STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| CHARLES H. ALLEN, et al.,<br><br>Petitioners - Appellants,<br><br>and<br><br>CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 504,<br><br>and<br><br>PLEASANT VALLEY ELEMENTARY SCHOOL DISTRICT,<br><br>Respondents. | Case No. LA-OS-52<br><br>PERB Decision No. 380<br><br>February 28, 1984 |

Appearances; James W. Marsala, Attorney for petitioners-appellants.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: Appellants are 65 employees in a classified representation unit of the Pleasant Valley Elementary School District (District) who had filed a petition for an election to rescind a service fee arrangement in favor of the California School Employees Association (CSEA), the exclusive representative for the unit.[1] They appeal a

[1]The regional office order does not identify appellants as the employees who petitioned for the rescission election. However, this claim is made in appellants' notice of appeal and is accepted here as accurate.

regional office order blocking the election pending the outcome of an unfair practice charge filed by CSEA against the District.

## FACTS[2]

CSEA's unfair practice charge alleged, inter alia, that the District, by refusing to compel compliance with the service fee provision of the negotiated agreement, has encouraged employees to refuse to pay the fee and to file the rescission petition. The regional office, pursuant to PERB Regulation 32752,[3] conducted an investigation as a consequence of which it determined that the District's actions were likely to influence the outcome of the rescission election. It issued the attached letter order blocking the election "to effectuate the purposes of the Act."4

Appellants raise a number of exceptions to the regional office's conclusions, virtually all of which reiterate arguments presented during the course of the investigation. Because the documentary evidence made available to the investigating board agent and submitted on appeal provides

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[2]The facts developed during the investigation appear in the attached regional office letter order. Only those germane to our decision are repeated here.

[3]PERB regulations are codified at title 8, California Administrative Code, section 31001 et seq.

[4]The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq. Unless otherwise indicated, all references are to the Government Code.

sufficient grounds for ordering that the election be stayed pending the final outcome of the underlying unfair practice charge, the Board finds it unnecessary to consider all of the exceptions.

The contract negotiated by the District and CSEA includes the following provisions:

> The District shall, upon appropriate written authorization from any employee, deduct and make appropriate remittance for dues deductions and service fees.
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> The District shall deduct dues in accordance with the Association dues and service fee schedule . . . from all employees who are members . . . and who have submitted dues authorization forms to the District. Each employee covered by this agreement who does not voluntarily acquire or maintain membership in the Association shall be required as a condition of continued employment . . . to pay the Association a service fee as a contribution toward the administration of this Agreement . . . (Emphasis added.)

This arrangement[5] was made effective in March 1982 following an organizational security election conducted by the Public Employment Relations Board (PERB). In November 1982, CSEA filed an unfair practice charge alleging that the District refused to implement the enforcement provisions of the contract, thereby violating EERA subsection 3543.5(c). A

[5]Although no argument is made that such a provision is unlawful or unenforceable, the Board notes that EERA subsections 3540(i) and 3546 specifically authorize such a provision.

complaint was issued in February 1983 after settlement conferences proved unsuccessful.

In March 1983, the petition to rescind the service fee provision was filed. In May, CSEA amended its charge to allege that the District: openly opposed the service fee requirement; refused to enforce the "condition of employment" provision by not terminating non-compliant employees; and that by this refusal and by its surface efforts to get compliance, influenced employees to file the petition for rescission and effectively prevented employees from exercising free choice in the anticipated election.

The District's position is that it will not now or ever terminate employees who fail to comply with the fee requirement. It claims that this was its understanding with CSEA when it negotiated the service fee provision and that the school board ratified the provision on this basis. In June 1982, in response to CSEA's demand that it enforce the contract, the District sent the following:

> The Pleasant Valley District Board of Trustees will not now or in the future terminate any employees for this reason. This was agreed upon, in our opinion, with the CSEA representative prior to the contract, and the [school] Board approved agency shop with this understanding.

## DISCUSSION

PERB Regulation 32752 provides:

> The Board may stay an election pending the resolution of an unfair practice charge

> relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination made by the Board pursuant to this Section may be appealed to the Board itself in accordance with the provisions of Division 1, Chapter 4, Article 2 of these regulations.[6]

In considering the stay of an election, the Board agent's obligation is to determine whether the facts alleged in the unfair practice complaint, if true, would be likely to affect the vote of the employees and, thus, the outcome of the election. Here, the requirement imposed on the Board agent was to conduct an investigation to determine whether the District's allegedly unlawful failure to terminate employees who refused to pay the negotiated service fee is likely to affect the manner in which votes are cast in the rescission election.

Pursuant to her investigation, during which petitioners, CSEA, and the District were afforded full opportunity to submit such information and briefing as desired,[7] the agent reviewed the negotiated agreement containing the service fee provision, and the District's letter stating that it would not terminate

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[6]The reference to investigating the effect of the alleged unlawful conduct on the election assumes that the charge has already been investigated and a complaint issued pursuant to Regulation 32640.

[7]The District declined to participate in this proceeding, considering it a matter between CSEA and petitioners.

non-compliant employees. Based on these documents, she decided that it was possible to assume that employees who had complied with the fee requirement would consider it unfair that they continue such payments while other employees pay nothing and are not compelled to pay by the District. She determined that as a consequence of the District's action, the employees' vote on the matter of rescinding or keeping the fee requirement would likely be affected, and that the election should therefore be stayed pending the outcome of the underlying unfair practice case.

Appellants argue that employees have no reason to feel secure in the District's refusal to terminate non-payers and therefore would vote for rescission anyway. This argument is both presumptuous and misguided, ignoring the real issue: the likely impact of the District's position on those employees who have complied with the fee requirement and on those employees who are members of the Association.[8] This latter combination

[8]It is also reasonable to assume that CSEA members who succeeded in both negotiating the fee provision and securing approval in the subsequent security election, recognized that the threat of termination was the most effective way to assure that those who benefited from CSEA's services paid their fair share of the cost of representation. The loss of this potent "incentive" to compliance, which would shift the burden of securing compliance from the District to CSEA and leave CSEA with expensive and time-consuming alternative methods of collecting its fees, could easily diminish the members' interest in the arrangement. In point, the record indicates that CSEA has filed proceedings in small claims court for collection of unpaid service fees.

comprises some 104 of the 166 unit employees, almost 63 percent of the eligible voters. A significant shift in their attitude toward the requirement could easily affect the outcome of the election.

Appellants also refer to the District's claim that it has an agreement with CSEA that non-compliant employees would not be terminated, a claim that CSEA disputes. This is a matter to be addressed in the unfair practice hearing. It is neither the Board agent's obligation nor function to resolve disputed facts or venture into a pre-judgment of the merits of the unfair practice complaint. The complaint alleged an unequivocal contractual obligation imposed on the District and the District's unequivocal refusal to terminate non-compliant employees. The agent was correct to accept both as fact for the purposes of her investigation.

In reviewing an agent's order staying an election, the Board will generally defer to the conclusions reached by the agent if it finds those conclusions supported by facts developed during the course of a properly conducted investigation Here, we find that the agent's conclusions were based on factual determinations of which all parties were aware and to which they had full opportunity to respond.

ORDER

The Board hereby ORDERS that the order of the regional office staying the rescission election petitioned for by

appellants, pending the outcome of the unfair practice complaint arising out of charges filed by CSEA against the District, is AFFIRMED.

Members Morgenstern and Burt joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
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June 17, 1983

Mr. James W. Marsala and Associates
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Ms. Patricia Roy, Field Representative
California School Employees Association
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Mr. Edward Jones
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Re: LA-OS-52
Pleasant Valley Elementary School District

Dear Interested Parties:

The California School Employees Association Chapter 504 (CSEA) filed an unfair practice charge (LA-CE-1673) against the Pleasant Valley Elementary School District (District) with this office on November 5, 1982. The charge alleges that the District engaged in bad faith bargaining when it refused to enforce the provision in the organizational security clause of the collective bargaining agreement requiring that employees pay an agency fee as a "condition of continued employment" and that the District had, by this action, denied the employees their right to representation and denied CSEA its right to represent employees.

Pursuant to PERB Regulation 32620(b)[1], the Los Angeles PERB Regional Attorney conducted an investigation, determined that ., the charge stated a prima facie violation, and issued a complaint on February 3, 1983. On March 10, 1983 an informal conference was held at which no settlement was reached

[1]PERB Regulation 32620 provides in pertinent part:
(b) The powers and duties of such Board agent shall be to:

On March 28, 1983 an organizational security rescission petition was filed with this office by a group of employees of the District seeking to rescind the organizational security arrangement authorized by a PERB conducted election in March 1982.

On May 16, 1983 CSEA, amended its unfair practice charge to allege that the District board members openly opposed the organizational security provision; that they refused to enforce the "condition of continued employment" provision by not terminating employees; that only surface enforcement had occurred "compelling" employees through ineffectual letters and memos; and that these actions influenced unit members to seek a rescission election and have effectively prevented employees from exercising free choice in such an election.

The District's position is that it will not now nor in the future terminate its employees for non-compliance; that this was agreed upon with CSEA prior to reaching agreement on the organizational security provision; and that their contractual obligation to "urge and compel" employees to join the union has been fulfilled through written and verbal communications. The District has also indicated that it will not compel compliance through automatic dues deduction without enployee authorizations.

This case presents the question of whether or not CSEA's unfair practice charge should "block" the rescission election. For the reasons that follow, it is found that the unfair practice charge does block the election and should be resolved before an election is conducted.

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> (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
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> (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration.
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> (6) Issue a complaint pursuant to section 32540.

## Discussion and Conclusions

PERB Regulation 32752 provides that:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that the alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.

To date, the Public Employment Relations Board (Board or PERB) has dealt with this rule in three decisions, all involving the same school district. In Jefferson School District (3/7/80) PERB Decision No. Ad-82, the Board said that the "blocking charge rule" serves to insulate an election from unfair practices that may influence its outcome. The board also said that, "It is therefore appropriate for PERB to delay decertification elections in circumstances in which the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents." Jefferson School District (6/29/79) PERB Decision No. Ad-66.

Likewise the National Labor Relations Board (NLRB) has long recognized that certain unfair practices interfere with the exercise of free choice in an election and tend to foreclose the possibility of holding a fair election (see NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 611-612, n.33, 23 L Ed. 2d 547, [71 LRRM 2481] and Franks Bros. Co. v. NLRB (1943) 321 U.S. 702, [14 LRRM 591]).

Although the instant case deals with a rescission election, the principle in Jefferson, which dealt with a decertification election is equally applicable here. Like Jefferson, this case poses a situation where an unfair practice complaint has been issued but not resolved. In applying the "blocking charge rule" PERB has said that it will not be applied mechanically but will be examined on a case by case basis to determine whether applying the rule will serve or deter the purposes of the Educational Employment Relations Act (EERA or Act) Jefferson School District, supra PERB Decision No. Ad-66. In the instant case, CSEA and the District negotiated an organizational security arrangement to become effective upon a majority vote in a PERB conducted election. The agreement

requires employees to join CSEA, pay a service fee or claim a religious objection as a condition of continued employment. The agreement also requires that the, "District shall take such action as to compel the employees to pay the required fee." Following a public meeting at which the Board of Trustees ratified the agreement, two board members who had voted against the agreement issued the following statement quoted in a newspaper article; "Employees should not be forced by a threat to their employment to provide financial support to an organization with which they do not agree."

The provision was approved March 24, 1982 by a 77-48 vote out of approximately 166 eligible voters. On March 31, May 5 and May 28, 1982 the District sent letters to the classified employees "compelling" them to comply with the provision. The letters reiterated the language of the agreement and urged employees to comply.

On or before April 12, 1982 a group of employees (53) opposed to the election results, wrote a letter to the District about their displeasure with the provision. On or about April 19, 1982, these employees circulated one of several memos containing similar statements which said,

> "Most Important!!! "Please do not give in to the pressure to sign the form allowing the District to deduct either a service fee or join CSEA! We will win if we all stick together. It was not the Board's intent to fire anyone who refused to join the union. (Emphasis in original).

On June 17, 1982, the Pleasant Valley Board of Trustees at it's regular public meeting, responded to a June 10 CSEA letter demanding the terminations of approximately 74 employees who had not complied. The Board of Trustees indicated it would continue with letters such as had already been written. On that date, the Board issued the following statement:

> "The Pleasant Valley School District Board of Trustees will not now or in the future terminate any employees for this reason. This was agreed upon, in our opinion, with the CSEA representative prior to the contract, and the Board approved agency shop with this understanding."

On November 5, 1982 CSEA, filed the instant unfair practice charge, in addition to filing suit in Ventura County Superior court against classified employees who had not complied.[2]

By not compelling employees to comply with the organizational security provision, as negotiated by their representative, the District has encouraged bargaining unit dissatisfaction with the provision. A significant number of employees have not complied with the provision. At the time of the election there were only 48 votes against approval of the agreement. Yet on June 10, 1982, less than three months after the election, approximately 74 employees had not complied. To date, more than one year later, approximately 62 employees have still not complied.

The figures cited arguably represent a shift in employee sentiment caused by the employer's alleged unfair practice. It may reasonably be presumed that some employees have felt that it is unfair or even useless to comply with the provision while others are not doing so and are not being forced to. This change in enployee sentiment would affect exercise of free choice in an organizational security election.

The election will be blocked until the unfair practice has been resolved.

A separate and independent ground for blocking the rescission election at this time is found in EERB Regulation 34040 which bars the filing of a rescission petition for one year from the date an organizational security arrangement has been voted upon.[3] This insulation period provides a reasonable amount

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[2]The suit was dismissed on the basis that jurisdiction belonged to municipal or small claims court. CSEA has recently filed in municipal court.

[3] PERB Regulation 34040 provides as follows:

Bar to Rescission. The Board shall dismiss any petition to rescind the existing organizational security arrangement if a majority of the employees voting in an election conducted by the Board have voted to approved the arrangement within the 12 months immediately preceding the filing of the petition.

of time for an arrangement to either succeed or fail. Because CSEA's unfair practice charge alleges that the arrangement was not enforced during the first year of it's existence, the arrangement was denied a reasonable amount of time to succeed. If the District is found to have committed an unfair practice, one of the potential remedies would be to extend the election bar for an additional year to provide this reasonable working period. To hold an election now would allow the District to profit from it's own wrongdoing, if the election results in rescinding the arrangement and if the unfair practice charge is ultimately resolved in CSEA's favor. Therefore, the pending unfair practice charge should be adjudicated before an election is conducted.

Based on all of the above, it is found that the blocking charge rule shall be applied in this case. In so doing we are foreclosing the possibility of conducting a tainted election, as well as preserving the purposes of the Act in promoting employer-employee relations.

## Petitioner's Arguments Against Applying the Blocking Charge Rule

The petitioner has advanced several arguments why PERB should not apply the blocking charge rule.

(1) The first argument is that the organizational security election in 1982 was not held in compliance with PERB rules and regulations. This argument has no bearing on whether the alleged unfair practice charge has influenced the election process. Moreover, the argument is moot since no timely objections were filed and the election results were certified accordingly. In addition, petitioner is referred to 109 Cal.App3d 878 (1980), aff. Oakland Unified School District (10/19/78) PERB Order No. Ad-48 where the appellate court upheld the Board's conclusion that only an employer -and an exclusive representative have standing to file objections to an organizational security election.

(2) Petitioner asserts that the allegations of unfair practices are not made against and should not affect the rights of the classified employees. In making this argument, petitioner states that the NLRB will not block an election if the alleged violations do not affect employees in the bargaining unit. They cite Stokely Foods Inc. (1948) 78 NLRB 842 and Cuneo Press of Indiana (1955) 114 NLRB 764. Those

cases are clearly distinguishable from the instant case[4] in that the alleged violations here have squarely affected unit members by encouraging non-canpliance as well as contributing to a shift in employee sentiment.

(3) A "Blocking Charge" should not be applied where it seems unlikely that the alleged violation would affect the election. Petitioner argues that in the instant case the alleged violations are unlikely to affect the election results. As indicated earlier, the alleged violations apparently did affect employees' willingness to comply with the union security provision. The petitioner cites two NLRB cases which are distinguishable. In Carson Pirie Scott and Co. (1946) 69 NLRB 935 and Chevron Oil Co. Administrative Decision (1967) NLRB case 22-RC-3355, the NLRB found that the employees dissatisfaction with the union was not attributable to the employer's unfair practice.

Petitioner also cites Jefferson School District, PERB Decision No. 82, supra, where the Board upheld the regional director's finding that refusal to bargain charges filed two years previously would no longer block an election. Petitioner asserts that in Jefferson as in the instant case, employees requested an election and therefore one should be held. But in Jefferson, the exclusive representative's members indicated a desire to proceed to an election. They did so because all local officers had resigned and because they were without effective representation. In addition, the refusal to bargain charges had been filed two years previously and were considered by the parties to be "technical" refusals to bargain based on negotiability, not bad faith bargaining charges.

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[4]In Stokley Foods three non-unit individuals filed unfairs against the employer alleging that they were discriminatorily refused employment. The NLRB refused to block a representation election because nothing in the record indicated the three individuals would be included in the affected unit and because the substance of the unfair did not affect the employees in the unit. In Cuneo the NLRB refused to set aside election results because of objections by the employer that the election should never have been held because of its pending unfair against a union not a party to the election which still represented some of its employees.

These facts are clearly distinguishable from the instant case where CSEA, members have not signed a request to proceed and where the alleged unlawful conduct is continuing to the present.

(4) A "blocking charge" would allow a union to effectively thwart statutory provisions for an election. In advancing this argument petitioner cites section 3546(b) of the EERA which provides that an organizational security agreement which is in effect may be rescinded by majority vote of the employees in the negotiating unit in accordance with EERB rules and regulations. Petitioner asserts that the rescission petition fully complies with PERB regulations and with statutory requirements, and should not be blocked for the sole reason that an unproved unfair practice charge has been filed. Petitioner cites NLRB v. Minute Maid Corp. (5th Cir. 1960) 283 F2d 705 [47 LRRM 2073]. Templeton v. Dixie Color Printing Co 5th Cir. 1971) 444 F2d 1064 [77 LRRM 2392]; and NLRB v. Gebhardt-Vogel Tanning Co. (7th, Cir. 1968) 389 F2d 71 [67 LRRM 2364]. In these cases, particularly in Templeton, the courts held that the NLRB could not mechanically apply the blocking charge rule without considering and acting upon the petitions before it. They held, inter alia, that the mere filing of an "unproved" unfair practice charge does not relieve the NLRB of it's duty to consider and act upon a petition.

In the instant case, the blocking charge rule has not been applied mechanically. The parties were given an opportunity to file briefs and supporting documents in support of their positions. The rescission petition, unlike the NLRB petitions, has been considered and acted upon in this administrative determination. Although the unfair practice charge is "unproven", the charge has been investigated and a complaint has issued on the basis that a prima facie showing of an unfair practice by the District has been made. Applying the blocking charge rule in this case does not thwart the statutory provisions for an election, but rather it ensures the integrity of the election process.

(5) The school District's conduct did not influence classified employees to seek a new election petition. Petitioner asserts that the rescission petition was initiated solely by the classified employees of the District without any influence from the District and therefore, the election should be held. It appears undisputed that approximately 53 employees voiced their dissatisfaction with the provision as early as two weeks after the election. During the course of the following year, the District has publicly refused to enforce the union security

agreement and the numbers of employees who have resisted compliance have grown. The purpose of an unfair practice proceeding is to determine whether the District's acts have interfered with the rights of CSEA as exclusive representative, as well as with employees' rights to be represented, by encouraging non-conpliance with the union security clause, including actions to seek its rescission. Thus petitioners' assertion that the District's acts did not influence employees to file a rescission petition will be resolved by the unfair practice proceedings.

An appeal of this decision pursuant to FERB Regulations 32350 through 32380 may be made within 10 calendar days following the date of service of this decision by filing an original and 5 copies of a statement of the facts upon which the appeal is based with the Board itself at 1031 18th Street, Suite 200, Sacramento, California 95814. Copies of any appeal must be concurrently served upon all parties and the Los Angeles Regional Office. Proof of service pursuant to Regulation 32140 is required.

Sincerely,

Frances A. Kreiling
Regional Director

PATRICIA HERNANDEZ
Senior Representative