

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

POWAY UNIFIED SCHOOL DISTRICT,

Employer,

and

POWAY COUNCIL OF CLASSIFIED
EMPLOYEES, CFT/AFT, AFL-CIO,

Petitioner,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION AND ITS POWAY
CHAPTER 80,

Exclusive Representative.

Case No. LA-DP-333-E

Administrative Appeal

PERB Order No. Ad-306

December 22, 2000

Appearances: California School Employees Association by David J. Dolloff, Staff Attorney, for California School Employees Association and its Poway Chapter 80.

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association and its Poway Chapter 80 to an administrative determination (attached) by a Board agent. The administrative determination finds that the objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO concerning serious irregularity in the conduct of the decertification election warrant setting aside the election results.

After reviewing the entire record, the Board affirms the administrative determination.

ORDER

Based on the entire record in this case, the election objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO (AFT) are sufficient to warrant setting aside the election results and ordering a new election. Therefore, the results of the decertification election tallied on June 26 and July 20 will not be certified, and a re-run election is hereby ORDERED.¹ The ballot choices shall be California School Employees Association and its Poway Chapter 80; Poway Council of Classified Employees, CFT/AFT, AFL-CIO; and No Representation.

Members Dyer and Baker joined in this Decision.

¹AFT requests that a runoff election be conducted between the two employee organizations. A runoff election (where "No Representation" would be dropped as a ballot choice) is not appropriate, however, because the election results are being voided.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
SAN FRANCISCO REGIONAL OFFICE

POWAY UNIFIED SCHOOL DISTRICT,)	
Employer,)	
)	
-and-)	Case No. LA-DP-333
)	
CALIFORNIA SCHOOL EMPLOYEES)	ADMINISTRATIVE
ASSOCIATION (CSEA) POWAY CHAPTER 80,)	DETERMINATION
Exclusive Representative,)	
)	September 28, 2000
-and-)	
)	
POWAY COUNCIL OF CLASSIFIED)	
EMPLOYEES, CFT/AFT, AFL-CIO,)	
Petitioner.)	
_____)	

This administrative determination finds that the objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO concerning serious irregularity in the conduct of the decertification election warrant setting aside the election results.

Procedural History

On April 28, 2000,¹ the Poway Council of Classified Employees, CFT/AFT, AFL-CIO (AFT) filed a decertification petition seeking to replace the California School Employees Association and its Poway Chapter 80 (CSEA) as the exclusive representative of the office-technical and paraprofessional unit in the Poway Unified School District (District). On May 18, PERB issued an administrative determination finding that AFT had submitted adequate proof of support with its petition. The parties entered into a consent election agreement for a mailed

¹All dates herein refer to 2000.

ballot election on May 22. Ballots were mailed to all eligible voters on June 2, due to be returned to PERB by June 23, and counted on June 26.

In all, three ballot counts were conducted, two on June 26 and the third on July 20. Prior to the first count, the parties and PERB Board agent Jerilyn Gelt (Gelt) engaged in a discussion regarding the number of ballots received by PERB's Los Angeles regional office. Various numbers were bandied about, including 706, 708 and 714. Gelt ended the discussion by telling the parties that the counting of the ballots would reveal the actual number of ballots received.

At the conclusion of the first count, the tally read as follows:

Approximate number of eligible voters	1107
Void ballots	1
Votes cast for CSEA	319
Votes cast for AFT	276
Votes cast for No Representation	31
Valid votes counted	626
Challenged ballots	2
Valid votes counted plus challenged ballots	628

Although AFT and CSEA questioned the accuracy of the total number of ballots,² the count was concluded. Since the challenged ballots were not sufficient to affect the results of the

²CSEA did not refute this assertion in its response to AFT's objections. The District also referenced the discussion in its response to the objections.

election, and CSEA received a majority of the valid ballots cast, it was declared the winner. All parties signed the tally, whereupon the District and AFT representatives left the PERB office, while CSEA representatives remained talking amongst themselves.

Shortly thereafter, Gelt informed CSEA that 71 additional ballots had been located.³ She asked that they remain in the PERB office while she attempted to locate District and AFT representatives.

AFT representatives were located outside of the building, informed of the error, and accompanied Gelt back to the PERB office. The District representative had already left the premises. CSEA and AFT then witnessed the counting of the additional 71 ballots. At the conclusion of the second count, the original tally was amended to read as follows:

Approximate number of eligible voters	1107
Void ballots	3
Votes cast for CSEA	353
Votes cast for AFT	307
Votes cast for No Representation	34
Valid votes counted	694
Challenged ballots	2

³AFT states in its objections that the ballots "were in a stack on the floor behind the head table." In its response to the objections, the District states that they were informed by Gelt on June 27 that the missing ballots had been found in a wastebasket. It is unnecessary to resolve this discrepancy since where the ballots were found is not dispositive of the issues raised in the objections.

Valid votes counted plus challenged ballots 696

Once again, the total number of ballots counted was questioned by AFT and CSEA.⁴

The numbers on the original tally sheet signed by the parties were crossed out and the new totals recorded. Neither CSEA nor AFT re-signed or initialed the revised tally. Based on the amended tally, CSEA remained the winner of the election.

THE OBJECTIONS

AFT filed timely objections to the election on July 3 pursuant to PERB regulation 32738.⁵ The statement of objections

⁴CSEA did not refute this assertion in its response to AFT's objections. There is no evidence in the record as to the outcome of the discussion.

⁵PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB regulation 32738 provides:

(a) Within 10 days following the service of the tally of ballots, any party to the election may file with the regional office objections to the conduct of the election. Any objections must be filed within the 10 day time period whether or not a runoff election is necessary or challenged ballots are sufficient in number to affect the results of the election.

(b) Service and proof of service of the objections pursuant to Section 32140 are required.

(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.

(d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

(e) No party may allege as grounds for setting aside an election its own conduct or the conduct of its agents.

alleged serious irregularity in the conduct of the election due to 1) ballots having been lost or unaccounted for, and 2) the confusion surrounding the actual number of ballots received by PERB. AFT alleged that if the actual number of ballots received was 706⁶ or more, CSEA would not have received a majority and a runoff election would have been ordered.

On July 13, the parties were informed by the undersigned that, as the first step in the investigation of the objections, a meeting would be held on July 20 to recount the ballots and afford all parties an opportunity to inspect all returned ballots.

(f) At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a PERB election objections hearing. The declarations shall specify the details of each occurrence; identify the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state where and when the allegedly objectionable conduct occurred; and give a detailed description of the allegedly objectionable conduct. All declarations shall state the date and place of execution and shall be signed by the declarant and certified by him or her to be true under penalty of perjury.

(g) The Board agent shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d). The objecting party may appeal the dismissal to the Board itself in accordance with Chapter 1, Subchapter 4, Article 2 of these regulations.

⁶AFT asserts that when AFT staff person Ellen Greenhut called the PERB office on June 23, the last day for receipt of ballots, she was informed by the Los Angeles regional office that 706 ballots had been received.

At the July 20 meeting, 3 unopened ballot envelopes that had been deemed void at the initial June 26 count but not recorded on the tally were found. The recount revealed that ballots for AFT had been miscounted, resulting in 2 additional votes.⁷ As a result of the third count, a corrected tally was prepared and signed by the parties which reflected the following new totals:

Approximate number of eligible voters	1107
Void ballots	6
Votes cast for CSEA	353
Votes cast for AFT	309
Votes cast for No Representation	34
Valid votes counted	696
Challenged ballots	2
Valid votes counted plus challenged ballots	698

Having garnered a majority of the valid ballots counted for the third time, CSEA remained the winner.

On July 25, AFT amended its objections to include allegations that approximately 16 business reply blue envelopes (in which ballots were returned to the PERB office) appeared to have been opened and resealed and, that the election had not been conducted under "laboratory conditions." It sum, it asserted that PERB's conduct had a "probable impact" on the election

⁷It is PERB's practice to count ballots in groups of 50 per ballot choice, with all parties given an opportunity to request a recount at the end of each group. Apparently, no party at the count caught the fact that each of 2 AFT piles contained an additional ballot.

results and as a remedy, it sought to have the election overturned and a runoff election conducted.

POSITION OF THE PARTIES

On July 27, both the District and CSEA were afforded an opportunity to file factual information, supported by declarations or documentary evidence, and legal argument in response to AFT's submissions. Both filed timely responses, though neither provided declarations or documentary evidence.

In its response, the District simply restates its version of events on June 26.⁸ It states that Gelt indicated prior to the first count that 706 ballots had been received, yet the District recites the numbers 708, 712, and 714 as totals that were also discussed. At the end of the first count, the District recalls both AFT and CSEA questioning the accuracy of the total number of ballots.⁹ The District also restated the new totals reached at the conclusion of the recount on July 20. In sum, the District did not take a position in response to the allegations raised by AFT in its objections nor its requested remedy.

CSEA does not dispute the handling or the counting of the ballots by PERB. It asserts that by signing the Tally of Ballots,¹⁰ each party was on notice regarding its responsibility

⁸None of the events cited by the District are disputed in any of the parties' submissions, except for the location of the missing ballots, which has been addressed above.

⁹As noted above, the District was not present at the second ballot count.

¹⁰As noted above, the parties did not sign or initial the changes made to the tally after the second count.

to monitor the counts and was acknowledging that the totals accurately reflected the results of the election.¹¹ In addition, CSEA asserts that AFT's July 25 ballot tampering allegation should have been raised at the recount and is unsubstantiated. Therefore, CSEA requests that the objections be denied.

ISSUES

- 1) Did serious irregularities occur in the conduct of the decertification election?
- 2) If so, should the decertification election results be set aside and a new election ordered?

DISCUSSION

PERB is the neutral State agency charged with conducting representation elections pursuant to the Educational Employment Relations Act.¹² Pursuant to PERB regulation 32738, objections to the conduct of an election are entertained by PERB on only two 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.

¹¹CSEA bolsters its argument by quoting the following statement which appears on the Tally of Ballots form:

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained and that the results were as indicated above. We also acknowledge service of this tally.

¹²EERA is codified at Government Code section 3540 et seq.

A party objecting to an election result must first present a prima facie showing of conduct that constitutes one of the two grounds. This includes a factual showing that employee choice was affected or that the conduct complained of had the natural and probable effect of impacting employee choice. (Santa Monica Unified School District and Community College District (1978) PERB Decision No. 52; San Ramon Valley Unified School District (1979) PERB Decision No. 111; Jefferson Elementary School District (1981) PERB Decision No. 164; Pasadena Unified School District (1985) PERB Decision No. 530.)¹³

After this threshold showing is met, PERB will decide whether to set aside the election result depending "upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (Clovis Unified School District (1984) PERB Decision No. 389; State of California (Department of Personnel Administration) (1986) PERB Decision No. 601-S.) Thus, even where some impact on voters can be inferred, the election result will not always be set aside.

PERB regulations require the Board agent to dismiss election objections which do not "satisfy the requirements of subsections (a) through (d)" of PERB regulation 32738. Even if not subject

¹³PERB looks for guidance, inter alia, to federal labor law decisions, including National Labor Relations Board (NLRB) precedent, in election objection cases. (See, e.g., State of California (1982) PERB Decision No. 198-S.) However, it does not always follow NLRB per se rules in the area of election objections. (San Diego Unified School District (1996) PERB Order No. Ad-278.

to dismissal under PERB regulation 32738, objections are to be dismissed by the Board agent if, after investigation, the objections "do not warrant setting aside the election." (PERB regulation 32739(f).) Alternatively, the Board agent may set aside the election if the results of the investigation warrant such action. (PERB regulation 32739(g).)

Since its inception, the Board's policy and practice has been to maintain and protect the integrity and neutrality of its election processes, with an eye towards maintaining high standards to avoid any taint in the balloting process. In order for the Board to succeed in its mission, the parties must have confidence in the Board's processes. As the NLRB noted,

The commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside the election. (Athbro Precision Engineering Corp., 166 NLRB No. 116, 65 LRRM 1699.)

Election objections regarding the integrity of the election process require assessment of whether a reasonable possibility of irregularity exists. Since this is paramount, "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." (San Diego USD, supra.)

However, "an election need not be perfect to be valid. Mistakes are made in any human endeavor. The question is whether

the mistakes were sufficient to affect the outcome" of the election. (State of California (1986) PERB Decision No. 601).

July 3 Objections

A significant question raised by the objections revolves around the number of ballots received by PERB. Both AFT and the District state that they were informed by PERB on the last day for receipt of ballots and/or prior to the first count that 706 ballots had been received by the Los Angeles regional office. CSEA did not address or dispute this statement, even though it was afforded an opportunity to do so. Thus, it is undisputed that the parties were under the impression that PERB had received at least 706 ballots. After the third count, however, the tally of ballots accounted for only 704 ballots. This is a crucial discrepancy, since an increase in the number of ballots beyond 704 could negate CSEA's majority status and necessitate a runoff election. Unquestionably, the potential of missing ballots sufficient in number to affect the outcome constitutes a serious election irregularity and raises doubts as to the fundamental integrity, fairness and validity of the election. (San Diego USD, supra).

A lack of confidence in the election appears justified given this discrepancy and the totality of events including the initial misplacement of 71 ballots, their subsequent count and addition to the June 26 tally, and the recount on July 20 where a new tally of ballots was issued to correct mistakes contained in the June 26 tallies. PERB and the parties will never know the true

number of ballots received, but the critical errors committed by the Board cannot be used to penalize one of the parties to the election.

AFT complains that beginning prior to the first count, confusion regarding the number of ballots received arose among the parties. Although comments were exchanged citing different numbers of ballots, the discussion was inconclusive. Coupled with the appearance of the 71 additional ballots which confirmed the parties' initial concerns, and the resurgence of identical doubts regarding ballot numbers after the second count, a lack of confidence in the Board's election process is more than justified.

CSEA seeks to diminish AFT's objections regarding the confusion over the number of ballots by arguing that by signing the tally of ballots form, each party was attesting to the accuracy of the results. It is important to note that the June 26 tallies were flawed. In addition, PERB raised the question initially regarding the accuracy of the first ballot count by alerting the parties that additional ballots had been located, and conducting the second and third ballot counts. Under the facts of this case, therefore, the signatures on the two tallies (original June 26 tally¹⁴ and the July 20 tally) are not an explicit waiver to the filing of objections regarding the ballot counts. Nor does regulation 32738 prohibit such objections. The

¹⁴As noted above, neither AFT nor CSEA re-signed or initialed the tally once the new totals were recorded.

determination regarding when a signature on a tally form would constitute a waiver regarding the right to file objections, or cast doubt on objections filed, is left to be determined in a future case.

July 25 Amendment to Objections

AFT raises a concern regarding 16 business reply blue envelopes which contained ballots returned to the regional office that appeared to have been opened and resealed.¹⁵ This allegation is not supported with either facts or argument and is so unclear as to leave the reader wondering what exactly is being alleged, who is accused of the wrongdoing, and the effect on the election. Therefore, since this allegation is vague and unsubstantiated, it is rejected.

AFT also claims that the election was not conducted under "laboratory conditions"¹⁶ and that PERB's conduct had a probable

¹⁵Business reply blue envelopes were included in the ballot packet sent by PERB to eligible voters. Voters were instructed to mark their ballots, enclose the ballot in the business reply envelope, and print and sign their name across the envelope's back flap. AFT does not assert that the signatures were compromised.

¹⁶Laboratory conditions is a standard established by the NLRB in General Shoe Corp. 77 NLRB 124, 21 LRRM 1337 (1948), enforced, 192 F2d 504, 29 LRRM 2112 (CA 6, 1951), cert. denied, 343 US 904, 29 LRRM 2606 (1952) for judging conduct in a representation election. In its decision, the Board stated

Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice...

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

impact on the election results. As noted above, PERB has refused to be constrained to follow NLRB per se rules in the area of election objections and has rejected rigid application of a "laboratory conditions" test. (See e.g., Sierra Sands Unified School District (1993) PERB Decision No. 977; Tamalpais Union High School District (1976) EERB Decision No. 1.) PERB looks to the totality of circumstances and the cumulative effect of the conduct alleged.

Having considered all of the facts in this case, the only reasonable conclusion is that the totality of circumstances surrounding the three ballot counts establishes that serious irregularities occurred in the conduct of the election which had a probable or actual impact upon the election results. Accordingly, the election results shall be set aside.

CONCLUSION AND ORDER

For the reasons discussed above, and based on the entire record in this case, the election objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO are sufficient to warrant setting aside the election results and ordering a new election. Therefore, the results of the decertification election tallied on June 26 and July 20 will not be certified, and a re-

run election is hereby ORDERED.¹⁷ The ballot choices shall be California School Employees Association (CSEA) Poway Chapter 80, Poway Council of classified Employees, CFT/AFT, AFL-CIO and No Representation.

The election objections concerning all other irregularities concerning the conduct of the decertification election are hereby DISMISSED.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, sec. 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board

Attention: Appeals Assistant

1031 18th Street, Suite 200

Sacramento, CA 95814-4174

FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the

¹⁷AFT requests that a runoff election be conducted between the two employee organizations. A runoff election (where No Representation would be dropped as a ballot choice) is not appropriate, however, because the election results are being voided.

carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the San

Francisco regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Code of Regulations, title 8, section 32132).

Dated: _____

Anita I. Martinez
Regional Director