



by secret ballot, under the supervision of the PERB Sacramento Regional Director. The election was to determine whether or not bargaining unit 1 employees desire to place in effect the fair share fee provision contained in the parties' collective bargaining agreement (CBA) effective May 18, 1989 through June 30, 1991. Although the Ralph C. Dills Act (Dills Act)<sup>1</sup> does not require PERB to conduct such an election, PERB agreed to conduct the election on a contract basis. Pursuant to the CEA, the election was conducted by secret mailed ballots and the ballot count was scheduled for June 4, 1991.

On May 24, 1991, CSEA filed with the PERB Sacramento regional office a "Motion for Order to Exclude From Voter Eligibility List Non-Unit 1 Employees." In its motion, CSEA requested that the PERB Regional Director issue an order declaring that all individuals who terminated their employment in bargaining unit 1 prior to casting their ballots on the fair share fee election be deemed ineligible and their ballots be invalidated. In the alternative, CSEA moved for an order requiring the ballots of all individuals who had terminated their employment in bargaining unit 1 prior to casting their votes be held unopened and uncounted pending an opportunity for further determination as to their validity. On May 29, 1991, the Regional Director issued his decision denying CSEA's motion to exclude certain employees from the voter eligibility list.

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<sup>1</sup>The Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

On May 30, 1991, CSEA filed in Sacramento County Superior Court a "Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction" against PERB. CSEA claimed that, pursuant to PERB regulations, individuals not employed on the date they cast their ballots in the election are ineligible to vote. CSEA further argued that PERB regulations provide that any party may, for good cause, challenge the eligibility of a voter and that unresolved challenges, when sufficient in number to effect the outcome of an election, shall be resolved by PERB.

On May 31, 1991, representatives from CSEA, DPA and PERB appeared in the Sacramento County Superior Court regarding the motion for a temporary restraining order. At the hearing, PERB representatives argued that CSEA had not exhausted its administrative remedy by first requesting a stay from the Board. The court suggested that CSEA file such a request, and if not granted, CSEA would be given an opportunity on June 3, 1991 to further argue before the court regarding the issuance of a temporary restraining order. On May 31, 1991, CSEA filed a Request for Stay and Memorandum of Points and Authorities with the Board requesting that the ballots of the identified 252 former bargaining unit 1 employees be sequestered and remain unopened and uncounted at the June 4, 1991 scheduled ballot count. On the same date, CSEA was contacted by the PERB General Counsel and Deputy General Counsel and informed that the request for stay was inadequate in that it failed to include, as required by PERB regulation, an administrative appeal. On June 3, 1991,

CSEA filed its appeal to the Sacramento Regional Director's May 29, 1991 administrative decision with the Board itself. On June 3, 1991, the Board issued PERB Order No. Ad-220-S wherein the Board stayed the ballot count in its entirety pending review of the appeal.

#### FACTS

Pursuant to the authority set forth in sections 3515 and 3515.7 of the Dills Act, DPA and CSEA entered into a CBA covering bargaining unit 1, effective May 18, 1989 through June 30, 1991, which provided that CSEA could request a fair share fee election at any time during the term of the agreement. The CBA also specified that the election "shall be conducted by the PERB," but also provided for selection of another state agency or private firm to conduct the election if PERB chose not to do so. The CBA further specified certain conditions for the election, including one condition regarding voter eligibility. Article 3, section 3.2 b (6) states:

Only those employees in Unit 1 who have been on the State payroll for a period of at least 45 calendar days prior to the fair share fee election shall be eligible to vote.

On February 11, 1991, DPA and CSEA agreed to the terms of the CEA, which was approved by the PERB Sacramento Regional Director. While the CEA states that the election is to be conducted in accordance with the CEA and applicable PERB procedures, there are specific sections addressing voter eligibility and challenges to voter eligibility. Section 3 of the CEA states:

A. The eligible voters shall be those employees within Unit 1 who were employed as of January 31, 1991. "Employed" means on paid or unpaid status in any position included in Unit 1.

B. Employees who are ill, on vacation, on leave of absence, less than full time, permanent-intermittent, and employees who are in the military service of the United States shall be eligible to vote.

C. The following groups of employees are NOT eligible to vote:

1. All employees who are not employed in classifications or positions within Unit 1, such as employees in positions which have been determined to be managerial, supervisory, confidential or excluded from coverage under the Dills Act by the PERB or by written agreement of the State Employer and CSEA.

2. Retired annuitants.

3. Employees on unpaid status for 12 or more consecutive months prior to January 31, 1991.

D. Employees who hold more than one job position in more than one unit represented by CSEA will be eligible to vote only if this primary position is in Unit 1.

Section 4.D. of the CEA provides an opportunity for DPA and CSEA to jointly stipulate, in writing, to corrections to the voter list (additions or deletions) prior to the mailing of notices or ballots. In section 2.F. of the CEA, a mechanism was specified whereby, during the time period set for duplicate ballots to be requested by employees on the voter list, employees not included on the list of eligible voters could request a challenged ballot.

Finally, in section 7, entitled "Challenged/Void Ballots," the CEA provides the following:

A. The State Employer and CSEA each agree not to challenge the eligibility of any voter whose name appears on the list of eligible voters.

B. PERB will issue challenged ballots pursuant to section 2.F. above. Any such ballots, if cast, will comprise the only challenged ballots in this election and will be set aside unless they are sufficient in number to affect the outcome of the election. Should challenged ballots be outcome-determinative, they will be resolved by the PERB Sacramento Regional Director or his designee, whose decision regarding the disposition of the challenges shall be final and binding upon the parties.

C. Should the parties discover, while the election is in progress, employee names which have been included on the voter list in error, they may mutually agree that ballots cast by these individuals be voided. Any such mutual agreement shall be in writing, signed by both parties, and shall be filed with the PERB Sacramento Regional Office not later than May 27, 1991.

Pursuant to the CEA, the election proceeded until June 3, 1991, when, as a result of the issue of voter eligibility, the Board ordered a stay of the ballot count scheduled for June 4, 1991. (State of California (Department of Personnel Administration) (1991) PERB Order No. Ad-220-S.)

#### ADMINISTRATIVE DETERMINATION

The Regional Director's analysis begins by noting that CSEA's argument relies heavily on its reading of the meaning of

PERB Regulation 32728<sup>2</sup>, which provides:

Voter Eligibility. Unless otherwise directed by the Board, to be eligible to vote in an election, employees must be employed in the voting unit as of the cutoff date for voter eligibility, and still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote. Mailed ballots may be utilized to maximize the opportunity of such voters to cast their ballots.

CSEA argues that a portion of this regulation should be incorporated into the CEA despite its obvious omission. In particular, the CEA does not include a provision that the individuals must still be employed on the date they cast their ballots in the election in order to be eligible to vote. Rather, the CEA includes a requirement that employees be employed in the unit as of a date certain (i.e., January 31, 1991). Even assuming that PERB Regulation 32728 applied to this election, the Regional Director rejected CSEA's argument. He reasoned the requirement that employees be employed at the time they cast their ballots is not applicable in all PERB-conducted elections. As PERB Regulation 32728 states, the Board has the authority to direct otherwise. In this case, the Sacramento Regional Director approved the CEA, which directed that eligibility in this election will not include the requirement that employees still be employed in bargaining unit 1 after January 31, 1991.

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<sup>2</sup>PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Next, CSEA argues that pursuant to PERB Regulation 32732, the Sacramento Regional Director is obligated to challenge the eligibility of the voters who have been identified by CSEA as ineligible. PERB Regulation 32732 provides:

(a) In an on-site election, a Board agent or an authorized observer may challenge, for good cause, the eligibility of a voter. A person so challenged shall be permitted to cast a challenged ballot.

(b) In a mailed ballot election, a Board agent or an authorized agent of any party to the election may challenge, for good cause, the eligibility of a voter. Such challenges shall be made prior to the tally of the ballots.

(c) When sufficient in number to affect the outcome of the election, unresolved challenges shall be resolved by the Board.

However, the Regional Director concluded that nothing in the language of PERB Regulation 32732 requires the Board agent to challenge the eligibility of certain voters. Further, the Regional Director stated that granting CSEA's request to challenge the eligibility of certain voters would result in an obvious subversion of the plain meaning of the CEA. Moreover, the Regional Director noted that in section 7.A. of the CEA, the parties expressly waived any right or opportunity to challenge the eligibility of employees who were eligible as of the cut-off date for voter eligibility. Rather, the only opportunity for challenging ballots was contained in section 7.C. of the CEA. That provision allows CSEA and DPA, but only mutually, to identify voters included on the voter list in error and to stipulate that their ballots be voided. In the present case,

CSEA does not argue that the 252 employees named were included on the voter list in error, but instead asserts they have since left the bargaining unit. Also, CSEA's own supporting documents attest to the fact that DPA does not join in this request.

#### CSEA'S APPEAL

CSEA states this appeal is necessary to resolve the "issue of whether the Public Employment Relations Board, the State of California and CSEA may, solely by contract, avert, avoid and make nugatory PERB Regulation 32728." CSEA also argues the appeal is necessary to determine whether the PERB Regional Director erred in his interpretation of the terms of the CEA.

In its "Supplemental Memorandum of Points and Authorities in Support of Appeal From Administrative Determination," CSEA argues that: (1) PERB has no authority to selectively exempt itself from its own laws and regulations; (2) CSEA did not unmistakably waive or concede to the inapplicability of the voter eligibility provisions set forth in PERB Regulation 32728; and (3) PERB Regulation 32380(a)<sup>3</sup> does not preclude CSEA's appeal as the appeal involves issues of fundamental rights and obligations of much broader consequences than the mere procedural mechanics of an election.

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<sup>3</sup>PERB Regulation 32380(a) provides, in pertinent part:

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot.

In essence, CSEA requests that, consistent with PERB Regulation 32728, the Board should exclude from the voter eligibility list for the fair share fee election those employees who have terminated their employment in bargaining unit 1 prior to casting their ballots. In the alternative, CSEA requests that the ballot of any such employee be sequestered and left unopened and uncounted, pending determination of whether such ballots could affect the outcome of the election and, if so, that CSEA be given an opportunity to further adjudicate the issue of voter eligibility.

DPA filed a one-sentence response that it opposes CSEA's appeal for the reasons set forth in the administrative decision.

#### DISCUSSION

Unlike a certification or decertification election where PERB has a statutory duty to conduct the election,<sup>4</sup> the present case involves an agency fee (or fair share fee) election which PERB is not required to conduct either by statute or PERB regulations.<sup>5</sup>

Pursuant to the parties' CBA, CSEA and DPA entered into a CEA which was approved by PERB. By the express terms of the CEA, voter eligibility is limited to those employees in bargaining unit 1 who were employed as of January 31, 1991. In addition to

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<sup>4</sup>See sections 3520.5 and 3521 of the Dills Act; PERB Regulations 32700-32786, 40130-40330.

<sup>5</sup>See sections 3515.7 and 3540.1(i) of the Dills Act; PERB Regulations 32720 and 40430.

the voter eligibility provisions, the CEA provides that the parties waive their rights to challenge voter eligibility.

CSEA argues that PERB Regulation 32728 applies to the present election. However, the applicable provision of PERB Regulation 32728, that individuals must still be employed on the date they cast their ballot to be eligible to vote, is absent from the CEA. As evidenced by the unambiguous language of the CEA, the parties agreed to determine voter eligibility using a different criteria than PERB Regulation 32728.

PERB caselaw establishes that parties to a valid, PERB approved CEA are bound by its terms. In its very first decision, Tamalpais Union High School District (1976) EERB Decision No. 1,<sup>6</sup> the Board held that the parties are bound by the terms of their CEA. Specifically, in determining voter eligibility, the Board held it need not decide whether the challenged voters were ineligible to vote under the Rodda Act.<sup>7</sup> Rather, the CEA was controlling.

In Los Angeles Unified School District (1980) PERB Decision No. 113, the Board defined its role in consent elections. The Board stated its participation was "ministerial as a matter of convenience to the parties concerned." This is especially true in the present case as the CBA provided that the parties could

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<sup>6</sup>Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

<sup>7</sup>The Educational Employment Relations Act was formerly referred to as the Rodda Act.

select another state agency or private firm to conduct the election if PERB chose not to do so.

Finally, in State of California (Department of Personnel Administration) (1986) PERB Order No. Ad-156-S, the Board held that PERB has the right to proceed under a CEA to conduct the election, even if one party no longer wishes PERB to hold the election. Through statutory interpretation and PERB Regulations 32720 and 40430, the Board found PERB is authorized to take the action necessary to implement the protection of section 3515 of the Dills Act to hold the election as originally agreed to.<sup>8</sup>

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<sup>8</sup>Section 3515 of the Dills Act provides:

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

This section was subsequently amended, effective January 1, 1990. This change has no impact on the disposition of this case.

PERB Regulation 32720 provides:

Authority to Conduct Elections. An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election, pursuant to

As the statute, regulations and cases illustrate, PERB is bound to follow the terms of the CEA. The fact that CSEA now disagrees with the terms of the CEA does not preclude PERB from proceeding with the election.<sup>9</sup>

Although CSEA argues that it does not waive or concede the inapplicability of PERB Regulation 32728 to the election, CSEA did agree to the explicit voter eligibility provision of the CEA. This language is clear and unambiguous: "The eligible voter

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the provisions of Division 2, Chapters 1 and 2; Division 3, Chapter 1; or Division 4, Chapter 1 of these regulations.

The Board shall determine the date, time, place and manner of the election absent an approved agreement of the parties.

PERB Regulation 40430 provides:

Alternative Procedures For Vote.

Notwithstanding the provisions of this Article, the employer and the exclusive representative may mutually agree upon alternative procedures regarding a vote on a fair share fee provision pursuant to Government Code section 3515.7(d).

<sup>9</sup>CSEA's reference to Chaffey Joint Union High School District (1988) PERB Decision No. 669 is misleading. This dismissal case involved interference allegations against both the employer and employee organization for their conduct during an agency fee election. The Board found that, in the totality of circumstances, the allegations stated a prima facie interference violation against both the employer and employee organization. Accordingly, the Board ordered the general counsel to issue complaints.

In its discussion of the CEA, the Board found that the Board agent's approval of a CEA was not sufficient to immunize an employee organization from a finding of a breach of the duty of fair representation. Contrary to CSEA's argument, there was no discussion in Chaffey Joint Union High School District that parties to a CEA may not insulate themselves from statutory or regulatory provisions.

shall be those employees within unit 1 who were employed as of January 31, 1991." By agreeing to this specific language limiting voter eligibility to a date certain, the parties have forgone the provisions of PERB Regulation 32728.

Additionally, the CEA includes provisions limiting the challenges to any ballots. The parties agreed "not to challenge the eligibility of any voter whose name appears on the list of eligible voters." The only opportunity for challenging voters under the CEA provides that CSEA and DPA may mutually identify voters included on the list in error and stipulate that their ballots be voided. Here, there is no such stipulation. Further, CSEA does not argue that certain individuals' names were included on the voter list in error, but asserts that these individuals have since left the bargaining unit. By arguing the applicability of PERB Regulation 32728, CSEA is attempting to circumvent its agreement not to challenge the eligibility of voters named on the voter eligibility list.

Lastly, CSEA argues that PERB Regulation 32380(a) does not preclude its appeal as the issues involve fundamental rights and obligations of broader consequences than the mechanics of an election. In the present case, the election has proceeded and the ballots are ready to be counted pursuant to the terms of the CEA. Instead, CSEA's appeal involves the proper interpretation of the CEA regarding voter eligibility. As the Board concludes the CEA is clear and unambiguous on its face, the Board finds

that the election should proceed pursuant to the terms of the  
CEA.

ORDER

The Board hereby lifts the stay of the ballot count in Case  
No. S-OS-86-S and orders the Sacramento Regional Director to  
proceed with the election.

Members Shank and Camilli joined in this Decision.