STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BOBBY J. FIKES, Charging Party, v. CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2363 PERB Decision No. 669 May 31, 1988
BOBBY J. FIKES, Charging Party, v. ASSOCIATED CHAFFEY TEACHERS ORGANIZATION, Respondent.	)	Case No. LA-CO-357

Appearances: Bobby J. Fikes, on his own behalf; Rosalind D. Wolf, Attorney, California Teachers Association, for Associated Chaffey Teachers Organization.

Before Porter, Craib and Shank, Members.

DECISION

PORTER, Member: These cases are before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party (Bobby J. Fikes) of the Board agent's partial dismissal of his charges against a school district and an employee organization. One charge alleged that the Associated Chaffey Teachers Organization (ACT) interfered with the rights

of employees during an organizational security election in violation of section 3543.6(b) and section 3544.9 of the Educational Employment Relations Act (EERA or Act).[1] Charging Party also appeals the Board agent's partial dismissal of his charge alleging that the Chaffey Joint Union High School District (District) discriminated against and interfered with employee rights during the course of an organizational security election held March 10, 1986, in violation of section 3543.5(a) of EERA.[2] Although these cases are derived from separate

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 provides, in pertinent part:

> It shall be unlawful for an employee organization to:
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> . . . .
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[2]Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to:

charges filed with the Board, they are consolidated for decision due to their identity of facts and similarity of issues.

BACKGOUND

ACT is the exclusive representative for the certificated bargaining unit. In the 1985/86 school year, the District and ACT negotiated a collective bargaining agreement for the period commencing February 3, 1986. This contract included an organizational security (or agency fee) provision providing for an election among the employees pursuant to EERA section 3546(a) for the purpose of determining whether there existed sufficient support in the unit for agency fee. The parties signed a consent election agreement providing for an agency fee election to be held March 10, 1986.

At the time of the election, there were seven high schools within the Chaffey District. Pursuant to the consent election agreement, the agency fee election was held at a single polling site, a District office within a 3 to 5-mile radius of six of the high schools, and within 12 miles from the seventh high school. The agreement provided for the polling hours of 11:30 a.m. to 4:30 p.m.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

On March 10, the day of the election, it rained heavily. Of the 662 certificated employees eligible to vote, 385 actually cast ballots. This reflected a participation rate of 58 percent. Of the 385 employees who participated in the election, 231 voted for agency fee and 154 were opposed to it. The results of the election thus showed that 60 percent of the total of voters participating approved of organizational security.

Charging Party offers comparative data of the results of an agency fee election held three years before, in 1983. At that time there were only 600 members eligible to vote, and six schools within the District. Three different polling sites were available, and polling hours were from 10:45 a.m. to 4:00 p.m. Five hundred and ten persons cast ballots, reflecting an overall participation rate of 85 percent; 283 employees voted against agency fee (or 55 percent of the total) and 227 voted in favor of it (45 percent). Thus, organizational security was not approved.

CHARGE AGAINST ACT (LA-CO-357)

Allegations

The thrust of Charging Party's allegations against ACT is that it improperly orchestrated the employees' approval of organizational security in the March 10, 1986 election. This was accomplished by a programmed effort not to generally publicize the election but, rather, to selectively inform only

those individuals sympathetic to the concept of agency fee, as well as to limit the number of polling sites and hours. Charging Party avers that ACT's alleged misconduct, which had the effect of obstructing the vote of unit members, constitutes a prima facie case of discrimination and interference with the rights of employees in violation of EERA section 3543.6(b), as well as a breach of the duty of fair representation.

More specifically, Charging Party alleges that ACT discriminated against bargaining unit members by making mailings concerning the election only to union members believed to be in favor of organizational security.[3] There was no notification issued generally by ACT to all bargaining unit members it represented apprising them of the time, date and polling place of the election. ACT's intention to conceal the election from certain elements of its constituency was further evinced by its omission of the date of the election from the

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[3]In his amendment to Charge No. LA-CO-357, Charging Party attached a letter to Associate Superintendent Dean Smothers written by unit member Monty Barnes in which a discussion Barnes had with an ACT official is described. In the discussion, the ACT official informed Barnes that the union held a vote concerning whether to adopt a policy of withholding information regarding the election from teachers not in favor of agency fee. The policy, which the union officials approved, involved the preparation of three separate lists: one containing the names of teachers who were not members of ACT, another containing the names of ACT members likely to vote "no" on organizational security, and the third listing the names of ACT members believed to be supportive of agency fee. Election notices were sent only to individuals whose names appeared on the third list.

calendar section of the ACT newsletter. The omission was particularly telling because events immediately preceding the March 10 election, as well as events occurring after the election, were included in the calendar.

Charging Party further alleges that ACT improperly agreed to terms of a consent election agreement providing for only one polling place and limited hours. In the previous agency fee election, although the District had one less high school and nine percent fewer certificated employees, there were three polling sites, as opposed to only one for this election. In addition to the fewer number of sites, Charging Party argues that the polling hours were too short to enable many teachers to vote, due to their participation in extracurricular activities. This point was reiterated in declarations of 28 employees. In the declarations, employees described how their required participation in extracurricular activities extended their workday to the point where, allowing for driving time in the Los Angeles area, they were not able to make it to the single polling site before it closed.[4]

Charging Party additionally alleges that members and

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[4]These declarations were produced by Charging Party in response to the regional attorney's request, during the course of her investigation, for evidence substantiating Charge No. LA-CO-357. Charging Party also produced statements signed by 42 individuals indicating that they did not vote because they did not see election notices posted pursuant to PERB Regulation 32724 (see fn. 6), or were otherwise not aware of the election.

officers of ACT interfered with employee rights by removing election flyers from teachers' campus mailboxes. In an attachment, Fikes contends that at least two ACT members, one of whom was an election official, went through teachers' mail boxes at two campuses and removed "vote no" flyers. In a separate attachment, a teacher (Monty Barnes) describes a conversation he had with an ACT official in which the latter admitted to personally removing from teachers' mailboxes flyers urging a "no" vote, because they had not been signed, and were therefore "illegal" according to District policy.

Regional Attorney's Analysis

A complaint issued only on the allegation that agents and officers of ACT, without the District's or unit members' authorization, removed election flyers from employees' mailboxes, thereby interfering with their right to participate or refuse to participate in the activities of the employee organization in violation of EERA section 3543.6(b). All other allegations against ACT were dismissed. This complaint, as well as a complaint against the District, were issued by the General Counsel and then consolidated for hearing. The hearing was stayed pending the Board's resolution of Charging Party's appeal of the partial dismissals.

Concerning Charging Party's allegation that ACT failed to adequately inform unit members of the upcoming agency fee election by omitting any reference to the election in its

newsletter and making selective election information mailings only to members known to be supportive of agency fee, the regional attorney reasoned that while PERB Regulation 32724[5] provides for the employer's conspicuous posting of PERB election notices, additional notice is not required by either the provisions of EERA or PERB Regulations.

The regional attorney next analyzed Charging Party's allegation that ACT discriminated against and interfered with the rights of employees by entering into an agreement which provided for only one polling place and limited polling hours so that some teachers were unable to vote due to their participation in extracurricular activities. In dismissing this allegation, the regional attorney noted that, under the

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[5]PERB Regulation 32724 provides, in pertinent part:

> (a) When the Board has determined that an election is required, the Board shall serve on the employer and the parties a Directed Election Order containing specific instructions regarding the conduct of the election. The Board may approve a Consent Election Agreement of the parties regarding the conduct of an election.
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> (b) Thereafter, the Board shall serve a notice of election on the parties. The notice shall contain a sample ballot, a description of the voting unit, and information regarding the balloting process. Unless otherwise directed by the Board, the employer shall post such notice conspicuously on all employee bulletin boards in each facility of the employer in which members of the described unit are employed.

terms of the consent election agreement, the polling hours were limited to the hours 11:30 a.m. to 4:30 p.m. She reasoned that the Board agent's approval of the single polling location and limited polling hours indicated that such were sufficient for a fair election, at least in the best estimation of the PERB agent. Thus, ACT's agreement to the terms of the consent election agreement could not be construed as being violative of EERA.

With respect to Charging Party's allegation that ACT failed to fairly represent employees by agreeing to the consent election agreement providing for only one polling place and limited hours, the regional attorney observed that the Board agent's approval of the agreement would probably preclude a finding of breach the duty of fair representation. Further, there was no showing that the union, in consenting to the terms of the agreement, did so for arbitrary, discriminatory or bad faith reasons. In reaching her conclusion, the regional attorney discounted the significance of the statements of 28 employees who contended that they were unable to vote due to their required participation in extracurricular activities. Analogizing to the law regarding the resolution of challenged ballots in contested elections pursuant to Regulation 32732,[6] the regional attorney concluded that 28 employees did not

[6]PERB Regulation 32732 provides, in pertinent part:

represent a sufficient number to affect the outcome of the election.

CHARGE AGAINST DISTRICT (LA-CE-2363)

Allegations

The charge filed against the District contains allegations similar in content to the ones in the charge against ACT. Charging Party alleges that the District failed to make announcements of the election time, date and polling place, and instructed site administrators not to make announcements. Fikes also alleges that the District, acting "in concert" with ACT, entered into a consent election agreement containing polling hours too short in light of the unit members' significant participation in extracurricular activities, and also containing an insufficient number of polling sites. Further, the District failed to maintain PERB notifications on bulletin boards, in that PERB election notices were often missing or covered. Thus, alleges Charging Party, the District violated EERA section 3543.5(a) by interfering with the employees' exercise of rights under the Act and by discriminating against them.

> (a) In an on-site election, a Board agent or an authorized observer may challenge, for good cause, the eligibility of a voter.
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> . . . .
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> (c) When sufficient in number to affect the outcome of an election, unresolved challenges shall be resolved by the Board.

Regional Attorney's Analysis

With respect to Fikes' charge against the District, a complaint issued on the allegation that the District failed to maintain conspicuously posted (PERB) Notices Of Election on employee bulletin boards at various high schools, thereby interfering with the employees' right to participate or refuse to participate in the activities of employee organizations in violation of EERA section 3543.5(a). In dismissing the remainder of the allegations, the regional attorney's analysis was virtually the same as that used in her dismissal of similar allegations against ACT.

Concerning the allegation that the District violated EERA by failing to make announcements about the election to teachers, and instructing its site administrators not to make announcements, the regional attorney reasoned that, while PERB Regulation 32724 prescribes the District's mandatory requirement to post PERB election notices, it does not impose additional obligations concerning notice on the District. Thus, although parties are free to give notice in addition to what is prescribed in PERB Regulation 32724, they are not obligated to do so.

With reference to the District's alleged discrimination against and interference with the rights of employees by its assent to an election agreement providing for unreasonably limited polling times and locations, the regional attorney again

relied on the Board agent's approval of the consent election agreement as sufficient to negate a finding that the District's conduct may have been violative of EERA.

DISCUSSION

Standing

At the outset, we find that Charging Party, Bobby J. Fikes, has standing to file his charges against ACT and the District. (EERA, sec. 3541.5(a).) The dissent argues that, because the charges fail to allege that Fikes personally did not know of the election, or was otherwise unable to vote, he suffered no harm and, accordingly, has no standing. We disagree. The gravaman of Fikes' allegations is that ACT and the District improperly restricted voters' access in the agency fee election, thereby skewing the results of it. Assuming the truth of such allegations, whether or not Fikes voted does not affect his standing to bring this charge inasmuch as the opportunity to vote in a "rigged" election is really no opportunity at all.

Moreover, the dissent's position fails to recognize the importance of conducting agency fee elections with credibility and integrity. When such essential ingredients are justifiably perceived by the unit to be lacking, there is a grave risk that employees will lose confidence in election procedures, as well as become demoralized by the conduct of parties to an election. Although such harm is not directly quantifiable, it is of the very sort that contributes to the instability of bargaining

relationships. Thus, we have no difficulty in concluding that Fikes does indeed have standing.[7]

CHARGE AGAINST ACT (LA-CO-357)

Interference

One of the primary arguments in the charge against ACT is that the organization, by its alleged conduct, interfered with the rights of employees in the organizational security election. In issuing a complaint against ACT, the regional attorney considered significant only Charging Party's allegation that ACT officers, without the District's or unit members' authorization, removed election flyers from employees' mailboxes. While the latter is sufficient to justify finding a prima facie case of interference, the regional attorney also should have issued a complaint on the basis that, under the totality of circumstances alleged, ACT interfered with the rights of employees in the organizational security election. (State of California (Departments of Personnel Administration, Mental Health, and Developmental Services) (1985) PERB Decision No. 542-S.)

In State of California (Departments of Personnel Administration, Mental Health, and Developmental Services),

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[7]Our dissenting colleague cites one PERB decision, Riverside Unified School District (Petrich) (1986) PERB Decision No. 562a, in support of his argument that Charging Party lacked standing to file the charges at issue. In Riverside, the charging party, a daytime employee, attempted to challenge an action of management which solely affected night shift employees. We find the facts of Riverside wholly distinguishable from those of the instant case.

supra, this Board specifically rejected an analysis involving the assessment of "each factual allegation contained in the charge as if it were singularly being offered as evidence of a prima facie violation." (P. 3.) The Board explained, in language we consider apposite to the instant case:

> [T]he critical inquiry is whether the factual allegations set forth in the charge, if true, would lend support to the legal theory that the Charging Party puts forth. Each individual factual assertion need not stand alone as conduct violative of the Act but, rather, the totality of circumstances must be considered. Thus, in the instant case, the individual factual allegations dismissed by the regional attorney must be considered in light of those aspects of the charge upon which a complaint issued and which the regional attorney found sufficient to state a prima facie case.
> (Pp. 3-4.)

We believe that the regional attorney erred in her analysis of each of Charging Party's allegations in isolation and, then, in issuing a complaint only on the basis that ACT interfered in the election by its alleged removal of election notices from unit members' mailboxes. Fikes' charge, when read in its entirety, references an entire course of conduct culminating, he states, in the obstruction of voters from participating in the election. We find it appropriate to read Charging Party's averment concerning ACT's formulation of a consent election agreement together with its alleged plan to selectively notify

only those unit members believed to approve of agency fee,[8]
and to remove election flyers from employees' mailboxes.

EERA section 3543 provides, in pertinent 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. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations. . . . [Emphasis added.]

While EERA, section 3543 guarantees the right of employees to form, join and participate in the activities of employee organizations, no less significant is its protection of the right to refuse to participate in such activities. Although the latter right — at least with respect to payment of agency fees — must yield to the outcome of an organizational security election at which the electorate expresses a preference for agency fee, this should not be the rule if the election's

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[8]We reject the dissent's position that, because ACT had "no duty to act," the Board cannot consider Charging Party's allegation pertaining to ACT's selective election information mailings under a totality of circumstances analysis. Although EERA does not place upon unions the affirmative duty to publicize upcoming elections, it does impose upon them the general obligation not to improperly influence the outcome of them. The allegation which our colleague would dismiss is intimately related to Charging Party's legal theory that ACT, by engaging in an alleged course of conduct, interfered with unit members' participation in the agency fee election.

outcome were secured by improper conduct.[9] Indeed, to the extent that ACT, through its improper conduct, sought to influence the outcome of the election, Charging Party's agency fees and those of others similarly situated were extracted on the false condition of a fairly conducted election. Thus, ACT's alleged misconduct interfered with Charging Party's "right to refuse to join or participate in the activities of employee organizations" in violation of EERA sections 3543.6(b) and 3543.

Further, EERA section 3546 provides, in pertinent part:

> (a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by

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[9]The U.S. Supreme Court, in Chicago Teachers Union, Local No. 1 v. Hudson, et al (1986) 475 U.S. 292 L89 L.Ed.2d 232J, recognized that requiring nonunion employees to support their collective bargaining representative, by compelling the payment of dues, has a decisive impact upon their First Amendment rights. Nonetheless, the Supreme Court rejected the claim that it was unconstitutional to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiation and administration of the collective bargaining agreement. (See also Abood v. Detroit Board of Education (1986) 431 U.S. 209 [97 S.Ct. 1782].) The Supreme Court in Hudson, however, recognized the necessity of basic procedural safeguards in the collection of nonmembers' dues so as to minimize the impingement upon their First Amendment rights. By analogy, an organizational security election must be conducted in such a manner as to afford employees a reasonable opportunity to exercise their franchise lest nonmembers' constitutional rights are impinged upon without even the true assent of employees in the unit.

> all members in the appropriate negotiating unit . . . . Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. [Emphasis added.]

As is apparent from the language of section 3546, if organizational security is to prevail during an agency fee election, a majority of those members of the negotiating unit voting must approve of it. Section 3546 contains at least an implicit requirement of good faith in the conduct of the election. The importance of this requirement is underscored by the facts alleged in this case. While a technical majority of those voting may indeed have approved of organizational security, their vote does not equal the "majority" contemplated by the statute if others perceived to vote a different way were obstructed from doing so. Inasmuch as the validity of organizational security rests upon the existence of a properly run election reflecting the preference of a majority of those voting, Charging Party alleged a prima facie case of interference with the right of all members of the unit to participate in an organizational security election where, at the very least, essential democratic procedures should have been respected. Accordingly, Charging Party alleged a prima facie violation of EERA sections 3543.6(b) and 3546.[10]

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[10]Alternatively, Charging Party also may have alleged an independent violation of EERA section 3546. Government Code section 3541.3(i) grants the Board the power to "investigate

DUTY OF FAIR REPRESENTATION (DFR)

We also reverse the regional attorney's conclusion that Charging Party failed to allege a prima facie case of breach of the duty of fair representation. Charging Party's allegations concerning ACT's selectively informing unit members of the upcoming agency fee election, as well as its formulation of a consent election agreement having the inevitable effect of obstructing a large number of teachers from voting, are sufficient to warrant, when considered in the totality of circumstances alleged, the issuance of a complaint. (State of California (Departments of Personnel Administration, Mental Health, and Developmental Services, supra.)

In reaching our conclusion that a complaint should issue on Charging Party's DFR allegation, we disapprove of the regional attorney's analysis regarding PERB Regulation 32724. She reasoned that, inasmuch as Regulation 32724 provides for posting of official PERB election notices by the employer, ACT's conduct was not prima facie violative of EERA because it had no obligation to notify unit members of the election. Such analysis, however, ignores the real issue pled by Charging

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unfair practices or alleged violations of [the] chapter, . . ." (Emphasis added.) Further, case law has established that this Board has the power to remedy violations of EERA in addition to those specified pursuant to sections 3543.5 or 3543.6. (Compton Unified School District (1987) PERB Order No. IR-50; Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 48-53, hg. den.; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765, 768-769.)

Party — namely, whether ACT, by selectively informing certain unit members of the upcoming election in an attempt to influence the outcome of that election, breached the duty of fair representation owing to all unit members.[11]

The Board recognizes a union's strong interest in conducting a free and vigorous campaign in which it is able to robustly promote itself in becoming or maintaining its position as the exclusive representative. Obviously, such advocacy is intrinsically related to a union's very survival. While some forms of such electioneering are lawful, we note a qualitative difference in a situation where the exclusive representative engages in conduct, not to influence the choice of the voter but, rather, to deprive the voter of the physical opportunity to vote. Further, we emphasize that the instant case occurs within the context of an agency fee election. The exclusive representative, in the course of an agency fee election, is under a statutory duty not to discriminate among members of the unit — particularly where the subject of the selective

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[11]The dissent systematically characterizes Charging Party's allegations against ACT (as well as those against the District) as falling within the rubric of a "failure to act." We agree with the dissent's underlying proposition that a failure to act cannot constitute an unfair practice unless there exists a threshold duty to act. However, we reject the dissent's position that this is a true "failure to act" case. Charging Party's averments, for the most part, allege affirmative conduct on the part of ACT and the District. One obvious example of such is ACT's alleged mailing of election information pamphlets only to unit members perceived to be supportive of agency fee.

treatment vitally concerns those persons against whom the union is discriminating. Inasmuch as Charging Party alleges that ACT's selective election information mailings were part and parcel of its plan to exclude some teachers from participating in the election, we find this factual allegation relevant to our analysis of whether Charging Party has stated a prima facie case of breach of the duty of fair representation.

The EERA places on exclusive representatives a statutory duty to represent all employees in the negotiating unit. (SEIU, Local 99 (Kimmett) (1979) PERB Decision No. 106.) EERA section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

In Oakland Unified School District (1978) PERB Order No. Ad-48, the Board stated:

> The exclusive right to represent employees in a designated unit carries with it concomitant obligations and potential liabilities. These include the duty of conducting good faith negotiations, representing employees in grievances and generally speaking to their interest on all matters within the scope of representation. (Pp. 9-10, emphasis added.)

EERA section 3543.2, which delineates EERA's scope of representation, expressly recognizes "organizational security pursuant to section 3546" as being within scope.

The duty of fair representation is not, of course,

all-inclusive. It does not extend to those union activities which do not directly involve the employer or which are strictly internal union matters, unless such internal union matters have a substantial impact[12] on the employees' relationship with the employer. (SEIU, Local 99 (Kimmett), supra; Rio Hondo College Faculty Association (Furriel) (1986) PERB Decision No. 583.)

We flatly reject the dissent's contention that a unit-wide organizational security election is an internal union matter and that the duty of fair representation should, therefore, not attach to ACT's conduct in connection therewith. EERA section 3540.1(i)(2) defines organizational security as "[a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee . . . ." (Emphasis added.) Moreover, EERA section 3543.2, which delineates EERA's scope of representation, expressly includes "organizational security" within the meaning of "terms and conditions of employment." As

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[12]We, too, share our dissenting colleague's interest in developing a coherent and consistent body of law. The dissent's application of the "substantial impact" test to define which matters are strictly internal union affairs is not supported by our precedent. On the contrary, whether an item has a substantial impact on the employees' relationship with the employer is at issue only once there has been made the threshold determination that the matter is an internal union one. (SEIU, Local 99 (Kimmett), supra, p. 8.)

a term and condition of employment, organizational security directly and integrally involves the employer. This is envinced not only by its express enumeration in EERA's scope provision, but also by the fact that "an organizational security term of a collective bargaining agreement shall 'become effective' only upon agreement by the employer and bargaining representative and, where requested by employer, ratification by a majority of the bargaining unit." (San Lorenzo Education Association v. Wilson (1982) 32 Cal.3d 841, 846; EERA secs. 3543.2, 3546.)

We further expressly disavow the dissent's position that unit members are protected from arbitrary, discriminatory and bad faith conduct concerning an agency fee provision only when such conduct occurs at the bargaining table. The genesis of the organizational security election at issue was the parties' negotiated agreement containing an agency fee provision. The duty of fair representation attaches not only to the negotiation of a collective bargaining agreement, but also to its administration and implementation.

ACT's conduct, when considered in the totality, is sufficient to state a prima facie case of breach of the duty of fair representation. Contrary to the regional attorney's conclusion that ACT's conduct was not motivated by arbitrary, discriminatory or bad faith reasons, we find that the allegations on their face provide sufficient evidence of

discriminatory motive to justify for this matter to go to hearing. While ACT may not have an EERA-imposed affirmative obligation to generally notify its constituency of the upcoming election, ACT's alleged scheme of selectively informing its constituency, with the goal of influencing the outcome of the election, is an important factor to be weighed in the determination of whether, in the totality of the facts, a prima facie case has been alleged. The fact that ACT's scheme was allegedly part of a comprehensive plan of differentiating between ACT members and nonmembers also gives rise to the possible inference of arbitrary treatment and discrimination by the exclusive representative. ACT's conspicuous omission of any reference to the election in its published calendar of upcoming events is yet another fact from which bad faith can be inferred. Further, ACT's method of selectively informing teachers of the election takes on an increased significance when viewed in light of its alleged tampering with unit members' mailboxes in order to remove "Vote No" pamphlets, as well as its formulation of the terms of the consent election agreement having the inevitable effect of obstructing unit participation in the election.

Concerning the consent election agreement, we reject the regional attorney's analysis that the Board agent's approval of it was sufficient to preclude a finding of breach of the duty of fair representation. Even looking no further than the terms of the consent election agreement, there are several unresolved

important questions: Why did ACT agree to such limited polling locations and hours for the 1986 election, despite a substantial increase in certificated personnel and a new school site in the District? Further, why was ACT not aware of the fact that many unit members were required to participate in extracurricular activities, which made it difficult, if not impossible, for them to leave campus and vote? In short, we cannot find that the Board agent's approval of the consent election agreement was sufficient to immunize ACT from a finding of a breach of the duty of fair representation.

In addition, we disagree with the regional attorney's analogy to the resolution of challenged ballots in contested elections. The regional attorney appeared to dismiss the significance of the 28 statements of employees unable to vote due to their work hours, on the ground that their votes would not have affected the outcome of the election anyway. We disavow the requirement of an outcome determinative voting standard in order to state a prima facie case of breach of the duty of fair representation within the present context.[13]

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[13] It is interesting to note that when the 28 potential votes of individuals who were unable to vote, due to conflicting extracurricular activities, are combined with the 42 potential votes of persons who did not vote because they did not see the posted election notices, the total (70 votes) theoretically could have affected the outcome. For example, if these 70 votes are added to the number of actual participants in the election (385) for a total of 455, the requisite 51 percent to approve agency fee would have been 232 votes. In the actual election, however, only 231 persons approved agency fee.

CHARGE AGAINST EMPLOYER (LA-CE-2363)

A complaint was issued on the allegation that the District, by its failure to maintain conspicuously posted election notices on employee bulletin boards, interfered with the "employees' right to participate or refuse to participate in activities of employee organizations in violation of Government Code section 3543.5(a)." Similar to our analysis of the charge against ACT, we find that the regional attorney erred by not also issuing a complaint based upon interference under an analysis considering the totality of circumstances alleged. (State of California (Departments of Personnel Administration, Mental Health, and Developmental Services, supra.)

For example, the regional attorney attached no weight to Charging Party's factual allegation that the District gave specific instructions to its site administrators not to make announcements. While these facts alone are not sufficient to state a violation of EERA, they should not be divorced from the context in which they arose. Namely, the District allegedly failed to fulfill even EERA's rudimentary notice posting requirement. One may reasonably draw the inference that the District did not want unit members to know of the election in light of its failure to adequately post election notices, combined with its instructions to site administrators to remain mute about it. This alleges more than a simple failure to act, as has been asserted by the dissent.

Similarly, the regional attorney erred in dismissing Charging Party's factual allegation that the District interfered with the rights of employees by helping formulate the terms of the consent election agreement which drastically limited voter participation. Again, the Board agent's mere approval of the terms of the consent election agreement is insufficient to immunize the District from potential liability under EERA for interfering with the rights of employees in the agency fee election.

Further, the regional attorney failed to consider Charging Party's factual allegation that ACT and the District acted collusively to achieve the approval of agency fee. In fairness to the regional attorney, only on appeal did Charging Party attempt to substantiate his allegation in Charge No. LA-CE-2363 that the District acted "in concert" with ACT in failing to provide accessible polling places. Such allegations submitted on appeal were that most of the District's trustees received substantial campaign contributions from ACT and other CTA-affiliated unions. Although it is not appropriate to now consider such facts, they are not essential in order to state a prima facie case of collusion. The terms of the consent election agreement must be considered in light of Charging Party's allegations concerning the geographical location of the schools and the unit members' substantial participation in extracurricular activities. When its terms are accordingly

viewed in the entire factual context, ACT and the District's collaboration in their formulation provides sufficient evidence of collusion to warrant this allegation being considered at hearing as well.

In short, the regional attorney was correct in issuing a complaint based upon the District's interference with the rights of employees in connection with its failure to adequately post and maintain election notices. However, we conclude that she erred in not finding a separate prima facie case of interference based upon the totality of circumstances. That is, the complaint should have encompassed the District's entire course of conduct during the 1986 organizational security election. This would include not only the District's failure to maintain election notices, but also its instructions to site administrators not to announce the election, as well as the District's collaboration with ACT in formulating the terms of the consent election agreement having the reasonably probable effect of restricting voter participation in the agency fee election. Further, for the same reason that would find that Charging Party alleged a prima facie case of ACT's interference with the rights of unit members in violation of EERA sections 3543.6(b) and 3546, we also find that Charging Party alleged the District's prima facie violation of EERA sections 3543.5(a) and 3546.

Remedy

Our decision, of course, stands only for the proposition that Charging Party has alleged a prima facie case against ACT and the District. Therefore, any discussion concerning the available remedy is premature. Nonetheless, we consider it appropriate to briefly address our dissenting colleague's concerns regarding such.

The dissent argues that filing objections pursuant to PERB Regulation 32738 is the exclusive means by which an election may be set aside in the event of serious misconduct in connection therewith. Inasmuch as Fikes did not have standing pursuant to PERB Regulation 32738 to file an objection, and the parties that were entitled to do so did not, the remedy of rescinding the election is not available lest Regulation 32738 be rendered a "nullity." We disagree.

In remedying unfair practices, the Board is empowered by our Legislature to "take such action . . . as the board deems necessary to effectuate the policies of [EERA]." (Sec. 3541.3(i).) It is thus self-evident that EERA does not exclude the setting aside of an election as an available remedy within the context of an unfair practice in an election setting. Nor is there a conflict between EERA section 3541.3(i) and PERB Regulation 32738. Even assuming, arguendo, as the dissent implies, the existence of an indirect conflict, a PERB <u>regulation</u> dealing with the filing of objections to an election

may not circumscribe this Board's broad remedial powers vested by statute over unfair practices.

ORDER

The partial dismissals in Case No. LA-CO-357 and Case No. LA-CE-2363 are REVERSED, and the General Counsel is directed to issue complaints consistent with this Decision.

Member Shank joined in this Decision.

Member Craib's concurrence and dissent begins at page 30.

Member Craib, concurring and dissenting: Before addressing the sufficiency of the dismissed allegations, there is a threshold issue which must be dealt with. The charging party in this case is an individual, Bobby J. Fikes (though he claims on appeal that the charge is in the nature of a class action). He complains that the right to vote in the agency fee election was interfered with by both the District and by ACT, to a degree rendering the election invalid.

My review of the record, in particular the charges and the attachments thereto, has revealed that nowhere has Fikes alleged that he was unaware of the election and thus unable to vote. In one of the numerous individual statements attached to the amended charge against ACT, John C. Freymueller declared that he was able to vote only because he ran into the charging party at 12:50 p.m. on the date of the election and the charging party informed him of the election. While this statement, if accurate, does not confirm whether Fikes was able to vote, it does reflect that he was aware of the election for at least a short time before its conclusion.

It is axiomatic that a claimant, to have standing, must have been harmed by the alleged unlawful conduct. For example, in Riverside Unified School District (Petrich) (1986) PERB Decision No. 562a, the Board held that the charging party had no standing because he was personally unaffected by the alleged unilateral change. See, generally, Witkin, California Procedure (3rd Ed. 1985) vol. 3, section 44. This is, of

course, true whether a charge is brought by an individual or in a representative capacity. Since the charge as now written fails to allege that Fikes was harmed by the alleged conduct, the entire charge, including that portion on which a complaint has already been issued (that portion of the case is being held in abeyance pending our review of the partial dismissal), must be dismissed. As discussed below, I would dismiss with leave to amend so that Fikes may properly allege that he was personally harmed or add a party who was.

Normally, a party is alerted by the Board agent processing the charge if it is deficient in some manner, and an opportunity to amend is afforded (see PERB Regulation 32621). Discretion to allow post-complaint amendments is afforded by Regulation 32647. Here, the record does not reflect that Fikes was ever apprised that there was a deficiency in his charge with regard to standing. Consequently, it would be unfair and inconsistent with normal PERB processes to refuse to allow Fikes the opportunity to correct the deficiency.

Assuming Fikes is unable to establish his standing to file the charge, it would be appropriate to allow a substitution of parties, even though the statute of limitations has run. As with other types of amendments to pleadings, under California law a policy of liberality is applied to the substitution of parties. Where a complaint does not state a cause of action in the named plaintiff, but an amended complaint with a substituted party would restate an identical cause of action,

such an amendment is freely allowed. See, generally, Witkin, California Procedure (3rd Ed. 1985) vol. 5, section 1150; and see Klopstock v. Superior Court (1941) 17 Cal.2d 13; Jensen v. Royal Pools (1975) 48 Cal.App.3d 717. Amendments are disallowed where they seek (after the statute of limitations has run) to add a wholly new cause of action based on a different set of facts. Klopstock, Jensen, supra.

Here, Fikes has clearly stated a claim (subject to the limitations discussed below) as to those who could demonstrate that their opportunity to vote in the agency fee election was interfered with by the alleged conduct of the District and ACT. Were he unable to proffer an amendment that would establish his standing to file the charge, the charge would nonetheless be identical if it were amended to include a substituted party who did have standing. We would simply have a situation where the wrong person originally filed the charge. In my view, the authorities cited above instruct that, in such circumstances, leave to amend to substitute a new charging party (or parties) should be granted. I now turn to the issue of the sufficiency of the allegations dismissed by the regional attorney.

I agree that approval of the consent election agreement by a Board agent does not insulate the parties from charges based on the content of the agreement. Theoretically, a Board agent might approve a flawed agreement due to an innocent mistake or an error in judgment. The flawed character of the agreement

would nevertheless remain the creation of the parties and they should not be absolved of all responsibility. In this case, the agreement provided for only one polling place, open from 11:30 a.m. to 4:30 p.m., in a multi-campus district. Arguably, such restricted hours could have interfered with employees' ability to vote in the agency fee election. Therefore, I agree with the majority that this allegation states a prima facie case of interference against both the District and ACT which should go to hearing.

However, I must part company with the remainder of the majority opinion because the allegation concerning the agreement itself is the only one which should be added to the complaint as an actionable claim. The remaining allegations were properly dismissed because, as a matter of law, they cannot constitute actionable claims, regardless of the surrounding circumstances or the intent of the District or ACT. At most, these factual allegations may be used as evidence in support of those allegations which describe actionable conduct. In a radical departure from established principles of law, the majority would find a failure to act unlawful even where there was no duty to act in the first place.

The Allegations Against the District

The remaining allegations against the District are that it failed to make announcements about the agency fee election and instructed its site administrators to make no announcements. Pursuant to PERB Regulation 32724(b), the District had the duty

to post PERB-provided notices of the election (see majority-opinion, fn. 6). Neither the statute nor PERB regulations create any additional duty to publicize the election. The majority admits as much when it concedes that "these facts alone are not sufficient to state a violation of EERA." However, the majority goes on to state, in essence, that the failure to make additional announcements may be unlawful if motivated by a desire to restrict the opportunity to vote. The majority concludes that all of the allegations should be added to the complaint based upon a totality of the circumstances analysis.

It is a fundamental principle of law that a failure to act is not unlawful unless there is a duty to act. This is, of course, a well-known tenet of tort law (see, generally, Witkin, Summary of California Law, 8th Ed. (1974), vol. 4, sections 5-6) and is equally applicable in the labor law context. See, e.g., Florida Mining & Materials Co. v. NLRB (5th Cir. 1973) 481 F.2d 65 [83 LRRM 2793], enforcing 198 NLRB No. 81 [80 LRRM 1848], cert, denied (1974) 514 U.S. 990 [85 LRRM 2711] (no interference with fair election by failure to disclose information where no duty to disclose); accord, Bokum Resources Corp. v. NLRB (10th Cir. 1981) 655 F.2d 1021 [107 LRRM 3230] enforcing (1979) 245 NLRB 84 [102 LRRM 1390]. Put another way, the harm, if any, which flows from a failure to act may be attributable only to those who had a duty to act. In this case, the District cannot be held responsible for some

employees' lack of knowledge of the election due to its failure to take action to publicize the election beyond that which is required by PERB regulations.

Further, the District's state of mind is of no relevance. A desire to restrict voting opportunities does not create a duty to publicize the election that does not otherwise exist. At most, such a state of mind is nothing more than "animus in the air." Certainly, the majority would not argue with the proposition that animus itself is not unlawful. Only where such animus results in some action or effect that breaches a duty is it deemed unlawful. See, e.g., Los Angeles Unified School District (1988) PERB Decision No. 659; Resistance Technology, Inc. (1986) 280 NLRB No. 177 [122 LRRM 1321]; Peerless, Inc. v. NLRB (7th Cir. 1973) 484 F.2d 1108 [83 LRRM 3000], enforcing 198 NLRB 982 [81 LRRM 1472].

The District could not, of course, actively restrict voting opportunities, because such action would breach its duty not to interfere with the employees' right to vote in the election. (EERA sections 3543.5(a), 3543, 3546.)[1] This is why the

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[1]Interestingly, pursuant to section 3546, the employees are provided the right to vote on the agency fee provision only if the employer insists on such a vote. Nevertheless, once such a vote is required, the employer certainly has the duty not to interfere with the vote.

The majority's finding that an "independent violation" of section 3546 as stated is unnecessary because any rights provided by that section are actionable through either section 3543.5 or section 3543.6, as those sections prohibit interference with "rights guaranteed by this chapter." While the Board may remedy violations of the statute which do not

allegation concerning the failure to maintain PERB-provided notices was properly included in the complaint by the regional attorney and why the allegation concerning the consent election agreement should also be included.

While the majority concedes that the failure to further publicize the election is not itself unlawful, it insists that, when viewed together with the other allegations (i.e., in the "totality"), the entire course of conduct could be unlawful. The majority fails to recognize that the lack of a duty to further publicize the election precludes finding the District's failure to make announcements unlawful, whether viewed in insolation or in the "totality." It is true that in certain contexts, including interference and refusal to bargain in good faith cases, an isolated action may not itself be sufficient to constitute a violation, though several such actions taken together could be sufficient.

In the bargaining context, it is often necessary to view the entire course of bargaining conduct in order to conclude that an inference of bad faith has been raised. Similarly, in an interference case when balancing the harm to statutory rights with respondent's business justification, it may require several incidences of harmful conduct in order to tip the

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neatly fit into the definitions of unlawful practices contained in sections 3543.5 and 3543.6, it has never been the practice of the Board to find both a violation of section 3543.5 or 3543.6 and an independent violation of the section providing the right interfered with.

balance in the charging parties' favor. However, in all such cases, the respondent is responsible for each incidence of harmful conduct because each implicates a duty that may have been breached (i.e., the duty to bargain in good faith or the duty to refrain from interfering with statutory rights). Here, the failure to make further announcements implicates no duty, therefore, it cannot separately nor cumulatively constitute a violation.

While the District's alleged failure to make further announcements cannot be termed actionable conduct, it is nonetheless relevant evidence. The failure to make announcements is consistent with the charging party's theory that the District intentionally sought to restrict voting opportunities (as opposed to evidence that the District did make announcements, which would undercut that theory). While evidence of intent is not required in an interference case, it is nonetheless helpful, if for no other reason than to undercut any purported justification offered for the conduct in question. Such allegations may even be properly included in the complaint, as long as it is clearly separated from the alleged conduct which is actionable.

Typically, a complaint issued by the General Counsel contains several paragraphs describing the factual allegations. The complaint concludes by stating that, by virtue of the conduct described in one or more of the paragraphs, a violation of the statute has occurred. The

remaining paragraphs, while alleging facts critical to the prima facie case, are not referenced in the concluding paragraph because they do not describe the actionable conduct, i.e., that conduct which, if true, would violate the statute. The allegations involved here are of the same character. While they may aid in the establishment of a prima facie case, they do not describe conduct which is arguably unlawful due to the underlying motive or due to its effect on statutory rights.

The Allegations Against ACT

The allegations that ACT failed to make any announcements about the election (except to send reminders to those viewed as likely to vote in favor of agency fees) should be analyzed in the same way as the District's alleged failure to make announcements. Neither the statute nor PERB Regulations expressly require that ACT do anything to publicize the election. Nor is there any duty which is implicitly breached by a failure to publicize. Announcement of the election is provided for through the employer's posting of PERB-provided notices. The parties are, of course, free to then engage in electioneering which does not interfere with free choice or the opportunity to vote. Since there was no duty to make announcements at all, the failure to include the agency fee election in the calendar section of the ACT newsletter and the selective sending of reminders to likely supporters cannot constitute actionable conduct.

The majority makes much of the alleged selective notifications of the election by ACT. This allegation is particularly emphasized in the majority's duty of fair representation analysis. Here, the majority at least identifies a duty which is allegedly breached. Assuming for the sake of argument that the duty of fair representation attaches in these circumstances (see discussion, infra), the majority's analysis is unpersuasive. Inherent in that analysis is that the duty of fair representation carries with it the concomitant obligation, if the union chooses to notify anyone of the election, to do so in an equal fashion.

The majority intimates that ACT's apparent desire to have only agency fee supporters vote reflects bad faith or discriminatory behavior, though it acknowledges that, "standing alone," selective notification is viewed as lawful electioneering under EERA. Yet, all that is alleged is that ACT engaged in a typical get-out-the-vote campaign. Inherent in any such campaign is the desire to increase turnout by supporters while avoiding any action that would increase the turnout of opponents. To say that this is even arguably discriminatory or in bad faith would effectively outlaw all such electioneering. Surely, the union must be permitted to try to influence the outcome of the vote. This is no more in derogation of nonmember rights than seeking agency fees in the first place. After all, in such circumstances the union's position is undoubtedly that agency fees will allow it to

better represent all members of the unit. While some may disagree, no one can argue that such a position is discriminatory or in bad faith.

Moreover, selective notification does not interfere in any way with the right to vote. Those not notified by the union are in the same position as they would have been had the union notified no one. Since the union has no duty to publicize the election, there is no effect upon statutory rights.

In sum, ACT's get-out-the-vote campaign (or "selective notification") cannot be the basis for a violation, whether standing alone or viewed in conjunction with the other allegations, because it violated no duty imposed upon ACT and thus had no effect upon employees' voting rights. It reflects allowable electioneering and no more, regardless of its motivation. Like the District's failure to make announcements, ACT's similar failure and its selective notification may constitute relevant evidence, but cannot be included in the complaint as actionable conduct (i.e., that conduct which arguably did interfere with the opportunity to vote).

Duty of Fair Representation

The majority claims that it cannot reasonably be contended that the duty of fair representation (DFR) does not attach to the conduct surrounding an agency fee election. It bases this conclusion solely on the fact that agency fees are within the scope of representation (section 3543.2) and that the employer is involved in requesting the election and posting notices

pursuant to PERB Regulations. I submit that this analysis is overly simplistic and that a thorough evaluation of the nature of agency fees dictates that they do not represent a matter to which the duty of fair representation attaches.[2]

The duty of fair representation extends only to "union activities that have a substantial impact on the relationship of unit members to their employers" and does not apply to those "activities which do not directly involve the employer or which are strictly internal union matters." Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106; Rio Hondo College Faculty Association (Furriel) (1986) PERB Decision No. 583. The key phrase is the first one, as precedent clearly provides that a "substantial impact on the relationship of unit members to their employers" is the central characteristic fixing the parameters of the duty of fair

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[2]At the outset, I wish to emphasize that whether or not the DFR attaches would not affect the outcome of this case. Further, nonmember rights with regard to agency fees are protected by the unfair practice provisions of the statute (sections 3543.5 and 3543.6) and, in fact, are more readily protected by those provisions given the high standard required to prove a breach of the DFR (arbitrary, capricious or bad faith conduct). My interest in making this point is in the development of a coherent and consistent body of law.

I recognize that my view is seemingly inconsistent with the result in King City High School District Assoc, et al. (Cumero) (1982) PERB Decision No. 197 (on appeal before the California Supreme Court), where the Board found a DFR breach as well as interference with the right not to participate. However, I note that the Board apparently just assumed that the DFR would attach without analysis or citation. I find the cases where the Board has expressly discussed the parameters of the DFR to be more instructive.

representation. Those activities which "do not directly involve the employer" or are "strictly internal union matters" by definition do not carry such impact.

Agency fees represent a "special animal" which is treated by the statute in a peculiar fashion. While it is a matter which is fundamentally between the exclusive representative and unit members, it may not come into existence absent the agreement of the employer. While it is, thus, technically within the scope of representation, it is not a term and condition of employment vis-a-vis the employer as are all other matters within scope. As such, it does not have a "substantial impact on the relationship of unit members to their employers." The employer's substantive involvement ends once an agreement to allow agency fees is reached at the bargaining table.

Because, at the bargaining table, the exclusive representative is acting in a representational capacity (i.e., acting on behalf of the unit vis-a-vis the employer), the duty of fair representation may attach to bargaining conduct surrounding the agency fee provision. However, once agreement is reached at the table, the exclusive representative no longer acts in that representational capacity. Subsequent conduct with regard to agency fees must therefore be evaluated under the unfair practice provisions of the statute.

Available Remedies

The regional attorney properly found that the charging party has no standing to file an election objection pursuant to

PERB Regulation 32738. In Bissell v. PERB (1980) 109 Cal.App.3d 878, the court affirmed the Board's decision that the "parties" who may file an election objection pursuant to Regulation 32738 are clearly defined as only the employer and the exclusive representative (see, also, Richmond Unified School District (1980) PERB Order No. Ad-89). Subsequently, Regulation 32721 (which clearly defines "parties" as the employer and the exclusive representative in these circumstances) was promulgated to essentially codify the Bissell holding. While it is logical that election conduct that could be addressed as an election objection might also be an unfair practice, including conduct that would be insufficient to warrant a new election, the same array of remedies cannot be available.

PERB Regulation 32739 sets out the powers and duties of a Board agent in evaluating election objections. Subsection (f) provides for dismissal when the objections do not warrant setting aside the election and subsection (g) provides for a written determination setting aside the election when such action is warranted. These provisions, in conjunction with the 10-day filing period (following service of the tally of ballots) provided by PERB Regulation 32738, clearly reflect that the election objection procedures set out in the regulations are intended to provide an expedited process by which charges of serious misconduct that may require the setting aside of an election may be addressed. The rationale

is obvious--should a rerun of the election be warranted, it must be determined quickly to avoid the tremendous disruption that a later invalidation of the election would inevitably create. Elections are serious matters, the results of which, once implemented, are difficult to unwind. The short 10-day filing period is particularly critical, since it allows the Board to stay the results of the election prior to their implementation if serious charges are filed.

If we were to allow an election to be overturned based upon an unfair practice charge filed by someone who has no standing to file election objections, we would undermine and effectively render a nullity the existing regulatory scheme for election objections. This would create one of two anomalous results. Either those without standing to file election objections would have six months to file an unfair practice charge carrying the same effect while the actual "parties" to the election are restricted to the election objection procedures, or everyone may file an unfair practice if the time for election objections has passed. Clearly, given the present regulatory scheme, the setting aside of an election cannot logically be an available remedy in an unfair practice case. Should it be determined that individuals ought to be allowed to petition for a rerun of an election, perhaps in special circumstances and/or upon a sufficient showing of unit support, that would properly be accomplished through regulation changes.