STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ST. HOPE PUBLIC SCHOOLS, Employer, and SACRAMENTO CITY TEACHERS ASSOCIATION, Petitioner.	Case No. SA-RR-1170-E PERB Order No. JR-29-E March 11, 2019

Appearances: Law Offices of Young, Minney & Corr, by Chastin H. Pierman, Attorney, for St. HOPE Public Schools; California Teachers Association, by Brian Schmidt, Attorney, for Sacramento City Teachers Association.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request filed pursuant to PERB Regulation 32500[1] that the Board join St. HOPE Public Schools (St. HOPE) in seeking judicial review of the Board's decision in *St. HOPE Public Schools* (2018) PERB Order No. Ad-472. In the underlying decision, the Board overruled an administrative determination dismissing a request for representation filed by Sacramento City Teachers Association (SCTA) and certified SCTA as the exclusive representative of an appropriate unit of certificated teachers.

In its request for recognition, SCTA sought to exclude "day-to-day" substitutes from its requested bargaining unit. St. HOPE opposed the request, contending that the requested unit was inappropriate because of this exclusion. Therefore, the issue was whether SCTA had

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

sufficiently rebutted the presumption created by *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), that all classroom teachers belong in the same bargaining unit. The *Peralta* presumption is rebuttable based on evidence of community of interest, established practices including extent of organization, and employer efficiency. In the underlying decision reversing the administrative determination, the Board determined that SCTA's evidence successfully rebutted the *Peralta* presumption and that it therefore requested an appropriate unit.

St. HOPE argues that the Board should join its request for judicial review of that decision because it allegedly concerns a legal question of "special importance" within the meaning of section 3542, subdivision (a) of the Educational Employment Relations Act (EERA).[2] For the following reasons, we deny St. HOPE's request.

DISCUSSION

Under EERA section 3542, subdivision (a):

> No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, *agrees that the case is one of special importance* and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

(Emphasis added.)

Under PERB Regulation 32500, the Board has the sole discretion to determine whether a case is one of special importance. The regulation states, in pertinent part: "The Board may join in a request for judicial review or may decline to join, at its discretion." (PERB Regulation, § 32500, subd. (c).)

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

The Board has strictly construed these provisions in order to ensure "that the fundamental rights of employees to form, join and participate in the activities of employee organizations is not abridged. Further, the standard is also employed to prevent employee organizations' rights from being inhibited because if unit determinations by PERB are subject to numerous legal challenges, delays of implementation of the Board's decisions could occur." (*California Virtual Academies* (2016) PERB Order No. JR-27, at pp. 3-4 (internal citations omitted).)

Consequently, the Board will join a request for review only if: (1) there is a novel issue presented; (2) the issue primarily involves construction of a statutory provision unique to the statute under consideration; and (3) the issue is likely to arise frequently. (*Burlingame Elementary School District* (2007) PERB Order No. JR-24, p. 3.) All three parts must be satisfied before PERB will join in the request for judicial review, meaning that PERB joins in requests for judicial review only in the narrowest of circumstances. (*California Virtual Academies*, *supra*, PERB Order No. JR-27, p. 4.)

St. HOPE argues that this case presents a novel issue because the Board has never before determined whether substitute teachers must be included in a unit of classroom teachers at the time of unit formation. But as St. HOPE recognizes in its request for judicial review, the Board has frequently had occasion since *Peralta* to determine the appropriate placement of substitutes, even if none of those cases fits the exact circumstances presented here. (*See*, *e.g.*, *Palo Alto Unified School District* (1979) PERB Dec. No. 84; *Paso Robles Union School District* (1979) PERB Decision No. 85; *Dixie Elementary School District* (1981) PERB Decision No. 171; *Long Beach Community College District* (1989) PERB Decision No. 765.) In these cases, the Board approved a variety of configurations. To be sure, St. HOPE disagrees

with the Board's decision to recognize SCTA's unit as appropriate, but its mere disagreement does not convert this otherwise pedestrian matter into an issue of novel or special importance. Nor should we reach a contrary result merely because the precise circumstances at issue here have not arisen before. (*California Virtual Academies, supra*, PERB Order No. JR-27, p. 5.) First, it is typically possible to find distinguishing facts or circumstances in any case, and St. HOPE's formulation would open the definition of "novel issue" to a very broad interpretation. Second, as discussed further below, the fact that these precise circumstances have not previously occurred may in fact weigh against judicial review, as it suggests that these circumstances are unlikely to recur "frequently."

St. HOPE also argues that this matter implicates our interpretation of section 3545 of the EERA, but this argument proves too much. It would mean that virtually any case involving the *Peralta* presumption or other EERA unit determination issues, as well as many other types of cases in which PERB applies a particular law to specific record facts, would qualify as primarily involving construction of the statute under consideration. The underlying decision focused on whether the facts adduced in the evidentiary record were sufficient to rebut the *Peralta* presumption: "The instant case tests under what circumstances employee choice and specific community of interest facts overcome the *Peralta* presumption in an unrepresented workplace. We consider that question based on the record the parties created." (*St. HOPE, supra*, PERB Decision No. Ad-472, pp. 10-11.) Significantly, the record here showed that St. HOPE employed a large number of substitutes who never worked a single day, that the regular teachers had organized themselves into a cohesive unit without the substitutes, and that St. HOPE made no effort to prove that the requested unit would in any way impact its operational efficiency. Taken together and in the light of our precedent, these facts sufficiently rebutted

the *Peralta* presumption. In other words, this case turned on very specific record facts, which further counsels against joining in St. HOPE's request for judicial review.

Finally, St. HOPE contends that this issue is likely to arise in the future with the creation of new units of classroom teachers in charter schools. As noted above, St. HOPE's own argument, in which it noted that PERB has not previously considered these precise circumstances, belies its "frequency" argument. In any event, while it is unclear whether the precise facts present here will recur, we agree with the statement in *San Diego Community College* District (2002) PERB Order No. JR-20: "[a]s the first two prongs of the Board's three part test for seeking judicial review are not met, it is not relevant whether the issues presented in this case are likely to arise frequently." (*Id.* at p. 4.)

Accordingly, we conclude that St. HOPE has failed to show that the Board should join its request for judicial review.[3]

ORDER

The request filed by St. HOPE Public Schools that the Public Employment Relations Board join in a request for judicial review of *St. HOPE Public Schools* (2018) PERB Order No. Ad-472 is hereby DENIED.

Member Krantz joined in this Decision.

Member Shiners' concurrence begins on page 6.

[3] In light of this conclusion, we also deny St. HOPE's request for a stay of its bargaining obligation pending judicial review.

SHINERS, Member, concurring: In *St. HOPE Public Schools* (2018) PERB Order No. Ad-472, I dissented from the majority's grant of a representation petition establishing an initial bargaining unit of classroom teachers at St. HOPE Public Schools (St. HOPE) that excludes day-to-day substitute teachers. In my view, the majority departed from the Board's longstanding interpretation of section 3545 of the Educational Employment Relations Act (EERA), as set forth in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*). Based on the facts before us, I would have found that the petitioner, Sacramento City Teachers Association, failed to rebut the *Peralta* presumption that an appropriate unit of classroom teachers includes all classroom teachers employed by the public school employer. Accordingly, I would have found the petitioned-for bargaining unit inappropriate and denied the petition.

Although I continue to believe my colleagues misapplied the *Peralta* presumption in the underlying decision, I agree this case is not one of "special importance" permitting judicial review under EERA section 3542, subdivision (a)(1). Because judicial review of a unit determination decision necessarily delays the effectuation of statutory rights, the Board "applies a strict standard when reviewing requests for judicial review." (*California Virtual Academies* (2016) PERB Order No. JR-27, p. 4; *San Diego Community College District* (2002) PERB Order No. JR-20, pp. 2-3.) One of the three necessary requirements for granting judicial review is that "the issue primarily involves construction of a statutory provision unique to the statute under consideration." (*Regents of the University of California* (2018) PERB Order No. JR-28-H, p. 3 (*Regents*).) That requirement is not met here because the Board did not have to interpret the language of EERA section 3545 to decide this case. Rather, it applied a well-established interpretation of EERA section 3545, i.e., the *Peralta* presumption, to the particular

facts in the record. As noted decades ago, the Board's "weighing and balancing of the multiplicity of section 3545(a) factors in light of the particular facts presented" does not constitute statutory interpretation. (*Livermore Valley Joint Unified School District* (1981) PERB Order No. JR-9, p. 4, footnote omitted.) Further, the majority's weighing of factors in the underlying decision does not compel a particular outcome in future cases with different facts. (*Id*. at p. 3, fn. 2; compare *Castaic Union School District* (2010) PERB Order No. JR-25, p. 4 [granting judicial review because the Board's interpretation of statutory provisions resulted in excluding all part-time playground positions from representational rights under EERA regardless of particular factual circumstances].) Accordingly, I agree this case does not present an issue primarily involving statutory interpretation.

As to the other two requirements for judicial review—that the issue be novel and likely to arise frequently (*Regents, supra*, PERB Order No. JR-28-H, p. 3)—I agree the issue presented in this case is not novel for the reasons stated in the majority opinion, and that we need not decide whether the issue is likely to arise frequently. Consequently, I join my colleagues in denying St. HOPE's request for judicial review.