STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF SPECIAL AGENTS OF THE DEPARTMENT OF JUSTICE, Employee Organization, APPELLANT, and CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION, Employee Organization, APPELLANT. State Employer-Employee Relations Act Unit Determination Hearings.	Case Nos. S-R-5-S S-R-6-S PERB Order No. Ad-78-S ADMINISTRATIVE APPEAL October 17, 1979

Appearances: Russell L. Richeda, Attorney (Carroll, Burdick & McDonough) for Association of Special Agents of the Department of Justice and California Department of Forestry Employees Association; Richard T. Baker, Executive Assistant for Professional Engineers in California Government (amicus); Barbara T. Stuart, Assistant Chief Counsel, Governor's Office of Employee Relations, for State of California (amicus).

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

The Association of Special Agents of the Department of Justice and the California Department of Forestry Employees Association (hereafter the Associations) appeal from a determination by the Public Employment Relations Board (hereafter Board) General Counsel that evidence relevant to exclusions from representation units of classifications and

individuals asserted to be managerial, supervisory or confidential must be presented in so-called Phase III proceedings and that such evidence already in the Phase II record is not admissible.[1] The Associations' position is that evidence offered in Phase II is responsive to the exclusionary claims of the Governor's Office of Employee Relations (hereafter GOER) and that the requirement that such evidence be produced anew is unnecessary and burdensome.

The general counsel's adverse ruling is predicated on his assertion that allowing Phase II evidence in the Phase III hearing would be harmful to the entire SEERA unit determination process, cause additional problems in the future and would be contradictory to the purpose of separating Phase II and Phase III issues. The general counsel also indicates that his procedure would provide to the Board itself a cleaner, more compact and understandable record.

The Board sustains the Associations' objections to the

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[1]The general counsel is conducting a single, consolidated hearing emcompassing all unit petitions filed under the State Employer-Employee Relations Act (hereafter SEERA, codified at Gov. Code sec. 3512 et seq.). However, for his convenience in dealing with the numerous and complex issues involved, he divided the proceeding into consecutive "phases." Phase II, now completed, dealt with the basic issues of appropriateness. Phase III, currently in progress, deals with the State's claim that certain classifications and individual employees must be excluded from representation units pursuant to SEERA sections 3513(c) and 3522 which bar managerial, supervisory and confidential employees from placement in such units.

general counsel's ruling. In doing so it is mindful of its determination in California State Employees Association, et al (3/5/79) PERB Order No. Ad 59-S, that the conduct of the SEERA unit determination hearings was within the discretion of the general counsel and would not be interfered with by the Board itself absent a showing of denial of due process or some other indication that the parties may be denied a fair and impartial proceeding.

Here, the general counsel has offered no specific grounds for his finding that the SEERA process would be harmed should Phase II material be admitted in the Phase III hearing. While the general counsel's concerns may be genuine, they should not be supported at the expense of feasible and economical participation by the parties whose interests are likely to be adversely affected by an unnecessarily burdensome procedure. To require a party to introduce a second time evidence already presented raises the strong likelihood that litigation costs will increase and further presents the possibility that witnesses used in Phase II may again be taken from their employment duties with the State.[2] Absent any clear evidence to the contrary providing an adequate basis for the general

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[2]Of course, the State or other parties may recall the Phase II witness as their own, to offer new evidence or to rebut evidence given in Phase II which is relevant to Phase III issues and which it was precluded from offering in Phase II.

counsel's concerns, his requirement points to a procedure which meets the Board's test of procedural bias announced in California State Employees Association, et al, supra. Moreover, the general counsel's ruling, absent specific support in the record, appears contrary to the general administrative law principle in favor of official notice of records of the administrative agency. (See e.g., Gov. Code section 11515; Witkin, California Evidence (1966) p. 35.)

The general counsel's desire to provide the Board itself with a separate and better organized record of Phase III evidence is appreciated, but can be otherwise satisfied. The Board's burden in coping with the Phase II transcripts can be lightened to supportable levels by requiring that a party seeking to utilize Phase II evidence, make an appropriate offer of proof by identifying the witnesses or physical evidence relied upon and citing the specific page(s) of the Phase II transcript where such evidence is to be found.[3] This procedure will also serve to place other parties to the hearing on full notice of such reliance.

ORDER

The Public Employment Relations Boards ORDERS that the appeal filed by the Association of Special Agents of the

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[3]The Phase II record exceeds 27,000 pages and it would otherwise be manifestly difficult to locate pertinent exclusionary evidence.

Department of Justice and the California Department of Forestry Employees Association from the general counsel's determination that evidence relating to exclusionary matters presented in Phase II of the State Employer-Employee Relations Act unit determination hearing is inadmissible in Phase III hearings is sustained as reflected hereafter:

The Board ORDERS that the general counsel shall, upon request, admit into evidence testimony, documents and such other evidence introduced in Phase II of the SEERA hearings that is properly admissible and relevant to issues raised in Phase III thereof; parties who have completed Phase III proceedings as of this date and who wish to introduce Phase II evidence may submit to the general counsel an appropriate motion, supported by good cause, to re-open that part of the proceeding; and

It is further ORDERED that the general counsel shall require each party, prior to seeking introduction of Phase II evidence in the Phase III hearings, to identify the witnesses and/or the other evidence offered in proof and the specific page(s) of the Phase II transcript wherein such evidence may be located; and

It is further ORDERED that the general counsel shall assure that any other parties to the Phase III hearings affected by such order of proof shall have notice thereof.

This order shall be effective the 17th day of October, 1979.

By: Harry Gluck, Chairperson

Raymond J. Gonzales, Member

Barbara D. Moore, Member

STATE OF CALIFORNIA

Memorandum

To: All SEERA Interested Parties Date: August 22, 1979

From: William P. Smith, General Counsel
PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
923 12th Street, Suite 201
Sacramento CA 95814
(916) 323-2531

Re: Motion to Use Phase II Evidence in Phase III Hearings

The motion of the Association of Special Agents of the Department of Justice and the California Department of Forestry Employees Association that Phase II evidence be considered in Phase III is denied.

Upon considering the arguments and authorities of all parties, it is found that allowing admission of Phase II evidence in Phase III would be harmful to the entire SEERA process to date and would cause additional unnecessary problems in the future. It would also be contradictory to the basic purpose of separating out the exclusionary issues in the first place, which was to expedite and simplify the process by allowing the parties to concentrate on the uniting criteria without then having to be concerned with the exclusionary issues.

The primary purpose of permitting such a procedure would be to prevent duplication and thereby shorten the Phase III hearings. It is found that such a proposed procedure would create more problems than it would solve. This is due to the fact that the parties would be attempting to incorporate, rebut and/or impeach witnesses and evidence by taking previous transcript language out of its original context. Should any party wish to recall a Phase II witness and address the same questions to such witness they are free to do so. It is felt that this procedure creates a cleaner, more compact and understandable record upon which the Board itself can base its Phase III decisions.

Phase I evidence and testimony, however, may be referred to in Phase III subhearings as was the original intention.