2006-2007, the administrative law judges issued 41 proposed decisions, with an issuance time of 85 days. Currently, the administrative law judges have 52 active unfair practice cases set for formal hearings and 19 proposed decisions to be written. He reported on case processing in the month of July; there were nine new cases assigned and 15 days of formal hearing were held.

For most of the fiscal year, Mr. McMonigle reported that PERB had five administrative law judges. A sixth position was in transition, a position which was held just briefly by recently appointed Member Wesley. Since then, Shawn Cloughesy, a very well qualified administrative law judge, has taken that position. Mr. Cloughesy has spent thirteen years holding hearings for the SPB, prior to that he was a labor attorney and senior labor attorney with the California Correctional Peace Officers Association for eight years. Mr. McMonigle expressed appreciation to have him on board.

Mr. McMonigle reported that there was an announcement out to fill a seventh administrative law judge position pending passage of the State budget. He stated that filling this position will help us to set hearings at an earlier date. Currently formal hearing dates are being set for November and December. Filling this position will further help to speed up decision writing and issuance time. In conclusion, Mr. McMonigle expressed his pleasure in receiving very qualified applicants for this seventh position.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported on regulations that did not concern the regulation issue on the agenda today. The agency fee regulation changes that were recently approved by the Board have now been approved by the Office of Administrative Law and filed with the Secretary of State. Those changes will take effect next Wednesday, August 22.

Regarding legislation, Mr. Chisholm reported that there has been no recent activity. He provided an update on tracked legislation that modifies provisions of statutes administered by PERB as follows.

Both AB 299 (Tran) and AB 1194 (Karnette) were chaptered since the last Board meeting. AB 299 is the maintenance of the codes annual revisit and there were no substantive changes. AB 1194 is the bill that restores the right of self-representation language under EERA, and that change will take effect January 1, 2008.

He reported that still pending final action in the Legislature are four bills: (1) AB 553 (Hernandez), that would clarify or restate existing law with respect to strikes under MMBA and PERB jurisdiction; (2) AB 1164 (DeLeon) that would establish child care provider representation rights and assign to PERB responsibility for checking proof of support and the conduct of any elections, but with our costs reimbursed for both those two duties; (3) AB 1463 (Eng), which addresses the question of coverage of joint-powers agencies like a regional occupational program under EERA rather than MMBA; and (4) SB 90 (Committee on Budget and Fiscal Review) that would exclude employees of the Office of Chief Information Officer from coverage under the Dills Act.

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

**Ayes:** Neuwald, Shek, McKeag, Wesley and Rystrom.

**Motion Carried.**

## **Old Business**

Chair Neuwald stated that the Board will now consider the proposed amendments to PERB regulations concerning proof of support and other technical changes, pursuant to the February 16, 2007 notice of proposed rulemaking and June 12, 2007 notice of proposed modifications. The Board will consider the written public comments received, and will receive and evaluate additional staff analysis and recommendations. If deemed appropriate, action will be taken on this matter. Chair Neuwald then requested that Les Chisholm of the General Counsel's Office give a presentation regarding the proposed regulations.

Member Wesley stated that, prior to her appointment to the Board, she was involved, to a certain extent, in the regulations as they were initiated by staff. For that reason, Member Wesley, out of an abundance of caution, respectfully abstained from voting on this matter.

Member Rystrom echoed Member Wesley, stating that her employment with PERB had just begun the day before the Public Meeting, and she too abstained from voting on this matter. She stated that she had read the recent public comments, found them very well written and would have found them very helpful had she participated in this issue. She expressed a hopefulness that these kinds of communications continue, that they are very helpful, and thanked the constituents who wrote them.

In his presentation, Mr. Chisholm reiterated Chair Neuwald's summary stating the regulations being considered were changes first noticed in February, the subject of a public hearing in April, and then the subject of a notice of proposed modifications on June 12, following the June 7 approval of that action by the Board. Two written comments were received on the proposed modifications. Prior to the Public Meeting, a memo was circulated to the Board, which is available to the public including at today's meeting. This memo discusses the comments received, and recommendations made by the General Counsel's Office. As noted in the memo, stated Mr. Chisholm, consideration of the comments received on the proposed modifications in concert with all of the testimony and written comments received earlier during this proceeding reaffirms that it would be worth pursuing further workshop discussions with interested parties about the subject of proof of support and PERB regulations in this area. At this point, no firm decisions or plans have been made in that regard, but it is something that would be warranted by the comments. Concluding his presentation, Mr. Chisholm stated that it is recommended that the Board only take final action and approve the regulation changes proposed as modified by the notice of proposed modifications, as described in the proposed modifications attached to the aforementioned memo.

Member Shek commended the efforts of the General Counsel's Office, both Ms. Bogert and Mr. Chisholm, in providing the Board with the copy of the proposed final text including reflection of all modifications, stating that it clarified the package. She inquired about the use of the word "clearly" in the regulations. She asked for an operational definition of the word "clearly" as used in Sections 32700(a)(1)-(4), 61020(a)(1)-(4), 81020(a)(1)-(4) and 91020(a)(1)-(4).

Mr. Chisholm responded that the use of the word or term “clearly” was not new in this package. It shows up more often because of the proposed splitting out of what used to be Section 32700(a) into Section 32700(a)(1), (2), (3) and (4). He stated that operationally what it means is that when a Board agent is reviewing the proof of support submitted by a petitioner, what is looked for is a lack of any ambiguity in terms of the expressed intent language that is contained on the authorization card or petition form or membership card or whatever type of document is submitted as evidence of proof of support. Mr. Chisholm stated, assurance has to be provided that there is no mistaking the intent of what an employee signed. An example would be if a document is submitted as proof of support in support of a representation petition, it simply says something to the effect that an election is desired. That simple statement does not clearly demonstrate that the employee desired to be represented by a specific organization for purposes of collective bargaining. This is an extreme example, but what PERB would be looking for is an unambiguous statement of intent on the document that the employee signed in reviewing the sufficiency of the proof of support.

Chair Neuwald clarified that the word “clearly” had been used in existing regulations. Mr. Chisholm confirmed this clarification.

Member McKeag inquired and wanted clarification about a recent communication received. She stated that in this communication the argument was made that revocation procedures may not be implemented on a case-by-case basis under the Administrative Procedures Act (APA).

Mr. Chisholm responded that the concern expressed was the general rule of law under the APA, which is interpreted by a number of court decisions. He stated that where there is a rule of general application, it has to go through the rulemaking process, but is distinguished from, for example, a situation such as the one in Antelope Valley Health Care District (2006) PERB Decision No. 1816-M. There, PERB’s procedures were not implicated because the petition was handled by the employer; the issue presented in that case was whether the employer had unlawfully refused to grant recognition to the petitioning union. Mr. Chisholm agreed, however, that this question needs to be looked at further. Part of the rationale in bringing the original package to the Board for consideration was the concern that there’s a policy enunciated by a Board decision, but that Board decision does not express the how, when, etc., for accomplishing revocation. Mr. Chisholm stated that it is recommended that PERB continue to discuss and consider what rulemaking, if any, is necessary and appropriate. He further stated that the APA issue is part of what comes into play, but is only a part of the package. APA is part of what needs to be looked at in terms of the landscape of various legal issues as well as practical issues involved.

**Motion:** Motion by Member McKeag and seconded by Member Shek to adopt the proposed final text on the proof of support and other regulation changes and to submit them to the Office of Administrative Law for approval.

**Ayes:** Neuwald, Shek and McKeag.

**Abstain:** Wesley and Rystrom.

**Motion Carried.**

Chair Neuwald reiterated the appreciation of Ms. Bogert and Mr. Chisholm for their work on this regulatory package and its outcome.

### **New Business**

Chair Neuwald took this time to make a couple of additional announcements.

Chair Neuwald first announced the PERB/CPER annual conference. She pointed out the attendance of PERB's co-sponsor, Carol Vendrillo of the California Public Employee Relations Program, at today's meeting. The Conference is scheduled September 20, 2007, at the campus of the University of California, Irvine. This is the second conference, a follow-up to a very successful conference held in September 2006. The Conference will focus on the unfair practice charge process and the theme is "PERB: A Step-by-Step Analysis of the Process." Chair Neuwald announced that there is still space available for persons wishing to register and links to the agenda and registration forms are available on PERB's website at [www.perb.ca.gov](http://www.perb.ca.gov). PERB at one time sponsored a lot of training and conferences. Due to budget constraints, PERB moved away from these activities. She stated that with a new generation of labor relations professionals, this kind of conference is very important, and PERB received great feedback from the last conference. Chair Neuwald expressed hope of achieving the same outcome as last year at its upcoming conference in Southern California.

Secondly, Chair Neuwald announced a zip code change for PERB's address in Sacramento. PERB was notified that on July 1 of this year, the U.S. Postal Service had split the broader 95184 zip code in Sacramento resulting in PERB's new zip code becoming 95811-4124. This information is available on PERB's website.

### **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 October 11, 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 Shek and seconded by Member McKeag that there being no further business, the meeting be recessed to continuous closed session.

**Ayes:** Neuwald, Shek, McKeag, Wesley and Rystrom.

**Motion Carried.**

Respectfully submitted,

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Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

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Karen L. Neuwald, Chair