

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN DIEGO UNIFIED SCHOOL DISTRICT,)
Employer,) Case No. LA-D-301
and) Administrative Appeal
SAN DIEGO EDUCATIONAL SUPPORT)
PERSONNEL/NEA,) PERB Order No. Ad-278
Employee Organization,)
and) June 27, 1996
CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION,)
Employee Organization.)
_____)

Appearances: Jose A. Gonzales, Assistant General Counsel, for San Diego Unified School District; California Teachers Association by Rosalind D. Wolf, Attorney, for San Diego Educational Support Personnel/NEA; Maureen C. Whelan, Attorney, for California School Employees Association.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Diego Educational Support Personnel/NEA (ESP) of a Board agent's administrative determination. The Board agent dismissed ESP's objections to the decertification runoff election between ESP and the California School Employees Association (CSEA) for members of the paraeducator unit within the San Diego Unified School District (District). ESP objected to the election on the grounds that the District violated the obligation of strict

neutrality mandated by section 3543.5(d) of the Educational Employment Relations Act (EERA)¹ by showing favoritism and support for CSEA in contract negotiations involving a separate bargaining unit, and by delaying negotiations with ESP over a successor agreement in the paraeducator unit. ESP also alleged that CSEA representatives violated PERB Regulation 32738(c)² by awarding voter prizes during the election period and by soliciting and collecting ballots.

The Board has reviewed the entire record in this case, including the administrative determination, ESP's appeal, the

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section of 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32738 states, in pertinent part:

(c) Objections shall be entertained by the Board only on the following grounds:

(1) The conduct complained of interfered with the employees' right to freely choose a representative, or

(2) Serious irregularity in the conduct of the election.

original election objections, and the responses filed by the District and CSEA. Based on the following discussion, the Board reverses the administrative determination, sets aside the election and orders that a new election be conducted.

BACKGROUND

ESP became the exclusive representative of the paraeducator unit within the District in June 1985. The most recent collective bargaining agreement (CBA) between ESP and the District expired on June 30, 1995³. CSEA filed a timely unit decertification petition on March 30. PERB conducted the decertification election, and counted the mail-in ballots on June 13. Of the approximately 2,829 eligible unit voters, 719 voted for ESP, 682 voted for CSEA, and 44 voted for "No Representation." Since no party received a majority of the votes, PERB scheduled a runoff election between ESP and CSEA.

The most recent CBA between ESP and the District required them to begin negotiations over a successor contract by March 3. ESP and the District mutually extended that deadline. On August 17, ESP presented its initial proposal for a successor agreement to the District. ESP sunshined this proposal on August 29. The District sunshined its initial proposal on October 24 and November 14.

In early August the District and CSEA reached a tentative agreement on a successor contract in another bargaining unit, the Operations Support Services (OSS) unit. The OSS unit tentative

³Unless otherwise stated, all dates refer to 1995.

agreement included a 3 percent salary increase and a "me too" provision. The "me too" provision provided that the OSS unit would receive a salary increase equal to any higher salary increase negotiated with any other unit in the District. On August 22, prior to the scheduled ratification of the OSS unit contract by both parties, the District notified CSEA that it would not ratify the agreement unless certain changes were made to its nondiscrimination clause. CSEA nevertheless ratified the tentative agreement on August 28. On August 29, the District pulled approval of the tentative OSS unit agreement from the agenda of its regular board of education meeting. Subsequently, CSEA and the District reopened negotiations.

On October 11, the District and CSEA agreed to a new OSS unit contract which included changes to the nondiscrimination clause, a 3.85 percent salary increase, and a .95 percent bonus. This represented an increase from the amount tentatively agreed to in August of .85 percent on the salary schedule plus the .95 percent bonus. The parties also agreed to extend the "me too" provision to cover the last two years of the three-year agreement.

On October 17, the District and CSEA issued a joint memorandum announcing their contract settlement for the OSS unit. The joint memo was addressed to employees within the OSS unit as well as employees in another unit, Office-Technical and Business Services, who had concluded reopener negotiations with the District. The District issued similar announcements from 1988 to

1991, but made no such announcements of contract settlements between 1991 and 1995. The District Board approved the OSS unit contract on October 24.

PERB mailed ballots for the runoff election in the paraeducator unit to the home addresses of eligible voters on October 23. PERB's voting instructions included the following under the heading "How To Cast Your Ballot":

This is a secret ballot election. An official ballot, an envelope marked "Secret Ballot Envelope" and a postage-paid return envelope addressed to the Public Employment Relations Board are enclosed. To cast your ballot, follow these instructions:

.....

3. Place the ballot (DO NOT FOLD) in the Secret Ballot Envelope. Seal the envelope.
4. Put the Secret Ballot Envelope into the postage-paid return envelope and seal the envelope. Across the flap (on the back of this envelope), PRINT and SIGN your name in the spaces provided.
5. Deposit the postage-paid return envelope in the U.S. Mail in time for your ballot to be RECEIVED by the Public Employment Relations Board no later than 3:00 p.m. on TUESDAY, NOVEMBER 14, 1995. In order to be counted, your ballot must be received by this date and time.

YOUR BALLOT MUST BE PROPERLY CAST IN ACCORDANCE WITH THE ABOVE INSTRUCTIONS IN ORDER TO BE COUNTED. If you spoil your ballot, call the Public Employment Relations Board at the telephone number shown above.

Prior to the ballot deadline, CSEA distributed site precinct instructions to an unspecified number of site representatives. The District includes 192 school sites. The instructions directed the site representatives to "Contact CSEA votes [sic] at your site to assure ballots were marked/mailed. Collect marked ballots that have not been mailed and post them to PERB immediately." CSEA's site precinct tally sheets specifically include separate columns for "ballot mailed" and "ballot collected." Eleven CSEA site representatives provided declarations. In his December 12, declaration, Anthony J. Fernandez (Fernandez), a CSEA field representative and the CSEA employee primarily responsible for coordinating CSEA's campaign, states that "instructions were given to site representatives to ask employees if they had mailed their ballots. Some site representatives were given already marked, signed and sealed ballots." In addition, Fernandez states that he instructed the site representatives that employees were eligible for a prize drawing if "they gave the site representative a sealed mailable ballot." Of the CSEA site representatives providing declarations, three admit to collecting and mailing a total of 24 marked ballots.

On November 13, CSEA site representatives conducted a prize drawing for two movie tickets at each school. To enter the drawing, employees needed merely to state that they had voted in the decertification election. CSEA also conducted a districtwide drawing for a VCR. To enter this drawing, an employee filled out

a postage-paid postcard attached to a CSEA flyer. The postcard indicated that the employee had voted and included the employee's name, address, and telephone number. CSEA picked the winner of this raffle on November 28.

PERB counted the runoff ballots on November 16. Of the approximately 2,636 eligible unit voters, 679 voted for ESP and 884 voted for CSEA. Thus, CSEA received a majority of the ballots cast. On November 28, ESP filed objections to the runoff election. The Board agent dismissed these objections in an administrative determination on March 18, 1996.

ESP'S OBJECTIONS

ESP objects to the conduct of the decertification runoff election on three separate grounds. First, ESP asserts that the District showed favoritism and support toward CSEA during the election period in violation of EERA section 3543.5(d). Specifically, the District's actions in pulling the OSS unit tentative agreement from the board of education meeting agenda, subsequently negotiating a more favorable agreement, and in agreeing to a "me too" provision in the OSS unit contract with CSEA are cited by ESP as conduct showing favoritism to CSEA. ESP also argues that the preparation and distribution by the District of a joint memorandum with CSEA announcing the OSS unit agreement constitutes unlawful favoritism by the District. Additionally, ESP asserts that while the District was negotiating and announcing this favorable agreement with CSEA, it unreasonably delayed commencing negotiations with ESP over a successor

agreement in the paraeducator unit so that there was no opportunity for ESP to negotiate prior to the decertification election.

Second, ESP argues that CSEA inappropriately influenced the election by offering and paying financial rewards and inducements to vote for CSEA. Specifically, ESP refers to the prize drawings conducted by CSEA at individual school sites and on a districtwide basis.

Third, ESP alleges that CSEA violated the secrecy of the ballot and the laboratory conditions of the election by actively soliciting and collecting marked ballots from voters. Specifically, ESP alleges that 11 CSEA representatives solicited and collected marked ballots at various school sites, and that CSEA representatives at other school sites similarly solicited and collected marked ballots.

DISTRICT'S RESPONSE

The District responds that it maintained strict neutrality and showed no favoritism or support for either CSEA or ESP by its conduct. The District asserts that its withdrawal of the tentative OSS unit contract agreement with CSEA from the board of education meeting agenda resulted from its concern over the nondiscrimination clause included in that tentative agreement. In subsequent negotiations, the District states that it made concessions to CSEA in order to secure the change in the nondiscrimination clause. The District also argues that the circulation of a joint memorandum with CSEA announcing the

tentative agreement on a contract in the OSS unit is consistent with its past practice. Finally, the District asserts that the timing of its negotiations with ESP over a successor agreement in the paraeducator unit resulted primarily from the fact that ESP's initial bargaining proposals were not submitted until August 17. Furthermore, the lack of specificity of ESP's initial proposals and the decentralized nature of the bargaining unit resulted in the District's response not being sunshined until October 24.

CSEA'S RESPONSE

CSEA responds to ESP's objections by stating that the prize drawings it conducted at school sites and on a districtwide basis were designed solely to encourage participation in the election by eligible voters. CSEA asserts that the only requirement for participation in these drawings was a statement that the employee had voted, and that no showing of support for CSEA was required. Additionally, CSEA argues that ESP conducted similar activities to encourage election participation, and that ESP had also conducted prize drawings in the original election. CSEA also notes that the districtwide prize drawing was not conducted until November 28, after the deadline for voting in the election.

CSEA offers declarations by or concerning the 11 CSEA representatives alleged by ESP to have solicited and collected marked ballots. Eight of the declarations assert that no ballots were solicited and/or mailed by the named individuals. Three CSEA representatives declare that they received and mailed a total of 24 marked ballots. However, CSEA asserts that the

ballots were marked, sealed and signed before they were received by the CSEA representatives; that none of the representatives assisted anyone in marking a ballot; and that ESP has made no allegation that CSEA representatives assisted in marking ballots or handled any ballots which had not already been marked, sealed and signed by the eligible voter. Additionally, CSEA notes that since its winning margin in the election was over 200 votes, the number of affected ballots (24) was insufficient to affect the outcome of the election.

CSEA also supports the District's position that it maintained strict neutrality in its conduct and favored neither CSEA or ESP.⁴

DISCUSSION

PERB Regulation 32738(c) outlines the grounds for objections to the conduct of an election. The regulation allows objections if: (1) the conduct complained of interfered with the employees' right to freely choose a representative; or (2) a serious irregularity occurred in the conduct of the election. For PERB to sustain the election objections, an effect on the election

⁴CSEA also argues that an addendum to ESP's appeal of the Board agent's administrative determination, filed on April 2, 1996, was untimely and should be rejected by the Board. PERB Regulation 32360 grants parties 10 days to file an appeal to an administrative determination with the Board itself. PERB Regulation 32130(c) grants a five-day extension of time to any filing made in response to documents served by mail. PERB served the administrative determination by mail on March 18, 1996. Including the five-day extension, an appeal was due to be filed no later than April 2, 1996. ESP made a timely filing of its appeal on March 29, 1996, and a timely filing of an addendum to its appeal on April 2, 1996.

result must be shown or logically inferred. The Board will infer the effect if the actions "had the natural and probable effect of discouraging voter participation in the representation election."

(Tamalpais Union High School District (1976) EERB Decision No. 1.)⁵

PERB treats the demonstration of unlawful conduct in the election as a "threshold question." (State of California (Departments of Personnel Administration, Developmental Services, and Mental Health (1986) PERB Decision No. 601-S.) The next issue is whether the unlawful activities establish a "probable impact on the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.) The Board does not require the objecting party to prove the conduct actually impacted the employees' votes. (San Ramon Valley Unified School District (1979) PERB Decision No. 111.) In deciding whether to set aside an election result, the Board will look at the totality of the circumstances and the cumulative effect of the conduct. (Clovis Unified School District (1984) PERB Decision No. 389 (Clovis USD).) It is against these standards that the Board evaluates election objections.

District Conduct

EERA section 3543.5(d) prohibits a public school employer from contributing financial or other support to any employee organization. The Board has held that this section imposes a

⁵Prior to January 1978, PERB was known as the Educational Employment Relations Board.

requirement of strict neutrality on employers. The employer must ensure that its conduct does not influence the free choice of employees in an election, or favor one employee organization or the other. (Santa Monica Community College District (1979) PERB Decision No. 103 (Santa Monica CCD).)

ESP contends that the District's conduct in its negotiations with CSEA over an OSS unit successor agreement prior to the runoff election showed favoritism toward and support for CSEA, thus violating the requirement of strict neutrality. ESP points to the District's removal of the initial tentative agreement in the OSS unit from the board of education agenda, apparently alleging that the District took this action in order to reopen negotiations and pave the way for additional concessions to CSEA.

Both CSEA and the District assert that the District refused to approve the tentative agreement due to a dispute over the text of the agreement's nondiscrimination clause. The District states that the nondiscrimination clause was too broad as written and, therefore, was unacceptable. CSEA claims that it was satisfied with the tentative agreement and did not wish to reopen negotiations.

In support of its position, ESP cites a variety of cases in which PERB has found employers violated the strict neutrality requirement.⁶ The significant distinction between those cases

⁶See Santa Monica CCD; State of California (Departments of Personnel Administration, Mental Health and Developmental Services) (1985) PERB Decision No. 542-S; and Antelope Valley Community College District (1979) PERB Decision No. 97.

and the instant situation is that the allegations of unlawful support relate to conduct engaged in by the District in its negotiations with CSEA in a bargaining unit not involved in the election. The requirement of employer neutrality does not prohibit an employer from fulfilling its statutory obligation to negotiate with an exclusive representative of one unit while a representation election is pending in an entirely different bargaining unit. The Board has refused to find a violation where a pay increase was granted to non-unit employees as well as to unit employees during an organizing campaign. (Clovis USD.)

Furthermore, there is no evidence to support ESP's inference that CSEA colluded with the District to stall ratification of the OSS agreement. Rather, the fact that CSEA went forward with its ratification vote after being notified of the District's intention to remove approval of the agreement from the board of education agenda is evidence of CSEA's desire to move forward with the process. Therefore, ESP's claim that the District violated its requirement of neutrality by pulling the tentative agreement from the agenda is without merit.

ESP also alleges that the District negotiated a "me too" provision in CSEA's contract while it had refused to agree to such a provision in previous negotiations with ESP. The District denies that it has refused to negotiate "me too" provisions with ESP. In support of its position, the District offers copies of the wage sections of other contracts with ESP which contain a "me too" provision. Accordingly, the Board finds that ESP has failed

to present evidence sufficient to conclude that the District's negotiation of a "me too" contract provision with CSEA violated the requirement of strict neutrality.

ESP further contends that the additional wage increase agreed to by the District for OSS unit employees is evidence of support for CSEA. Both the District and CSEA point out that the initial tentative agreement reached in August contained a "me too" clause for the first year. Since the District had subsequently made a higher wage offer than that contained in the tentative OSS unit agreement to a unit comprised of certificated teachers, both CSEA and the District assert that the District was obligated to increase the wage proposal to CSEA. ESP contends that the District was under no legal obligation to grant CSEA the additional wage increase at that time since the higher wage offer to the teachers had not been accepted or ratified. Even if, as ESP claims, the District was under no obligation at that point in time to offer the higher salary proposal, ESP has failed to demonstrate that the District's action violated its requirement of neutrality. It appears that the District's increased wage offer resulted from factors unrelated to the decertification election, such as the dispute over the agreement's nondiscrimination clause and the general status of the negotiations process relative to the OSS unit. ESP has failed to demonstrate that the District's conduct violated its obligation of neutrality.

ESP alleges that the issuance of a joint memo from the District and CSEA announcing their contract settlement in the OSS unit was a departure from its established practice and showed support for CSEA. ESP asserts that under the established practice, new contract settlements are announced by administrative circular issued by the employee services director after District board approval. However, the District and CSEA dispute that the issuance of the joint memo was a departure from past practice. To support this claim, the District submits several examples of such joint announcements issued between 1988 and 1991. Again, since the joint memo involved lawfully negotiated contracts that affected bargaining units not involved in the decertification election, and since ESP has provided no evidence that the memo was circulated outside the units affected by the tentative agreement, its issuance is not objectionable conduct. Furthermore, ESP has not demonstrated that there was a clearly established practice from which the District departed when it issued the joint memo regarding the contract settlements.

ESP also claims that the District unreasonably delayed sunshining its initial proposal for a successor agreement with ESP and, therefore, deprived ESP of the opportunity to negotiate prior to the decertification election. In support of this claim, ESP offers a comparison of timelines between the District's sunshining of its initial proposal to ESP and to the Peace Officers Association (POA) which represents a unit of security officers within the District. The ESP and POA initial proposals

were both sunshined on August 29. The District sunshined its initial proposal to the POA on October 10, and its initial proposal to ESP on October 24 and November 14.

The District sets forth several reasons for responding to ESP's proposal later than to POA's. The District received ESP's initial proposal two weeks later than POA's. The POA proposal was more specific, and POA had met with the District as early as March to apprise the District of its proposals. Finally, while the POA bargaining unit is under the supervision of one supervisor, ESP's unit members are distributed throughout the District, necessitating more time to contact the affected administrators for their input.

The facts do not support ESP's contention that the District unreasonably delayed sunshining its proposal and, therefore, deprived ESP of the opportunity to negotiate before the decertification election. Had the District sunshined its proposal on October 10, the same date it sunshined its proposal to the POA, less than two weeks remained for the parties to engage in negotiations prior to the mailing of ballots on October 23. Furthermore, ESP and the District mutually waived their contractual timelines for sunshining. Those timelines required ESP to present its initial proposal in the beginning of March 1995 and the District to present its proposal five weeks later. Adherence to these timelines would have allowed the bargaining process to begin in the spring of 1995. In light

of this joint waiver and the relatively brief delay in the District's response, ESP's allegations concerning the District's delay of the sunshining process are rejected.

In summary, the Board concludes that ESP has not shown that the District, by its conduct, violated the obligation of strict neutrality required by EERA section 3543.5(d). Consequently, ESP's election objections relating to the District's conduct are rejected.

CSEA Conduct

ESP contends that the election should be set aside because the prize drawings conducted by CSEA represent an unlawful promise and grant of valuable benefits to employees during an election period. As noted above, CSEA conducted two types of drawings, one at individual schools for two movie tickets, and one on a districtwide basis for a VCR. In both instances, employees had only to identify themselves and indicate that they had mailed their ballots to PERB to participate in the drawing. The movie tickets were awarded on November 13, the day before the end of the balloting period, and the VCR drawing was held approximately two weeks after the November 16 ballot count.

PERB has looked to National Labor Relations Board (NLRB) cases for guidance in this area. In National Gypsum Co. (1986) 280 NLRB 1003 [122 LRRM 1295], the employer held raffles shortly before the election, awarded prizes of substantial value, and required participants to complete and sign a questionnaire based on the employer's campaign literature. The NLRB found that the

responses on the signed questionnaires indicated to the employer "where additional campaign efforts should be focused, and afforded potential for directing pressure at particular employees." The NLRB ordered that a new election be conducted.

In Owens-Illinois, Inc. (1984) 271 NLRB 1235 [117 LRRM 1104], the NLRB upheld objections against a union which gave away \$16 jackets to voters between two polling periods. The NLRB found that since the jackets were given away on election day itself, they could have appeared as a reward to those who had voted for the union and as an inducement to those who had not yet voted. However, the NLRB has found the use of inducements permissible when they relate to furthering the election process, are independent from a showing of support of the offering party, and are of insufficient value to create a feeling of obligation in the mind of the winner. (Thrift Drug Co. (1975) 217 NLRB 1094 [89 LRRM 1292]; Crestwood Manor (1978) 234 NLRB 1097 [97 LRRM 1396]; Stride Rite Corporation (1981) 254 NLRB 297 [106 LRRM 1107].)

In this case, to participate in the prize drawings, voters were required only to identify themselves and state that they had voted. They were not required to identify their affiliation, if any, with either organization, nor to state how they had voted. Both ESP and CSEA engaged in this type of conduct during the original and/or runoff elections. The timing of the awarding of the prizes by CSEA is also significant. The school site drawings occurred on November 13, one day prior to the end of the

balloting period. However, ballots had to have been mailed by that date in order to be received by PERB by the November 14 due date. The districtwide prize was awarded on November 28, well after the balloting had been completed. Based on these facts, the Board concludes that ESP's election objections to CSEA's conduct relating to the prize drawings it conducted are without merit..

The remaining issue involves CSEA's collection and mailing of marked ballots. PERB has held that an objection regarding the integrity of the election process requires an assessment of whether the facts indicate that a reasonable possibility of irregularity occurred. (Gilroy Unified School District (1991) PERB Order No. Ad-226 (Gilroy USD) citing Peoples Drug Stores (1973) 202 NLRB 1145 [82 LRRM 1763].) Because the integrity of the election process must be assured, "the Board goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity." (Gilroy USD citing Brink's Armored Car, Inc. (1986) 278 NLRB 141 [121 LRRM 1129] (Brink's Armored Car).)

It is undisputed that CSEA representatives gained unsupervised access to at least 24 marked ballots. Unquestionably, this constitutes a serious election irregularity. The Board must determine whether this irregularity is so serious as to call into question the fundamental integrity, fairness and validity of the election.

Initially, it should be noted that great value is placed

on mail ballot secrecy within PERB's election process. PERB prepares and mails the ballot to the employee's home address. This procedure allows employees to cast their votes away from the electioneering pressures of the parties. PERB voting instructions begin with the statement: "This is a secret ballot election." The voting instructions direct the employee to place the secret ballot into the postage-paid return envelope provided by PERB. The employee then prints and signs his or her name on the back of that envelope. Finally, the instructions specifically direct the employee to deposit the postage-paid return envelope in the U.S. mail. These steps are designed to ensure ballot secrecy and guard against unsupervised access to marked ballots, including the specific instruction that the voter mail the marked ballot to PERB via the U.S. postal system.

In a previous election irregularity case, PERB set aside a mixed mail and on-site election when it was determined that a party to the election jeopardized the integrity of the election process. (Gilroy USD.) In a decertification election, a party to the election circulated a flyer and sign up form mischaracterizing the eligibility requirements for mail ballots. This flyer also characterized the purpose of the election as keeping the incumbent union as the exclusive representative. As a result of this flyer, 82 ineligible employees signed up for mail ballots. The 82 employees were originally eligible for the on-site election. The Board found a material breach of the election process which "calls into question the fairness and

validity of the election."

PERB has not previously considered a case which involved unsupervised party access to marked employee mail ballots. In considering access to marked ballots, the NLRB focuses on whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election. (Polymers, Inc. (1969) 174 NLRB 282 [70 LRRM 1148].) The NLRB goes to great lengths to protect the integrity of the election process, and has determined that the danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations due to the absence of direct board supervision over the employees' voting. (Brink's Armored Car.) Therefore, mail elections require a more rigorous review of irregularities, particularly those involving marked ballots.

The NLRB sets aside an election whenever an irregularity involving marked ballots occurs that casts doubt or a cloud over the integrity of the election. (Austill Waxed Paper Co. (1968) 169 NLRB 1109 [67 LRRM 1366].) In Paprikas Fono (1984) 273 NLRB 1326 [118 LRRM 1150], the NLRB set aside an election because the board agent improperly handled challenged ballots following the election. The board agent failed to place the challenged ballots in a sealed envelope in the presence of the parties. Instead, he took the ballots to his office and placed them in a sealed envelope the following day. The board found no evidence of tampering, but found the ballots had not been adequately safeguarded. The NLRB based its decision on the appearance of

irregularity created by the procedures used. The NLRB went so far as to say that it "would set aside an election whenever there has been any unsupervised access to the ballot box" (emphasis in original).⁷ This unsupervised access may include access by a neutral board agent.

In New York Telephone Co. (1954) 109 NLRB 788 [34 LRRM 1441], the NLRB set aside a runoff mail ballot election due to a discrepancy between the number of returned ballots and tallied votes. During the initial tally, the board agent noted 729 of the 4467 returned ballots were missing. The parties searched the room but did not locate the missing ballots. The next week, the board agent found the box of unopened ballots. The board agent had locked the room containing the missing ballots during the time they were missing, and no evidence of tampering existed. The board agent opened and tallied the missing ballots in the presence of the parties. However, since the irregularity concerned an essential condition of the election and exposed a sufficient number of ballots to question, the NLRB ordered a new election.

PERB does not always follow the per se rules of the NLRB in the area of election objections. (State of California (Department of Personnel Administration) (1992) PERB Decision No. 948-S; Sierra Sands Unified School District (1993) PERB

⁷The NLRB declines to set aside elections based on ballot irregularities when the unsupervised access was to unmarked ballots. (Trico Products Corporation (1978) 238 NLRB 380 [99 LRRM 1265]; Bell Foundry Corporation (1987) 126 LRRM 2705.)

Decision No. 977.) However, both the NLRB and PERB cases highlight the importance of preserving the laboratory conditions surrounding the mail ballot election in order to protect the integrity of the election process.

The Board considers any unsupervised access to marked ballots by a party to the election to be a serious election irregularity. When a party to the election engages in a concerted effort to obtain unsupervised access to marked ballots in direct violation of PERB's voting instructions, the laboratory conditions of the election are compromised and its fairness, validity and integrity are called into question.

In this case, CSEA engaged in an organized, concerted, multiple-site effort to gain access to marked ballots, in direct violation of PERB's voting instructions. That effort succeeded, resulting in the unsupervised possession by CSEA, a party to the election, of at least 24 marked ballots at at least three sites. Thus, an essential condition of the election has been violated by CSEA. Under these circumstances, it is unnecessary for the Board to evaluate CSEA's intent in gaining access to the marked ballots, or to consider whether CSEA's unsupervised possession led to ballot tampering, or to determine whether CSEA possessed a sufficient number of ballots to change the election's outcome in light of the margin of victory.

The Board has no more fundamental responsibility in conducting elections than to insure their fairness and integrity. CSEA's conduct constitutes an egregious election irregularity

in violation of an essential election condition which has compromised the fairness and integrity of the election. Therefore, the Board concludes that the election must be set aside and a new election conducted.⁸

ORDER

Based on the election objection filed by the San Diego Educational Support Personnel/NEA concerning the California School Employees Association's (CSEA) solicitation and collection of marked mail ballots, the Board ORDERS the San Francisco Regional Director to set aside the runoff election tallied on November 16, 1995, not to certify the results, and to conduct a new election. The Board DISMISSES the election objections concerning the District's obligation of strict neutrality and the prize drawings conducted by CSEA.

Members Johnson and Dyer joined in this Decision.

⁸The Board does not hereby conclude that any unsupervised access to a marked ballot violates an essential election condition and compromises the integrity of the election to the extent that it must be set aside. Incidental handling of a sealed, marked ballot, such as through an employee's deposit of a coworker's ballot in a mailbox, may occur in a mail election. The Board will consider circumstances involving unsupervised access to marked ballots on a case-by-case basis evaluating the specific conduct of the parties to the election relative to the unsupervised access.