STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHILDREN OF PROMISE PREPARATORY ACADEMY, Employer, and INGLEWOOD TEACHERS ASSOCIATION, CTA/NEA, Petitioner.	Case No. LA-RR-1213-E Administrative Appeal PERB Order No. 402 November 6, 2013

Appearances: Bartsch & Haven by Duane Bartsch, Attorney, for Children of Promise Preparatory Academy; California Teachers Association by Jean Shin, Attorney, for Inglewood Teachers Association, CTA/NEA.

Before Huguenin, Winslow and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Children of Promise Preparatory Academy (Academy) of a an administrative determination (attached) certifying the Inglewood Teachers Association, CTA/NEA (Association) as the exclusive representative of the Academy's non-managerial, non-supervisory, and non-confidential certificated personnel. The Association sought recognition as the exclusive representative pursuant to PERB Regulation 33050.[1]

The Board agents[2] assigned to the case by PERB's Office of the General Counsel determined that the Association had demonstrated proof of support by more than 50 percent of the employees in the proposed bargaining unit, that no other employee organization had intervened to represent any of the petitioned-for employees, that the Academy had not granted

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

[2] The first Board agent handled the case from inception in January 2013 through June 11, 2013. Thereafter, a second Board agent was assigned effective June 13, 2013.

recognition, and that there was no need for an evidentiary hearing on the matter. Thus, the Board agents concluded that PERB should certify the Association as the exclusive representative under PERB Regulation 33485.[3]

On appeal, the Academy asserts that the Board agents abused their discretion in determining that the Association had shown proof of majority support, by misleading the Academy through their statements, and in determining that an evidentiary hearing was not necessary. The Academy argues in addition that the second Board agent should have disqualified himself, and requested a stay of activity regarding this case pending this appeal.[4]

We have reviewed the entire record in this matter and find that the second Board agent's administrative determination was well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, we adopt the second Board agent's administrative determination as the decision of the Board itself, subject to our discussion below of the issues raised on appeal, including the Academy's request for disqualification of the second Board agent.

BACKGROUND

The Academy is a kindergarten through fourth grade charter school approved by the Inglewood Unified School District. It serves approximately 200 children and has thirteen employees, eight of whom are certificated. The Academy is a "public school employer" within

[3] The second Board agent assigned to the case also denied the Academy's request that he disqualify himself pursuant to PERB Regulation 32155(c).

[4] The Academy's request for stay of activity was addressed in a recently-issued decision. (See *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-401 (*Children of Promise*).)

the meaning of section 3540.1(d) the Educational Employment Relations Act (EERA).[5] The Association is an "employee organization" within the meaning of EERA section 3540.1(k).

On January 18, 2013,[6] the Association filed a representation petition and proof of support at PERB's Los Angeles Regional Office. On February 15, in response to PERB's written request therefor, the Academy submitted the names of eight certificated teachers to the Board agent. On February 28, the Board agent notified the parties that the Association's proof of support was sufficient to meet the requirements of PERB Regulation 33050(b) and requested a decision from the Academy within 15 days regarding the Association's request for recognition. On April 11, the Association requested an expedited investigation concerning the Academy's failure to file a decision on the request for recognition. Also on April 11, the Academy filed its decision on the recognition request with PERB, via facsimile, denying the Association's recognition request. The Academy then stated that its denial was based on its contention that one of its certificated employees was on probationary status due to poor performance and was, therefore, not an appropriate member of the proposed bargaining unit.

On April 16, the Board agent scheduled a settlement conference for April 26. The Notice for the conference included a "Community of Interest" checklist used in resolving relevant issues and advised the Academy to use the checklist as a guide to prepare for the conference. On April 23, the Academy informed the Board agent and the Association that it was unavailable on April 26, and would not be available for a settlement conference until May 13. On April 26, the Association sent the Board agent a letter claiming that the Academy was violating the rights of its certificated employees with delaying tactics and by its improper refusal to recognize the Association. The Association also requested prompt processing of its

[5] EERA is codified at Government Code section 3450 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[6] Unless otherwise noted, all dates herein refer to the 2013 calendar year.

recognition petition. On May 2, the Board agent issued an amended notice of settlement conference for June 11.

On June 11, the settlement conference was held at PERB's Los Angeles Regional Office. As per PERB regulations, no record was made of the conference.[7] It is undisputed that the parties did not reach an agreement and that the Academy asked the Board agent to disqualify herself. The Board agent complied with the Academy's request and withdrew from the case. Two days later, on June 13, the case was transferred to a different Board agent.

On June 17, the second Board agent issued an order to show cause (OSC). The OSC noted that there is a rebuttable presumption that all classroom teachers must be placed in the same bargaining unit (citing *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*)) and requested a response from the Academy no later than June 24, demonstrating why PERB should not certify the Association as the exclusive representative without an evidentiary hearing. On June 24, the Academy notified the Board agent that pursuant to PERB Regulation 32130(c) it was automatically entitled to an extension of time to July 1, by which time it would submit its response.

On July 1, the Academy submitted its response. As an initial matter, the Academy requested that the second Board agent disqualify himself. The Academy argued that under PERB Regulation 32155(c) its concurrence was required to the identity of any replacement Board agent, and it had not concurred in assignment of the second Board agent. The Academy also argued that the second Board agent had demonstrated prejudice against it by "demanding" that the Academy respond to the OSC by June 24.

As to the bargaining unit, the Academy argued that the petitioned-for unit was inappropriate because: (1) it contained four management employees and a probationary

[7] PERB Regulation 33290(a) prohibits the making of a record at settlement conferences.

employee; and (2) because of the Academy's small size, its efficiency would be impaired by the unionization of its certificated employees and that therefore unionization would not achieve the primary purpose of EERA which is "the improvement of personnel management and employer-employee relations." (EERA, § 3540.)

Finally, the Academy challenged the sufficiency of the Association's proof of support, arguing that two of the remaining undisputed members of the proposed bargaining unit had stated that they would not return to the Academy for the next school year.

In support of its contentions, the Academy attached to its OSC response[8] job descriptions for three positions that it maintained were management and, in addition declarations under penalty of perjury from the Academy's chief executive officer (CEO), the Academy's attorney, and the Academy's school's administrator.[9]

On July 3, the second Board agent issued a notice of telephonic prehearing conference. The conference was scheduled for July 29. The notice indicated that the parties were available

[8] As the administrative determination notes, "[t]he OSC advised that 'if the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein.' (OSC, p. 4.) The job descriptions provided by the Academy fail to comply with this [authentication] requirement since the job descriptions are undated, and are not attached to any declaration." (Admin. Deter., at p. 13.)

[9] The three positions the Academy asserted were management and for which the Academy submitted job descriptions were "Academic and Testing Coordinator," "Technology Management Specialist," and "Instructional Lead Teacher." The Academy alleged that there were four employees who filled these positions. Neither the tendered job descriptions which were not authenticated as required by the OSC, nor the Academy's "declarations under penalty of perjury by witnesses with personal knowledge" (OSC, at p. 4) identified the incumbents in the alleged management positions or demonstrated that the "actual job duties" of the actual persons in the alleged management positions set forth facts to demonstrate that those persons alleged to be management were "using independent judgment to formulate or administer Academy programs." (Admin. Deter., at p. 13.)

for a formal hearing on July 31, but that the parties would be notified later if it were determined that a hearing would be necessary.[10]

On July 11, the Association replied to the Academy's response to the OSC and the Academy's request for disqualification of the second Board agent. The Association opposed disqualification of the second Board agent, noting that there was no basis to disqualify him because the Academy had misread PERB Regulation 32155(c) and in any event had not been prejudiced by the June 24 deadline for responding to the OSC because under PERB's procedures the Academy had until July 1 to file its response. Responding to the Academy's claims concerning appropriateness of the petitioned-for bargaining unit, the Association contended that: (1) the Academy had failed to present any evidence regarding the actual job requirements and responsibilities of the bargaining unit members claimed to be management; (2) in any case, the job duties described were not managerial in nature, but merely the duties of experienced teachers; and (3) the probationary status of an employee is irrelevant to the employee's inclusion in the bargaining unit. In response to the Academy's claim regarding proof of support, the Association noted that the adequacy of proof of support is determined at the time it is submitted to PERB, and that subsequent staff turnover does not call into question the adequacy support already determined. The Association asked the second Board agent to process its petition, to forego an evidentiary hearing, and immediately to certify it as the exclusive representative.

On August 5, the second Board agent issued his administrative determination, which we describe below.

---

[10] The notice advised the parties that at the prehearing conference they should be prepared to discuss their theories of the case, the witnesses they intended to call, the documents they intended to introduce, any anticipated evidentiary issues and objections and any other motions that could be made prior to the hearing.

On August 20, the Academy filed its appeal from the second Board agent's administrative determination and requested a stay of activity in the case.

On August 30, the Association filed its opposition to the Academy's appeal and request for stay.

BOARD AGENT'S ADMINISTRATIVE DETERMINATION

As an initial matter, the Board agent reviewed the procedural history of the case, noting that the Academy had been given a full opportunity through the settlement conference and OSC process to present facts which would rebut the *Peralta, supra,* PERB Decision No. 77 presumption and would justify the exclusion of disputed positions from the proposed bargaining unit. Had the Academy done so, the Board agent observed, an evidentiary hearing would then be appropriate to resolve any substantial and material factual disputes. However, he concluded, the Academy had failed in its response to the OSC to establish a prima facie rebuttal of the *Peralta* presumption and thus "[u]nder these specific circumstances presented here, it is proper and appropriate for PERB to rely solely on an investigation and production of facts through an OSC, rather than setting the matter for an evidentiary hearing." (Admin. Deter., at p. 9.)

Probationary Employees

In its OSC response, the Academy contended that the probationary employee lacked a community of interest with other employees. The Board agent ruled that the Academy had presented no evidence or legal authority supporting its contention that probationary classroom teachers lacked a sufficient community of interest with other certificated employees to warrant their exclusion from the proposed bargaining unit. The Board agent noted that a unit consisting of "classroom teachers" includes full-time probationary teachers. (*Petaluma City*

Elementary and High School Districts (1977) EERB Decision No. 9.)[11] Since there was no factual dispute regarding the probationary teacher, the Board agent ruled that the Academy failed to rebut the *Peralta, supra,* PERB Decision No. 77 presumption that the probationary teacher was appropriately included in the proposed unit.

Management Employees

In its OSC response, the Academy contended that three of the unit positions covering four different employees[12] were managerial and not properly included in the unit. The Board agent noted that the Academy bore the burden of proof as to the issue (*Los Angeles Unified School District* (2004) PERB Decision No. 1665), and in order to be deemed "management," the positions in dispute must be "clearly allied with management." (*Paramount Unified School District* (1977) EERB Decision No. 33.) Management employees are "only those employees who have significant responsibilities for both formulating district policies and administering district programs." (Admin. Deter., at p.12, citing *Lompoc Unified School District* (1977) EERB Decision No. 13.)[13] Moreover, the Board has defined the formulation of policy as "the exercise of discretionary authority to develop and modify institutional goals and priorities." (*Id.*, quoting *Hartnell Community College District* (1979) PERB Decision No. 81 (*Hartnell*).) The Board agent quoted with emphasis from the Board's decision in *Hartnell*:

> The administration of programs contemplates effective implementation of the policy through the exercise of independent judgment. Thus, managerial status contemplates those persons who have discretion in the performance of their jobs beyond that which must conform to an employer's established policy. The question as to whether particular employees are managerial must be answered in terms of the employees' actual job responsibilities, authority and relationship to the employer.

[11] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

[12] See footnote 9 above.

> Managerial status is not necessarily conferred upon employees because they possess some limited authority to determine, within established limits, curriculum, course content or budgetary allocations.

(*Id.*, emphasis added by second Board agent.)

In its OSC response, the Academy submitted job descriptions for the three certificated job classifications claimed to be management but without authenticating declarations under penalty of perjury by witnesses with personal knowledge of the actual job duties.[14] Moreover, the Academy failed to identify any incumbent employee who filled the disputed classifications during the 2012-2013 school year. The Board agent concluded that because the evidence submitted by the Academy failed to comply with OSC's authentication directive, he could not reliably determine the actual job duties of the four certificated employees claimed to be management. (See *Santa Barbara Community College District* (2011) PERB Decision No. 2212 [management positions are determined primarily by the position's actual job duties, not just by language in a job description].) He further determined that even if the job description documents had been authenticated, the job descriptions submitted by the Academy failed to describe duties demonstrating "discretionary authority to formulate policies and institutional objectives." (Admin. Deter., at p.13, citing *Hartnell*, *supra*, PERB Decision No. 81.) On this basis, the Board agent concluded that the Academy had failed to demonstrate a prima facie basis for excluding from the bargaining unit the four employees in the three disputed job classifications.

[14] In the OSC, the second Board agent had advised the Academy to authenticate any document submitted as evidence, to wit, the document "must be attached to the declaration and authenticated therein." (OSC, at p. 4.)

Efficiency of Operations

In its OSC response, the Academy argued that due to the small size of the Academy and the bargaining unit, collective bargaining would impede the school's ability to operate efficiently, but presented no factual evidence or legal citation to support its argument.[15] The Board agent noted that increased costs and potential time spent in negotiating did not outweigh the employees' representational rights. (*Santa Ana Unified School District* (2010) PERB Order No. Ad-383 (*Santa Ana*) [increased costs due to negotiating responsibilities not a basis to deny representation petition]; *Antelope Valley Community College District* (1981) PERB Decision No. 168 [potential loss of time spent in negotiating does not outweigh benefits of collective bargaining].) On this basis, the Board agent rejected the Academy's efficiency argument and determined that no hearing was necessary to resolve this issue.

Proof of Support

In its OSC response, the Academy contended that the recognition petition now lacked requisite support, because the Academy no longer employed the majority of the employees who had been in the proposed bargaining unit during the 2012-2013 school year. The Board agent noted that: (1) proof of support was valid for one year immediately prior to the date the recognition petition was filed (PERB Reg. 32700(c)); (2) proof of support remains valid during a contested unit determination (*Davis Unified School District, et al.* (1980) PERB Decision

---

[15] EERA section 3545(a) states:

> In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(Emphasis added.)

No. 116); and (3) proof of support is not extinguished by showing that employees who supported the petition are no longer employed by the employer (*Kings County Office of Education* (1990) PERB Decision No. 801). The Board agent also noted that proof of support is confidential (PERB Reg. 32700(f)); and not part of the record (*San Diego Community College District* (2001) PERB Decision No. 1445); and that both EERA section 3544(b) and PERB Regulation 33075 grant PERB sole authority to determine proof of support. On these bases, the Board agent determined that there was no legal or evidentiary basis to address the issue of proof of support at an evidentiary hearing.

Disqualification of Board Agent

In its OSC response, the Academy argued two theories for Board agent disqualification. First, urged the Academy, following the disqualification of a Board agent, PERB regulations require that the parties to the case concur in the replacement Board agent, and that the Academy had not accepted the current Board agent. Second, urged the Academy, the Board agent "is not, has not and [cannot] be fair and impartial through these proceedings" (OSC Response, at p. 2) and should disqualify himself.

The Board agent concluded that: (1) the Academy's request that he disqualify himself did not conform with the requirements of PERB Regulation 32155(c) since it was not made under oath; (2) the Academy had made no showing that he had exhibited any bias or prejudice toward the Academy; and (3) the Academy's contention that its concurrence was necessary in the identity of a replacement Board agent was based on a misreading of the particular regulation. On this basis, the second Board agent determined that the Academy had failed to plead sufficient grounds for disqualification and denied the Academy's request.

Board Agent's Conclusion

The Board agent concluded that the Academy failed to present proper factual support: (1) rebutting the presumption that the proposed bargaining unit was appropriate; (2) demonstrating that any of the employees in the proposed bargaining unit were managerial; (3) demonstrating that the proposed bargaining unit did not share a sufficient community of interest; or (4) demonstrating that collective bargaining would impede the efficient operation of the Academy. Therefore, concluded the Board agent, no formal hearing was required and the petitioned-for bargaining unit should be certified.[16]

POSITION OF THE PARTIES

On appeal the Academy argues: (1) both Board agents abused their discretion; (2) the Academy was entitled to an evidentiary hearing, because it had presented a material factual dispute whether the three job classifications were managerial, which issue could only be resolved at hearing; and (3) the second Board agent should have disqualified himself, because the Academy never concurred in his selection and because he had demonstrated bias against the Academy.[17] In addition, the Academy requested a stay of activity regarding the present case.

The Association responds that: (1) it had demonstrated proof of majority support in a presumptively appropriate bargaining unit; (2) the Academy failed to present sufficient evidence to rebut that presumption of appropriateness; and (3) the Board agent properly

---

[16] The second Board agent described the bargaining unit as including "all certificated personnel, including classroom teachers" and excluding "all management, supervisory and confidential personnel." (Admin. Deter., at p. 19.)

[17] The Academy does not raise in its appeal the second Board agent's administrative determinations regarding the probationary employee or the Academy's efficiency of operations claim. Thus these issues, having not been appealed, are not before us. (PERB Reg. 32360(c); *Los Angeles City & County School Employees Union, Local 99, SEIU, AFL-CIO (Kimmett)* (1987) PERB Order No. Ad-167.)

refused to disqualify himself, because the Academy's disqualification request was procedurally deficient and, in any event, was based on a mischaracterization of facts and a misreading of PERB regulations.[18]

DISCUSSION

The Academy's Claim that Board Agents Abused Their Discretion

The Academy argues that the Board agents abused their discretion in determining that the Association had provided valid proof of support, in misleading the Academy regarding the composition of the unit and in deciding not to hold an evidentiary hearing. We take in turn these claims.

1. Abuse of Discretion Standard

In reviewing whether a Board agent has conducted a proper investigation, the Board generally has looked at whether or not the Board agent abused his or her discretion. (*Robert L. Mueller Charter School* (2003) PERB Order No. Ad-320 (*Mueller*); *Jefferson School District* (1980) PERB Order No. Ad-82; *State of California (Department of Personnel Administration)* (1985) PERB Order No. Ad-151-S; *California State University* (1988) PERB Order No. Ad-177-H; *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380.) We deem this standard appropriate here as well.

2. Proof of Support

The Academy argues that the first Board agent's investigation of the proof of support was deficient. According to the Academy, the first Board agent erred both in her calculation of the proof of support and in her instructions to the Academy's CEO as to which employees were

[18] The Association also opposed the Academy's request for a stay on the grounds that it also is procedurally deficient and that to grant a stay would undermine the rights of the bargaining unit members.

included in the proposed bargaining unit. We conclude that both of the Academy's contentions lack merit.

EERA section 3544(b) and PERB Regulation 33075 grant PERB sole authority to determine the sufficiency of an employee organization's proof of support. (*Santa Ana, supra,* PERB Order No. Ad-383.) The process for determining proof of support is confidential. (PERB Reg. 32700(f).) A party may challenge the proof of support on the basis that it was obtained by fraud or coercion, or that the signatures on support documents are not genuine, by filing with the Regional Office, within 20 days after the filing of the representation petition, "declarations under penalty of perjury supporting such contention[s]." PERB will not consider declarations which are not timely filed, absent a showing of good cause for any delay. (PERB Reg. 32700(g).) The Academy failed to file timely a challenge to the proof of support, and proffers no good cause for the delay. We conclude that the Board agent did not abuse her discretion in determining that the Association had submitted to PERB proof of majority support.

Lastly, the Academy maintains that because half of the proposed bargaining unit members were managers, it was impossible for more than fifty (50) percent of the unit to support the union. The Academy bases this contention on its view that a bargaining unit is established at the time there is an election. The Academy errs. Proof of support is determined by PERB when a petition is filed and an employer provides a list of employees that comprise the petitioned-for unit. When a dispute arises thereafter as to the composition of the bargaining unit, PERB conducts an investigation to determine unit appropriateness. During this investigative process, which may or may not require an evidentiary hearing, the identity of individual employees within the unit may change over time as employees leave employment and are replaced. However, the initial determination regarding sufficiency of support for the

recognition petition, once made, is determinative on the issue of majority support within the petitioned-for unit. If, following an investigation, a different unit is determined to be appropriate, an election may be conducted in the revised appropriate unit to determine whether a majority of employees wish to be represented by the petitioning organization.

Here, the Board agent initially requested that the Academy provide PERB a list of employees in certificated non-management and non-supervisory positions. The Academy submitted the names of eight certificated employees, each of whom was described as being a "teacher." Based on this information, the Board agent determined that the Association had demonstrated majority support in the petitioned-for bargaining unit. The Academy has had an opportunity, through the OSC process, to demonstrate that the petitioned for unit is inappropriate. It failed to do so. The initial determination of the Board agent that the Association demonstrated sufficient proof of majority support in the petitioned-for unit is affirmed.

3. Board Agent's Allegedly Misleading Statements

The Academy also contends that it was misled by the first Board agent into providing names of employees who should not have been part of the bargaining unit. We conclude the Academy's contention lacks merit.

The Board agent's letter to the Academy requesting a list of employees in positions within the petitioned-for unit clearly stated that the Association had submitted a request for recognition of a unit consisting of "all certificated non-management, non-supervisory employees" (emphasis added) and requested information, including the names, of all employees in such a unit. The Academy maintains that when it sought clarification of which employees to include on the list for PERB, the first Board agent told them to provide the

names of "all certified (sic) teachers" and did not elaborate further.[19] The Academy thus maintains that it inadvertently submitted the names of management and supervisory certificated personnel despite the first Board agent's letter clearly excluding such employees from the proposed bargaining unit.

Through the OSC process the Academy had an opportunity to demonstrate, prima facie, that some of the employees on the list provided to PERB are management employees and thus not appropriately included within the petitioned-for unit. But it failed to provide authenticated documentary evidence or competent declaration testimony regarding the names and job duties of persons it claims are management employees. Thus, the Board agent properly concluded that there are no disputed material facts regarding the appropriateness of the petitioned-for unit and certified the Association as the representative of the petitioned-for unit. We conclude that the Academy's contention that the Association's recognition petition lacks sufficient proof of support, lacks merit.

4. An Evidentiary Hearing was Required

a. Hearings are conducted when appropriate in representation cases

The Academy maintains that the second Board agent abused his discretion by certifying the bargaining unit without an evidentiary hearing. According to the Academy, it is entitled to an evidentiary hearing to present evidence that four of its certificated employees were managers who should be excluded from the unit. We conclude the Academy's contention lacks merit.

Our procedures provide no guarantee or entitlement to an evidentiary hearing in a representation proceeding. As stated in PERB Regulation 33237(a):

[19] Throughout its pleadings the Academy refers to its certificated personnel as "certified."

> Whenever a petition regarding a representation matter is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election or take such other action as deemed necessary to decide the questions raised by the petition.

(Emphasis added.) (See also *Mueller, supra,* PERB Order No. Ad-320 [under EERA, the Board agent must conduct inquiries and investigations but has discretion as to whether or not to hold a hearing].) Although Board agents must conduct an investigation, that investigation may lead them to determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing, or they may determine, as did the Board agent did in this case, that no material issue of fact exists and thus that a hearing is unnecessary.

The burden of providing sufficient evidence demonstrating that a material issue of fact does exist lies with the party seeking to exclude certain employees from the bargaining unit on the basis that they are managerial, supervisory, or confidential. (*Unit Determination for the State of California* (1980) PERB Decision No. 110c-S [burden of proving an exclusionary claim is on the party asserting it]; see also *The California State University* (1983) PERB Decision No. 351-H.) Moreover, it is well established that in cases involving a presumptively appropriate bargaining unit, such as "all classroom teachers," the burden of proof also lies with the party opposing the unit. (*Peralta, supra,* PERB Decision No. 77; *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165; *Compton Unified School District* (1979) PERB Decision No. 109; *Modesto City Schools* (1986) PERB Decision No. 567.) Under either theory, the burden of proof was on the Academy to demonstrate a disputed issue of material fact.

Here, the second Board agent provided the Academy in the OSC with clearly stated guidelines for submitting evidence in response. The Academy failed to present evidence in the manner required. It did not provide declarations on personal knowledge showing the actual job

duties of the three job classifications it claimed to be management, nor did it identify by name the employees who filled such positions during the 2012-2013 school year. The Board agent reasonably determined that the Academy failed to meet its evidentiary burden under the OSC to present, prima facie, issues of material fact that needed to be resolved at a hearing. The Board agent's administrative determination fully stated the issues, facts, law and rationale for his decision. In doing so, the second Board agent was well within the authority granted to him under PERB Regulation 33237(a) and in full compliance with the requirements for an administrative decision under PERB Regulation 32350(b). We conclude that the second Board agent did not abuse his discretion in deciding that an evidentiary hearing was unnecessary.

b. The First Board Agent Did Not Issue or Serve a Notice of Hearing

The Academy claims that it was entitled to a hearing, because the first Board agent allegedly stated at the June 11, settlement conference that if the parties could not agree to management status of the disputed positions, the question could only be resolved at an evidentiary hearing. The Academy also maintains that during the settlement conference and at the first Board agent's insistence, the parties agreed to a mutually satisfactory date for a hearing. We conclude that the Academy's contentions lack merit.

PERB Regulation 33300 requires that a Board agent serve a notice of hearing if he or she determines that a hearing is necessary. It is undisputed that a notice of hearing was never served on the parties.[20] Moreover, stating an opinion at a settlement conference and soliciting dates from the parties upon which a hearing might be held do not amount to the service of a notice of hearing pursuant to PERB Regulations 33300 and 32140. Thus, we conclude that the Academy has not established that it was entitled to an evidentiary hearing based either on the

[20] PERB Regulation 32140 specifies the means of service of documents.

first Board agent's alleged statements that a hearing would be necessary or on her solicitation of a mutually agreeable date for a potential hearing.

Additionally, the Academy solicited the first Board agent to disqualify herself and withdraw. She did so. Thereafter, the case was assigned by PERB to a different Board agent, who was himself free to determine the best course of action within the parameters of PERB Regulation 33237(a). The second Board agent chose, reasonably in our view, to issue an OSC prior to determining whether or not an evidentiary hearing was necessary.

Board agents routinely use the OSC procedure in representation investigations to determine if there are material facts in dispute and whether or not there is sufficient evidence to decide a disputed matter without convening an evidentiary hearing. (*Santa Ana, supra,* PERB Order No. Ad-383.) An OSC provides an opportunity for the party opposing a representation petition to demonstrate the existence of a material issue of fact requiring resolution through an evidentiary hearing. Since the party challenging a presumptively appropriate bargaining unit bears the burden of proof, that party, here the Academy, must demonstrate the existence of a material issue of fact. The OSC process balances the interests of the parties by providing an employer the means to demonstrate the existence of a material factual issue, while protecting employee representation rights by assuring that a hearing and the accompanying delay in the exercise of employee representation rights will occur only where a material factual issue exists.

We conclude that the Board agent's decision to issue an OSC prior to deciding whether an evidentiary hearing was necessary, complies with PERB Regulation 33237(a), was the proper course of conduct, and was not an abuse of his discretion.

5. The Second Board Agent Should Have Disqualified Himself

On July 1, the Academy asked the second Board agent to disqualify himself on the grounds that under PERB Regulation 32155(c), it had to concur in his assignment to the case and it had not done so. Alternatively, the Academy argued that the second Board agent had demonstrated bias against it by "demanding" a response to his OSC within "two business days" or "face dismissal." (Emphasis in original.) We are not persuaded.

PERB Regulation 32155(c) provides

> Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.
>
> If such Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel or the Chief Administrative Law Judge, as appropriate, who shall designate another Board agent to hear the matter.
>
> Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation.

PERB has held that a "fixed anticipatory prejudgment" against a party must be shown to establish bias sufficient for Board agent disqualification. (*Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzalez*); *United Teachers of Los Angeles (Adams)* (2011) PERB Decision No. 2205 (*UTLA (Adams)*; *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M.) Such prejudgment is established through statements or conduct by the Board agent indicating a clear predisposition against a party. (*Gonzalez.*) Erroneous legal or factual rulings, in themselves, do not indicate bias. (*Chula Vista Elementary EA, CTA (Larkins)* (2003) PERB Order No. Ad-322.)

a. PERB Regulation 32155(c)

PERB Regulation 32155(c) requires that any request that a Board agent disqualify himself or herself be made under oath and specifically set forth all facts supporting it. It is undisputed that the Academy's request was not made under oath and therefore is not a valid request for disqualification. On this basis alone, we affirm the Board agent's decision of August 5, not to disqualify himself and reject the Academy's argument that he should have disqualified himself.

In addition, we conclude that PERB Regulation 32155(c) does not require the concurrence of the parties to the identity of a replacement Board agent. The plain language of the final paragraph of PERB Regulation 32155(c) provides an alternative means of selecting a replacement Board agent in which the disqualified Board agent requests another Board agent to serve, rather than waiting for appointment of a successor by PERB's General Counsel or Chief ALJ, as appropriate. Only in that instance is approval of the parties required. Therefore, even if the Academy's request for disqualification of the second Board agent had been made properly, the basis for its request lacks merit.

b. The Second Board Agent's Purported Bias

The Academy claims that the second Board agent demonstrated bias by requiring the Academy to respond to the OSC within one week. According to the Academy, by the time it received the OSC, it only had two days to respond. We are not persuaded.

The second Board agent's conduct fails to exhibit a "clear predisposition" against the Academy. His statement in the OSC, that the Academy had failed thus far to provide sufficient evidence to rebut the presumption that the proposed unit was appropriate, "did not indicate bias but rather a candid and appropriate appraisal" of the Academy's position. (*UTLA (Adams), supra,* PERB Decision No. 2205, at p. 7.) Moreover, rather than indicating a "fixed

anticipatory prejudgment," the issuance of the OSC afforded the Academy a further opportunity to present additional evidence in support of its position, without imposing on the parties an unnecessary delay.

With regard to the purported two days the Academy had to respond, the Academy properly calculated the due date for its submission in response to the OSC in accordance with PERB regulations, and determined its response was due on July 1. Therefore, we fail to see how the Academy was prejudiced or its rights abridged by the June 24 "deadline" stated in the OSC. We conclude that even if the Academy had properly submitted a request for disqualification on this ground, which it did not, the second Board agent would properly have declined to disqualify himself.

Request for Stay

The Academy's request for stay was dealt with in an earlier decision. (See *Children of Promise, supra,* PERB Order No. Ad-401.)

ORDER

The Board agent's administrative determination in Case No. LA-RR-1213-E is hereby AFFIRMED.

Members Winslow and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHILDREN OF PROMISE PREPARATORY ACADEMY, Employer, and INGLEWOOD TEACHERS ASSOCIATION, Petitioner.	REPRESENTATION CASE NO. LA-RR-1213-E ADMINISTRATIVE DETERMINATION (August 5, 2013)

Appearances: Bartsch & Haven, by Duane Bartsch, Attorney, for Children of Promise Preparatory Academy; California Teachers Association, by Jean Shin, Staff Attorney, for Inglewood Teachers Association.

Before Yaron Partovi, Hearing Officer.

INTRODUCTION

On January 18, 2013, the Public Employment Relations Board (PERB or Board) received a request for recognition (petition), pursuant to PERB Regulation 33050,[1] from the Inglewood Teachers Association/CTA/NEA (Petitioner) for a unit of all certificated non-management, non-supervisory employees at Children of Promise Preparatory Academy Charter School (Academy). The Academy is a small charter school located in Inglewood, California that serves approximately 200 students in kindergarten through fourth grade and employs 13 employees, including eight certificated personnel. In summary, the Academy argues that: (1) for several different reasons, the Petitioner's proposed unit is inappropriate; (2) PERB is required to conduct a formal hearing to resolve the unit dispute; and (3) the undersigned Board agent must be disqualified from hearing the matter. The Petitioner disputes all of the Academy's arguments regarding these allegations. Pursuant to a June 17, 2013 Order to Show

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

Cause (OSC), the Academy was required to submit legal argument and declarations in support of its allegations. This administrative determination addresses the above issues.

PROCEDURAL HISTORY

On February 15, 2013, the Academy confirmed receipt of the request for recognition and stipulated that "There is no organization currently recognized or certified as the exclusive representative of our employees." On February 19, 2013, PERB received an alphabetical list of employees in the proposed unit (i.e., all non-management, non-supervisory, and non-confidential certificated teachers). On February 28, 2013, PERB issued an administrative determination finding that the Petitioner had demonstrated majority support in accordance with PERB Regulation 33050, subdivision (b) and requested that the Academy file an employer response pursuant to PERB Regulation 33190. PERB also notified the parties that since the Petitioner had evidenced majority support and no valid intervention was filed, recognition must be granted unless the Academy doubted the appropriateness of the unit. (Gov. Code, § 3544.1[2]; PERB Regulation, § 33480.)

On April 11, 2013, the Academy notified PERB that, pursuant to PERB Regulation 33190, it was denying recognition because it doubted the appropriateness of the proposed bargaining unit on the single ground that "One employee remains on probationary status due to poor performance." In an April 26, 2013 letter to PERB, the Petitioner claimed that the Academy's stated reason for denying recognition (i.e., the unit is purportedly inappropriate because it includes a probationary teacher with "poor performance") was "frivolous." The Petitioner also requested the Board agent to promptly process the instant petition.

In an effort to promote settlement of the issues raised by the Academy, both parties participated in a June 11, 2013 PERB settlement conference with a PERB Board agent. The

[2] Unless otherwise noted, all statutory references are to the Government Code.

settlement conference did not result in a resolution and on June 13, 2013, the instant case was assigned to the undersigned for further processing.

On June 17, 2013, this office issued the attached OSC affording the Academy the opportunity to show cause why PERB should not certify the Petitioner as the exclusive representative of the proposed unit of certificated teachers without an evidentiary hearing given that the unit is presumed appropriate in accordance with *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta CCD*).) The OSC also directed the Academy to support its factual assertions "with declarations under penalty of perjury by witnesses with personal knowledge. . ." and "[i]f the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein." The OSC directed the Academy to file its response by no later than June 24, 2013. On June 24, 2013, the Academy confirmed that, in accordance with PERB Regulation 32130, the deadline for it to file a response was extended to July 1, 2013.[3] On July 1, 2013, this office received the Academy's response to the OSC and on July 11, 2013, the Petitioner filed a reply to the Academy's July 1, 2013, response.

RELEVANT FACTS

The Petitioner is an "employee organization" within the meaning of Educational Employment Relations Act (EERA),[4] section 3540.1, subdivision (d). The Academy is a "public school employer" within the meaning of section 3540.1, subdivision (k).

---

[3] PERB Regulation 32130, subdivision (c), provides that "[a] five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California." PERB Regulation 32130, subdivision (c), also provides that "[w]henever the last date to file a document falls on a Saturday . . . the time period for filing shall be extended to and include the next regular PERB business day." Here, since the fifth day fell on a Saturday (June 29, 2013), the deadline was extended to the next regular PERB business day (Monday, July 1, 2013).

[4] EERA is codified at Government Code section 3540 et seq. Statutory references are to the Government Code unless otherwise specified.

At the time the petition was filed with PERB, there were eight certificated teachers employed by the Academy. Academy School Administrator Trena Thompson's July 1, 2013, declaration states that one certificated teacher (unidentified) was on probationary status and that two other unnamed teachers "stated they will not return to the Academy for the coming school year." She further states that "the eight certified teachers are no longer employed by the Academy as of the end of the school year, June 30th" and that the Academy intends to hire ten new certificated teachers for the coming school year beginning July 1, 2013.

There is no dispute that one of the eight certificated teachers was on probationary status. The Academy's OSC response asserts that there are four certificated teachers employed in three classifications who have been designated "management": one Academic and Testing Coordinator, one Technology Management Specialist, and two Instructional Lead Teachers.[5] However, the Petitioner disputes that any of the eight certificated teachers had such title designations.

The job description of the Academic and Testing Coordinator provides that the incumbent "serves as a primary classroom teacher" or "Master Teacher" that performs the following: student instruction; supervises teachers; organizes, implements and develops curriculum and student instruction programs; collaborates with the Academy Administrator to "lead and nurture" school staff; advises the Academy Administrator concerning, among other things, personnel management; and other "teacher leadership responsibilities." Additionally, the job description provides that the Academic Testing Coordinator reports directly to the School Administrator and is issued an annual performance evaluation.

[5] The Academy's OSC response includes, as an exhibit—without any supporting declarations under penalty of perjury—job descriptions for each of these three disputed classifications.

The job description of the Instructional Lead Teacher provides that, under the supervision of the School Administrator, the incumbent "serves as a primary classroom teacher" and is responsible for, among other things, the following duties: advising the Academic and Testing Coordinator and School Administrator concerning various school issues, including staff recruitment/hiring and teacher work assignments; monitoring school staff performance; administering personnel policies and procedures; and training, evaluating and supervising school staff. This position is issued an annual performance evaluation.

The Technology Management Specialist Teacher job description provides that, under the supervision of the School Administrator, the incumbent "serves as a primary classroom teacher" and is responsible for, among other things: training and advising teachers on integrating technology into the classrooms; managing the microcomputer networks; advising the Academy Administrator concerning use of technology programs; troubleshooting software and hardware; and arranging for repairs. This position is issued an annual performance evaluation.

POSITIONS OF THE PARTIES

Position of the Academy

The Academy asserts that an evidentiary hearing is needed in the instant matter to address the following issues.

The Academy argues that the unit is not appropriate since one of the petitioned-for certificated teachers was on probationary status.

The Academy also argues that while the Academic and Testing Coordinator, the Technology Management Specialist, and the Instructional Lead Teachers are certificated employees, their inclusion in the certificated unit is also inappropriate because they are "management" employees pursuant to the section 3540.1, subdivision (g). Consequently, the

Academy claims that currently there is no majority proof of support, since four of the eight certificated employees are management employees who should not have been included in PERB's proof of support determination. Additionally, argues Respondent, majority support does not exist since the certificated teachers that signed the proof of support are no longer employed by the Academy. Relying solely on the job descriptions of these three classifications, the Academy argues that such positions perform work that "exceeds that of a Teacher" since the disputed positions allegedly develop curriculum and policies "through exercise of independent judgment," meet with community members, and advise the Academy on school expenditures.

The Academy asserts that granting the instant recognition request would "impair" the efficiency of its school's operation for the following reason:

> The Academy is a small charter school with only 13 full-time employees including the eight [certificated] teacher employees. Experience and common-sense show that there can be no increased efficiency or "improved employer-employee relations through the medium of collective negotiations" when a school is so small that everyone from the CEO to the janitor is expected to chip in and help.

Finally, the Academy asserts that under the disqualification standard set forth in PERB Regulation 32155, subdivision (c), PERB may not assign this petition to the undersigned Hearing Officer, since the parties have not reached a mutual agreement that the undersigned shall conduct the formal hearing. The Academy also asserts that the undersigned must be disqualified for "prejudice" since the Academy was purportedly afforded only two business days to respond to the OSC upon receiving it on June 20, 2013.

Position of the Petitioner

The Petitioner opposes an evidentiary hearing and requests that PERB summarily certify the proposed unit as appropriate. According to the Petitioner, the Academy has failed

to show any reason why the proposed bargaining unit is inappropriate, has repeatedly missed deadlines when providing PERB its decision to refuse recognition, has made "unfounded arguments" concerning appropriateness of the unit, and has prevented timely recognition of the Petitioner as the exclusive representative.

The Petitioner asserts that the "probationary" status of the employees is irrelevant because an appropriate unit under EERA includes classroom teachers, except those that are management, supervisory, and confidential.

The Petitioner also argues that the Academy's OSC response did not include facts supported by declarations and authenticated writings—as required by the OSC—showing that the incumbent Academic and Testing Coordinator, Technology Management Specialist Teacher, and Instructional Lead Teacher classifications are *actually* responsible for formulating Academy policy and administering Academy programs. The Petitioner further asserts that the job descriptions of these positions, even if accepted as relevant for the unit determination, do not describe duties demonstrating that incumbent employees have authority to formulate Academy policies or develop institutional objectives. The Petitioner further contends that there are no actual incumbent teachers in the bargaining unit that have held the above job titles. In the alternative, Petitioner argues it would not be able to adequately prepare for this hearing given that the identities of incumbent employees are unknown.

The Petitioner also argues that PERB should not credit the Academy's contention that majority support for the petition has not been established. The Petitioner argues that the turnover in teaching staff is irrelevant since proof of support is determined at the time the petition is filed. (*Kings County Office of Education* (1990) PERB Decision No. 801.)

Finally, the Petitioner asserts that the undersigned should not be disqualified to hear this matter and that the Academy misread PERB Regulation 32155, subdivision (c).

CONCLUSIONS OF LAW

I. Order to Show Cause

At issue here is whether it is necessary to hold a formal hearing in this matter to decide the disputed questions raised by the petition. The Academy contends that an evidentiary hearing must be held to resolve, among other things, the appropriateness of the proposed unit. This contention is incorrect. PERB Regulation 33237, subdivision (a) (Board Investigation) provides:

> Whenever a petition regarding a representation matter is filed with the Board, the Board *shall investigate and, where appropriate, conduct a hearing and/or a representation election or take such action as deemed necessary to decide the questions raised by the petition.* [Emphasis added.]

PERB Regulation 33300 (Notice of Hearing) provides:

> *If the Board determines that a hearing is necessary*, the Board shall serve a notice of hearing on each party. The Notice shall state the date, time and place of the hearing. [Emphasis added.]

Consistent with PERB's Regulations, PERB utilizes the OSC process as a component of the investigation process and is not required to conduct hearings in all cases. (*Robert L. Mueller Charter School* (2003) PERB Order No. Ad-320; *Los Angeles Unified School District* (1993) PERB Order No. Ad-250.) Additionally, where there are no material factual disputes to be resolved, a hearing is not warranted. (*Ibid.*)

The OSC process gave the Academy a full opportunity to present facts—supported by declarations under penalty of perjury—which, if true, would justify the exclusion of the disputed positions from the proposed certificated unit. (OSC, p. 4; see *Victor Valley Community College District* (2010) PERB Order No. Ad-388.) In that event, a hearing would be necessary to enable PERB to resolve the substantial and material factual disputes. However, if the Academy fails to establish a *prima facie* basis to overcome the presumption

that the proposed certificated unit is appropriate in accordance with *Peralta CCD, supra*, PERB Decision No. 77, a hearing would be unnecessary and could easily jeopardize employees' representational rights under section 3543, subdivision (a).[6] Specifically, organizational efforts may be impeded by an employer unscrupulously disputing the appropriateness of a proposed unit in such a manner as to cause delay via Board litigation. (See *Frontier Hotel* (1982) 265 NLRB 343 at p. 344 ["Since our rules require a hearing only in cases in which material facts are in dispute, hearings in all other cases would waste time, money, and effort for all concerned, while unduly delaying resolution of the question concerning representation and unjustifiably denying unit employees their right to have their election choice implemented through the appropriate certification"]; see also, *Palomar Community College District* (1992) PERB Decision No. 947 at fn. 1, Hesse, Chairperson, concurring ["undoubtedly, employee free choice is best insured by the expeditious handling of representational disputes. . . . For that reason, the Board itself will continue to endeavor to resolve the representational cases in a more timely manner"].) Under these specific circumstances presented here, it is proper and appropriate for PERB to rely solely on an investigation and production of facts through an OSC, rather than setting the matter for an evidentiary hearing. Therefore, as discussed in greater detail below, it is determined that a hearing is not necessary.

[6] Section 3543, subdivision (a) provides in relevant part:

> Public school 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.

A. Probationary Employee with "Poor Performance"

The Academy reiterates that the certificated unit desired by the Petitioner is inappropriate since it includes an employee on probationary status due to "poor performance."

As stated in the June 17, 2013, OSC, there is a rebuttable presumption that "all classroom teachers" be contained in a single unit. (*Peralta CCD*, *supra*, PERB Decision No. 77.) The burden of proving inappropriateness of a comprehensive classroom teacher bargaining unit is placed on the party opposing the unit. (*Ibid.*) PERB determines the appropriateness of a unit by reviewing the "community of interest" factors, which include: the extent to which employees share education and other special qualifications, training, and skills; job functions; method of wages or pay schedule; hours of work; fringe benefits; supervision; frequency of contact with other employees; integration with work functions of other employees; and interchange with other employees. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1267.) As previously stated, the Petitioner's request for recognition seeks to create a bargaining unit comprising solely of non-management, non-supervisory certificated employees.

The "definition of a classroom teacher for the purposes of the EERA . . . [includes] regular full-time probationary and permanent teachers employed by the district." (*Petaluma City Elementary and High School Districts* (1977) EERB Decision No. 9.)[7] The parties do not dispute that at the time the petition was filed, there was an incumbent certificated teacher on probationary status by virtue of "poor performance." As discussed in the OSC, the mere fact that an employee is on probationary status by virtue of "poor performance," does not change the outcome of the unit determination such that inclusion of the probationary employee renders the unit inappropriate. In the OSC, the Academy was specifically instructed to provide PERB

[7] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

with evidence supporting a finding that probationary classroom teachers—including the employee exhibiting "poor performance"—do not maintain sufficient community of interest with other employees in a certificated unit to warrant their exclusion from that unit. The Academy has not presented any factual evidence or legal argument supporting the assertion that the probationary teacher has a separate and distinct community of interest from the proposed unit based on the factors set forth in *Los Angeles Unified School District*, *supra*, PERB Decision No. 1267.

Given the lack of a factual dispute concerning the probationary employee, a hearing is not needed to address this legal issue. Accordingly, the Academy has not provided PERB with any evidence that the mere existence of a probationary employee rebuts the *Peralta CCD* presumption that the proposed unit is appropriate.

B. Management Employees

Section 3540.1, subdivision (g) provides:

> "Management employee" means an employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the [PERB].

As previously stated, EERA entitles public school employees the right to form bargaining units and be represented in their employment conditions by an employee organization of their choosing. (§ 3543, subd. (a).) Employees properly designated as managers, on the other hand, are excluded from the definition of a public school employee under EERA, and consequently are denied collective bargaining rights. (§ 3540.1 subd. (j); *Los Angeles Unified School District* (2004) PERB Decision No. 1665 (*LAUSD*).)

Because of management employees' lack of collective bargaining rights, the Board has found that "great care must be exercised in determining who should be considered a

management employee." (*LAUSD*, *supra*, PERB Decision No. 1665, quoting *Oakland Unified School District* (1977) EERB Decision No. 15.) In other words, it must be demonstrated that the position at issue is "clearly allied with management." (*Paramount Unified School District* (1977) EERB Decision No. 33.) For similar reasons, the "burden of proof rests with the party designating an employee as management." (*LAUSD*, *supra*, PERB Decision No. 1665, citing *San Francisco Unified School District* (1977) EERB Decision No. 23.)

Although the definition of "management employee" is written in the disjunctive, it has been narrowly construed to include only those employees who have significant responsibilities for both formulating district policies and administering district programs. (*Lompoc Unified School District* (1977) EERB Decision No. 13.) PERB has defined the "formulation of policy" to include "the exercise of discretionary authority to develop and modify institutional goals and priorities." (*Hartnell Community College District* (1979) PERB Decision No. 81 (*Hartnell CCD*).) Discussing the definition of management employees, the Board in *Hartnell CCD* further explained:

> The administration of programs contemplates effective implementation of the policy through the exercise of independent judgment. Thus, managerial status contemplates those persons who have discretion in the performance of their jobs beyond that which must conform to an employer's established policy. The question as to whether particular employees are managerial must be answered in terms of the employees' *actual job responsibilities*, authority and relationship to the employer. Managerial status is not necessarily conferred upon employees because they possess some limited authority to determine, within established limits, curriculum, course content or budgetary allocations. [Italics added.]

The Academy asserts for the first time in its OSC response, that the Academic and Testing Coordinator, Technology Management Specialist, and Instructional Lead Teachers are "management" positions that should be excluded from the bargaining unit. In the OSC, the Academy was advised to provide factual assertions supported by "declarations under penalty of

perjury by witnesses with personal knowledge." (OSC, p. 4.) The Academy has failed to present evidence *supported by declarations*: (1) showing that the actual job duties of the Academic and Testing Coordinator, Technology Management Specialist, and Instructional Lead Teacher classifications include using independent judgment to formulate or administer Academy programs; and (2) identifying the incumbent employees who filled such positions in the last school year (2012-2013). The only evidence provided by the Academy are the job descriptions of the disputed classifications that were merely attached as exhibits to the OSC response. The OSC advised that "if the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein." (OSC, p. 4.) The job descriptions provided by the Academy fail to comply with this requirement since the job descriptions are undated, and are not attached to any declaration.[8] Even if authenticated in accordance with the OSC directive, the job descriptions fail to describe duties demonstrating that the disputed positions have discretionary authority to formulate policies and institutional objectives. (*Hartnell CCD*, *supra*, PERB Decision No. 81.)

Based on the above circumstances, a *prima facie* basis for excluding the disputed positions from the proposed unit has not been established to justify a hearing to resolve whether the four certificated employees are managers. (See e.g., *Robert L. Mueller Charter School*, *supra*, PERB Order No. Ad-320 [a hearing concerning a representation request for recognition not warranted where employer failed to provide sufficient evidence supporting its

[8] In *Santa Barbara Community College District* (2011) PERB Decision No. 2212 (*Santa Barbara CCD*), at footnote 10, the Board considered whether a job description was sufficient to establish that a position was a management position. The Board noted that while the job description at issue included the phrase "policy development," it did not elaborate on the disputed position's actual role in policy formulation. The Board held, consistent with *Hartnell, CCD*, *supra*, PERB Decision No. 81, that management positions are determined primarily by the position's actual job duties, not just by language in a job description. (*Santa Barbara CCD*, *supra*, PERB Decision No. 2212.) Since the Academy's OSC response did not attach the job descriptions to a declaration(s), the actual job duties of the disputed positions cannot be ascertained.

objection to recognition].) As such the Academy does not overcome the presumption established under *Peralta CCD, supra*, PERB Decision No. 77.

C. Efficiency of Operations

PERB must consider the effect of a proposed unit on an employer's ability to operate efficiently. (§ 3545 subd. (a); *San Francisco Community College District* (1994) PERB Decision No. 1068.) PERB balances any impact on efficiency with the "employees' right to effective representation in appropriate units." (*San Diego Unified School District* (1977) EERB Decision No. 8.) In balancing the impact on the efficient operations of an employer with the employees' right to effective representation in appropriate units, the Board has never found the efficiency factor to outweigh representation rights. (See *Los Angeles Unified School District, supra*, PERB Decision No. 1267; *Sweetwater Union High School District* (1976) EERB Decision No. 4.)

The Academy essentially argues—without any legal support—that given the school's small size (i.e., approximately 13 employees), collective bargaining would impede the school's ability to operate efficiently. The Academy's argument lacks merit for several reasons. First, the factual assertions underlying this argument (i.e., the small size of unit would not improve employer-employee relations) are not supported by declarations under oath. (See *Victor Valley Community College District* (2010) PERB Order No. Ad-388 [petitioner's efficiency of operations argument found unpersuasive since the underlying contention was not supported by declarations under penalty of perjury]; *Santa Ana Unified School District* (2010) PERB Order No. Ad-383.) Second, the Academy's concern that the EERA's requirement of meeting and conferring with a *single* employee organization (i.e. Petitioner) would create an unstable relationship and would be burdensome, seems implausible since the petitioned-for certificated employees are entitled to organizational rights afforded under the EERA. (*Santa Ana Unified*

School District, supra, PERB Order No. Ad-383 [Board rejected employer's assertion that representation petition should be denied on the basis that negotiating responsibilities increased employer's operating costs]; *Antelope Valley Community College District* (1981) PERB Decision No. 168 [Legislature found that "the potential loss of time spent in negotiations does not outweigh the benefits of an overall scheme of collective bargaining"].) Finally, there is no showing that the Academy's claimed impact on efficiency outweighs the certificated teachers' right to representation in a single unit of classroom teachers. (*Los Angeles Unified School District, supra*, PERB Decision No. 1267.) For these reasons, the Academy's assertion that collective bargaining would impede the school's ability to operate efficiently is rejected. Accordingly, since a factual dispute does not exist, a hearing is not necessary to adjudicate whether the proposed unit is appropriate.

II. Proof of Support

According to the Academy, there is no longer proof of majority support for the petition since the Academy no longer employs the majority of the employees who purportedly signed the proof of support cards.

PERB Regulation 33075 provides in relevant part:

> (a) Within 20 calendar days of the date of receipt of the request . . . the employer shall file with the regional office an alphabetical list. . . of employees in the claimed unit *on the date the request for recognition was filed with the employer*.
>
> (b) If, after initial determination, the showing is insufficient the [PERB] may allow up to 10 calendar days to perfect the showing of support.
>
> (c) Upon completion of the review of the showing of support, [PERB] shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the showing of support.
>
> (Italics added.)

PERB received the alphabetical list of employees in the proposed unit (i.e., all non-management, non-supervisory, and non-confidential certificated teachers) on February 19, 2013. In accordance with PERB Regulation 33075, PERB officially determined the adequacy of proof of support for the claimed unit on February 28, 2013, and advised the parties of such. While the Academy disputes that a majority proof of support *currently* exists in the claimed unit, section 3544, subdivision (b) and PERB Regulation 33075 grant PERB sole authority to determine the sufficiency of an employee organization's proof of support. Such proof of support determinations are not subject to an interlocutory appeal. (*Pasadena Area Community College District* (1990) PERB Order No. Ad-219.)

PERB Regulation 32700 provides that the proof of support must demonstrate that the employee desires to be represented by the employee organization and identifies the information that must be provided as to each employee signing the proof of support. Such proof of support is valid for one year immediately prior to the date the petition is filed. (PERB Regulations, 32700, subd. (c).) The proof of support remains valid when filed even during the period of a contested unit determination. (*Davis Unified School District, et al.* (1980) PERB Decision No. 116.) The Board has found "meritless" an employer's argument that lack of support is extinguished or revoked by a showing that the employee is no longer employed following PERB's proof of support determination. (See e.g., *Kings County Office of Education*, *supra*, PERB Decision No. 801.) With the exception of PERB Regulation 32700, subdivision (g), which applies to proof of support obtained via fraud, coercion, or forgery—all inapplicable to the instant matter—PERB regulations do not otherwise provide a mechanism for challenging PERB's proof of support determination at this stage of the investigation.

Additionally, PERB Regulation 32700, subdivision (f), provides that proof of support "shall remain confidential and not be disclosed . . . to any party other than the petitioner. . . ."

Accordingly, such information shall not be disclosed to determine whether the Association provided majority support. (See also, *San Diego Community College District* (2001) PERB Decision No. 1445 [proof of support cards not made a part of record].) Thus, an evidentiary hearing is not warranted to address the proposition that there ostensibly exists a lack of employee support for the claimed unit.

III. Request for Disqualification of Board Agent

PERB Regulation 32155, subdivision (c), provides, in relevant part:

> Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written. . . . The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.
>
> If such a Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel. . ., as appropriate, who shall designate another Board agent to hear the matter. . . .
>
> Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation. [Italics added.]

The Academy asserts that PERB may not appoint the undersigned Board agent to hear this matter without agreement of all the parties and that the undersigned should, in any case, be disqualified to hear the instant matter.

The Academy's disqualification request is deficient on several grounds. First, the Academy's written request to disqualify the undersigned was not supported under oath in accordance with PERB Regulation 32155, subdivision (c). Second, there is no showing that the undersigned has exhibited any bias or "prejudice" towards the Academy by setting a June 24, 2013 deadline to respond to the June 17, 2013 OSC. Indeed, the Academy confirmed that

pursuant to PERB Regulation 32130, the deadline to file a response automatically extended to July 1, 2013, thus allowing the Academy a full two weeks to submit a response. The Academy has failed to present any legal authority showing that setting such a deadline means the undersigned acted with bias or "prejudice."[9] (See *Gonzales Union High School District* (1985) PERB Decision No. 480 [bias not established unless Board Agent had "fixed anticipatory prejudgment"].) Third, the Academy's argument is based on a misreading of PERB Regulation 32155, subdivision (c), as the regulation does not require PERB to designate a Board agent based on the Academy's approval and there is no showing the assignment of the undersigned was inconsistent with PERB's regulations. Accordingly, since the Academy does not plead sufficient grounds for disqualifying the undersigned, the Academy's request is hereby denied.

CONCLUSION

In the present case, the Academy presented conclusions and characterizations in response to the OSC without accompanying proper factual support rebutting the presumption that the proposed unit of certificated employees is inappropriate. (*Peralta CCD*, *supra*, PERB Decision No. 77.) Also, there is no supporting evidence that the petitioned-for unit includes classroom teachers (i.e., Academic and Testing Coordinator, Technology Management Specialist, and both Instructional Lead Teachers) with managerial status consistent with section 3545, subdivision (b)(1). Finally, there was no evidence that the petitioned certificated unit does not share a sufficient community of interest with all certificated teachers of the Academy or that such unit adversely affects the efficient operation of the Academy. (§ 3545, subd. (a).) Therefore, no formal hearing is necessary and it is determined that the petitioned for unit sought by Petitioner is appropriate.

[9] Prejudice towards the Academy is also not established given that the Petitioner was granted a shorter deadline of ten days (i.e., July 11, 2013) to reply to the Academy's response.

DETERMINATION OF PROOF OF SUPPORT

PERB Regulation 33485 (Certification of Exclusive Representative) provides:

> If the Board determines (1) the employee organization requesting recognition has demonstrated proof of support of more than 50 percent of the employees in an appropriate unit, (2) no other employee organization has demonstrated proof of support of at least 30 percent of the employees, and (3) the employer has not granted recognition, the Board shall certify the petitioner as the exclusive representative.

As stated above, Petitioner has demonstrated proof of majority support in an appropriate certificated unit. No other employee organization intervened to represent any of the petitioned-for employees. Since the Academy has not granted recognition, it is **HEREBY CERTIFIED** as of **August 5, 2013**, that **Inglewood Teachers Association/CTA/NEA** is the exclusive representative of all employees in the unit set forth below.

Certificated Unit

Shall Include: All certificated personnel, including classroom teachers.

Shall Exclude: All management, supervisory, and confidential personnel.

RIGHT OF APPEAL

An appeal of this decision to the Board itself may be made within ten calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five 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 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also § 11020, subd.

(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135 subdivision (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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. (Cal. Code Regs., tit. 8, § 32360, subd. (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. (Cal. Code Regs., tit. 8, § 32370.)

If a timely appeal is filed, any other party may file with the Board an original and five copies of a response to the appeal within ten calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered, or when deposited in the mail or with a delivery service properly addressed, or when sent by facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135, subdivision (d).

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. (Cal. Code Regs., tit. 8, § 32132.)

Yaron Partovi
Hearing Officer

Attachment