

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OXNARD UNIFIED SCHOOL DISTRICT,)
)
Employer,)
)
and) Case No. LA-DP-316
)
OXNARD FEDERATION OF TEACHERS,) PERB Decision No. 1341
LOCAL 1273,)
) August 3, 1999
Exclusive Representative,)
)
and)
)
CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION, OXNARD CHAPTER 800,)
)
Petitioner.)
_____)

Appearances: Parham & Rajcic by Mark R. Bresee, Attorney, for Oxnard Unified School District; Lawrence Rosenzweig, Attorney, for Oxnard Federation of Teachers, Local 1273; California School Employees Association by Maureen C. Whelan, Staff Attorney, for California School Employees Association, Oxnard Chapter 800.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on exceptions filed by the California School Employees Association, Oxnard Chapter 800 (CSEA) to a Board hearing officer's proposed decision (attached). In that proposed decision, the hearing officer dismissed CSEA's objections to an election in the Oxnard Unified School District's (District) classified unit.

The Board has reviewed the entire record in this case, including the hearing transcript, the proposed decision, CSEA's

exceptions, and the responses of the District and the Oxnard Federation of Teachers, Local 1273. The Board finds the hearing officer's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, the objections to the election are hereby DISMISSED.

Member Amador joined in this Decision.

Chairman Caffrey's dissent begins on page 3.

CAFFREY, Chairman, dissenting: The Oxnard Unified School District (District) violated section 3543.5(d) of the Educational Employment Relations Act (EERA)¹ by its conduct relating to a decertification election involving the Oxnard Federation of Teachers, Local 1273 (OFT) and the California School Employees Association, Oxnard Chapter 800 (CSEA). Considering the totality of the circumstances, I would sustain the objections filed by CSEA and order a new election to be held.

DISCUSSION

Public Employment Relations Board (PERB or Board) Regulation 32738(c)(I)² allows parties to file objections to an election on the grounds that "the conduct complained of interfered with the employees' right to freely choose a representative." For PERB to sustain the election objections, an effect on the election result must be shown or logically inferred. The Board will infer the effect if the actions "had the natural and probable effect of

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

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

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

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

discouraging voter participation in the representation election." (Tamalpais Union High School District (1976) EERB Decision No. 1.)³

In considering election objections, PERB treats the demonstration of improper conduct in the election as a "threshold question." (State of California (Departments of Personnel Administration, Developmental Services, and Mental Health) (1986) PERB Decision No. 601-S (DPA, et al.)). The Board next considers whether the improper activities establish a "probable impact on the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.) The determination of probable impact is based on a consideration of the facts submitted by the objecting party, which may include, for example, the timing of the improper acts and the number of employees affected by or aware of the acts. This standard is an objective one; that is, whether it can be reasonably concluded that voters were influenced by the improper conduct. (State of California (Department of Personnel Administration) (1992) PERB Decision No. 948-S; Clovis Unified School District (1984) PERB Decision No. 389 (Clovis USD)). The Board does not require the objecting party to prove that the conduct actually impacted employees' votes. (San Ramon Valley Unified School District (1979) PERB Decision No. 111.) In deciding whether to set aside an election

³Prior to January 1978, PERB was known as the Educational Employment Relations Board.

result, the Board looks at the totality of the circumstances and the cumulative effect of the improper conduct. (Clovis USD.)

These standards exist to ensure that elections are conducted without undue interference, and to ensure that employees' votes are not unnecessarily set aside. This results in a need to balance competing interests, as occurred in State of California (Department of Personnel Administration) (1986) PERB Decision No. 601-S (DPA). In that case, the state was found to have violated certain portions of the Ralph C. Dills Act (Dills Act)⁴ by the actions of its agents, including comments which were found to constitute advocacy on behalf of one of the competing organizations. The state was also found to have interfered with the objecting organization's access rights. Nevertheless, the Board concluded that:

[t]he record does not support setting aside the election and denying employees the free choice to select another representative because of the limited, almost minimal, nature of the violations.

In the DPA case, the challenging union had won the statewide election by 600 votes and the evidence indicated that only a handful of voters may have been influenced by the improper conduct.

The instant case presents significantly different circumstances. Here there were 245 eligible voters and, excluding voided and challenged ballots, 206 votes were cast and

⁴The Dills Act is codified at Government Code section 3512 et seq.

counted. In order to prevail in this election, 104 votes were necessary. OFT received 120 votes. Therefore, a change of 17 votes, approximately 8 percent of the votes cast, could change the outcome of the election. Accordingly, in this case, a determination of probable impact on a relatively small number of votes is sufficient to find interference with an employee's right to freely choose a representative, warranting an order to set aside the election.

The Board has held that EERA section 3543.5(d) imposes a requirement of strict neutrality on employers. The employer must ensure that its conduct does not influence the free choice of employees in an election, or favor one employee organization over the other. (Santa Monica Community College District (1979) PERB Decision No. 103.) In my view, the record establishes that the District violated that requirement.

The Board agent's proposed decision finds that District transportation supervisor Rick Fowler (Fowler) made repeated statements to his subordinates that favored OFT over CSEA, and that these statements were "clearly improper" under DPA, et al. However, the Board agent concludes that:

. . . in light of the small number of employees to whom they were addressed and the fact that two of those employees were CSEA activists throughout the campaign, it is determined that the probable impact of Fowler's statements was minimal and insufficient to warrant setting aside the election.

I disagree with this conclusion for two reasons. First, Fowler's repeated statements were made to his 15 subordinate bus

drivers. As noted above, a change of 17 votes could have changed the outcome of the election in this case, so demonstrating improper support of OFT to 15 employees could have a significant effect on the election's outcome. Second, the Board agent's reference to two of Fowler's subordinates as "CSEA activists" implies that the District could improperly support OFT to those employees with impunity, since their support of CSEA was clear. Obviously, that implication is inappropriate and inconsistent with the concept of a fair election, free of employer influence. As the Board agent notes:

. . . to require employees to submit declarations indicating their ballot choice and why they voted for that choice would be contrary to PERB's respect for ballot secrecy. Further, a voter's subjective reaction to alleged improper conduct is essentially irrelevant. The standard is an objective one, that is, whether a voter could reasonably have been influenced.

(Emphasis in original; citations omitted.)

I am particularly concerned with the District's conduct relating to the May 1998 salary bonus. Several aspects of the circumstances surrounding the bonus convince me that the District's conduct was improper. The District prepared an April 30, 1998, memorandum addressed to all employees, announcing with specific detail the amount of the bonus and the dates on which employees would receive it. Curiously, the District lists itself and OFT as the authors of the memorandum. Yet, the memorandum was not distributed to employees by the District. Instead, the District faxed it to OFT. Clearly, had the District intended to distribute the memorandum to employees, it would have

done so. The only logical conclusion is that the District prepared the memorandum so that it could be given to OFT. OFT prepared and distributed a May 1, 1998, memorandum to employees announcing agreement with the District on the salary bonus. The District's action in preparing the memorandum and providing it to OFT occurred at precisely the time employees were casting their ballots in the decertification election.

The District's April 30 memorandum makes no reference to the fact that payment of the bonus was subject to approval by the District's Board of Education. Ironically, OFT's May 1 memorandum to employees clearly indicates that payment of the bonus is contingent upon Board of Education approval. The District's Board of Education approved the bonus on May 13, 1998, near the completion of the mail ballot decertification election. I conclude from these facts that the District prepared the April 30, 1998, memorandum and provided it to OFT with the knowledge of the timing of the decertification election.

The Board agent concludes that the District cannot be found to have violated its obligation of strict neutrality or to have had a probable impact on employees' votes, by merely writing a memorandum which it never distributed. I disagree. The April 30 memorandum was prepared for the sole purpose of providing it to OFT. It was prepared without reference to the required Board of Education approval of the salary bonus during the period in which employees were deciding whether to decertify OFT as their exclusive representative. I can think of nothing more certain to

influence employees' views of their exclusive representative than the performance of that organization with regard to attaining employee salary increases. By acting improperly with regard to the preparation and timing of the salary bonus announcement, the District violated its strict neutrality obligation and lent support to OFT. It can reasonably be concluded that this conduct had a probable impact on the votes of employees who, at the precise time of the District's improper actions, were considering their decertification election ballots.

As the Board stated in San Diego Unified School District (1996) PERB Order No. Ad-278:

The Board has no more fundamental responsibility in conducting elections than to insure their fairness and integrity.

Considering the totality of the circumstances here, I conclude that the District compromised the fairness of the election by its improper conduct which had a probable impact on employees' votes and thereby interfered with their right to freely choose a representative, in violation of EERA section 3543.5(d). I would set aside the election and order a new election to be conducted.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

| | | |
|----------------------------------|---|--------------------|
| OXNARD UNIFIED SCHOOL DISTRICT, |) | |
| |) | |
| Employer, |) | Representation |
| |) | Case No. LA-DP-316 |
| and |) | |
| |) | PROPOSED DECISION |
| OXNARD FEDERATION OF TEACHERS, |) | (3/29/99) |
| LOCAL 12 73, |) | |
| |) | |
| Exclusive Representative, |) | |
| |) | |
| and |) | |
| |) | |
| CALIFORNIA SCHOOL EMPLOYEES |) | |
| ASSOCIATION, OXNARD CHAPTER 800, |) | |
| |) | |
| Petitioner. |) | |

Appearances: Parham and Racjic by Jack Parham, Attorney, for Oxnard Union High School District; Lawrence Rosenzweig, Attorney, for Oxnard Federation of Teachers, Local 1273; Maureen Whelan, Staff Counsel, for California School Employees Association, Oxnard Chapter 800.

Before Jerilyn Gelt, Hearing Officer

PROCEDURAL HISTORY

On May 18, 1998,¹ the Public Employment Relations Board (PERB or Board) issued a tally of ballots after a decertification election it conducted in the classified bargaining unit in the Oxnard Unified School District (District).² Of the approximately 245 eligible voters, 120 voted for the incumbent,

¹All dates referenced herein are in 1998 unless otherwise noted.

²Ballots were mailed by PERB on April 27, due on May 15 and counted on May 18.

Oxnard Federation of Teachers, Local 1273 (OFT),³ 85 voted for the petitioner, California School Employees Association, Oxnard Chapter 800 (CSEA), and 1 voted for "No Representation."⁴

On May 29, CSEA filed objections to the election pursuant to PERB Regulation 32738.⁵ On June 4, PERB requested that CSEA

³OFT represents three bargaining units in the District: certificated, classified, and paraprofessional.

⁴One ballot was voided and five were challenged. The challenged ballots were not counted since they were not determinative.

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

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

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

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

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

.....

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

submit declarations and argument in support of its objections pursuant to PERB Regulation 32738 (f). CSEA filed two declarations and no argument on June 15. One of these declarations raised new allegations regarding the conduct of District supervisors. Responses to CSEA's objections were timely filed by OFT and the District.

An investigation of the documents submitted by all parties revealed disputed facts which required resolution by a formal hearing, which was held on November 9 and 10. Briefs were filed and the case was submitted for decision on December 28.

CSEA'S OBJECTIONS

CSEA filed four objections to the election, three alleging District misconduct, and one alleging OFT misconduct.

Alleged District Misconduct

Objection #1 alleged that, on "repeated occasions during the month of April and the first two weeks of May", Transportation Supervisor Rick Fowler stated that employees "would be fools for voting for CSEA" and that they would be in danger of losing OFT negotiated benefits, including a retirement medical benefit, if CSEA won the election. The objection stated that Fowler expressed this opinion to each and every employee under his

allegedly objectionable conduct. All declarations shall state the date and place of execution and shall be signed by the declarant and certified by him or her to be true under penalty of perjury.

(g) The Board agent shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d)

supervision during the "relevant period." A new allegation raised in CSEA's supporting declaration asserted that Fowler allowed a unit employee to "damage/deface" CSEA posted literature.

Objection #2 contained allegations identical to those in Objection #1, except that the individual alleged to have made the statements was Custodial Supervisor Jim Gallagher. Additionally, Objection #2 stated that Gallagher asked unit employees which union they supported during numerous visits to school sites. CSEA's supplementary declaration raised new allegations claiming that Gallagher conducted a surveillance of a CSEA meeting in January 1998 and threatened employees "not to show at the function or they would be put on report and would be called in on the carpet."

Objection #3 related to a flyer entitled "Retiree Medical Benefits" issued by OFT on or about April 24. The flyer described the value of these benefits and compared retiree coverage in the District to neighboring districts where employees are represented by CSEA and another organization. The flyer also described the composition of the District's medical committee and trust. Finally, the flyer urged employees not to jeopardize their retiree benefits and to vote for OFT. CSEA claimed that the wording of the flyer implied a loss of benefits should CSEA win the election.

Objection #4 concerned the announcement during the election period of a one-time salary bonus for all District employees

pursuant to an agreement between the District and OFT. CSEA alleged that the District and OFT jointly announced the bonus in a memo dated April 30 which the District distributed to all employees. The memo stated that the 2.0718 percent bonus would be retroactive to July 1, 1997, and would be distributed in the May 29 and July 10 salary warrants.⁶

The objection stated that the District's past practice was to issue salary bonuses in October or November, and that there was no past practice of announcing the bonuses in a joint communication. CSEA claimed that "the timing of the salary bonus 'agreement' combined with the joint communication was clearly intended to influence the election outcome."

RESPONSES OF THE PARTIES

District's Response

The District submitted declarations from supervisors Fowler and Gallagher, both of whom denied making the statements alleged in CSEA's objections. Gallagher admitted informing custodians that they could not attend a January 1998 CSEA meeting on work time. He also acknowledged sitting in his parked car near that meeting until he was approached by a District unit employee and another individual, at which time he drove away.

The District also submitted a declaration from Assistant Superintendent Richard W. Canady regarding the timing of the

⁶Adult education teachers are the only employees paid on the 10th of the month.

salary adjustments given to OFT unit members over the past five years.

OFT's Response

OFT first argued that CSEA's objections should be dismissed on procedural grounds.⁷ In the alternative, OFT asserted that several of the allegations in the statement of objections were not supported by the declarations and should be stricken. While OFT's arguments were not without merit, PERB determined that CSEA's procedural deficiencies did not warrant dismissal of the objections. Furthermore, since the initial investigation of the objections and the responses thereto revealed disputed facts which required a formal hearing to resolve, PERB decided that all allegations would be addressed in the hearing.

FACTS

Alleged Misconduct of Supervisor Gallagher

Gallagher supervises approximately 42 full-time and 7 part-time custodians, all of whom work the night shift (3:30 p.m. - 12:00 a.m.). Gallagher met with the night custodians at each of their work sites the evening before the January 1998 CSEA meeting at Oxnard Elementary School District. He told them that 24-hour notice was necessary to attend any union meeting, and that they could not use personal necessity leave, sick leave or

⁷CSEA's declarations were not served on OFT as required by PERB regulations and PERB's June 15 letter. In addition, OFT claimed that the declarations did not comply with the requirements of the Code of Civil Procedure section 201.5 (and PERB Regulation 32738 (f)) in that neither stated the place of execution or specified that the matters stated were within the personal knowledge of the declarant.

compensatory time to attend the CSEA meeting.⁸ In response to one custodian's question, Gallagher stated that attendance during the lunch hour was acceptable.

Gallagher also told the custodians that he planned to be in the area of the meeting and would report to the District anyone he saw there on sick or personal leave. Gallagher parked his District car approximately one half block from the site of the CSEA meeting at about 6:00 p.m. the following evening, as people were arriving. He remained there for a few minutes, until Toliver and Phil Melnick, a CSEA staff organizer, began to walk toward him. He then drove away.

Gallagher testified that his appearance near the CSEA meeting was, in part, a response to a personal dispute between himself and Toliver. He stated that he wanted to show Toliver that he was not intimidated by him.

Approximately 40-50 District employees attended the CSEA meeting. No night custodians attended the meeting.

Mike Miller has been a mechanic in the transportation department for ten years and was a CSEA activist during the campaign. He testified regarding two OFT meetings he attended at a pizza parlor in November 1997 and February 1998. He stated that he was told by one of two night custodians in attendance that Gallagher had given them permission to attend OFT meetings on work time.

⁸Steven Toliver, a District bus driver and CSEA organizer, testified that the custodians knew about the CSEA meeting a week in advance.

No testimony was presented to support the allegations in Objection #2 that Gallagher made improper statements about CSEA in the presence of classified unit members or that he asked employees which union they supported. In fact, three custodians testified that they never heard Gallagher make any such remarks.

Alleged Misconduct of Supervisor Fowler

Toliver testified that he asked Fowler if he could address the bus drivers regarding CSEA during their monthly safety meeting at the end of 1997. Fowler told him that he could do so during the break.

Toliver testified that in March or April, he was called to a meeting with Superintendent Bill Studt, Personnel Director Wayne Edmonds and Fowler. Studt informed him that he had received information that Toliver was engaging in campaign activities during work time. Studt then told him that, according to District policy, he could not use District equipment for campaigning, and that he could not campaign on-site during work time. When Toliver questioned these instructions, Studt consulted with Edmonds and corrected himself, stating that Toliver was allowed to campaign on-site during break time.⁹

Fowler testified that he believed the superintendent was instructing both him and Toliver regarding campaign parameters,

⁹In late 1997 and/or early 1998, Edmonds met separately with both CSEA and OFT representatives regarding their campaign activities. He told both groups that they could speak with employees regarding the campaign during breaks, lunch and non-work time. He also informed them that they could not use District equipment for campaigning.

and that it was his responsibility to ensure that campaign activities did not take place during work time. Toliver testified that Fowler made unwarranted accusatory comments to him about using District time to conduct union business approximately three times during the election period.

Toliver also testified regarding a monthly safety meeting in early April at which 12-13 of the 15 bus drivers and Fowler were present. The bus drivers were discussing the possibility of the District contracting out transportation. Fowler indicated that the District was seriously looking into it, noting that Dr. Canady and another management employee had requested route sheet information from him. Fowler told the drivers that they could "win a battle, but lose a war." Toliver understood that comment to mean that the District would contract out transportation if CSEA won the election. Toliver was aware that OFT and the District were discussing contracting out at the bargaining table. Toliver stated that Fowler made no comments specifically about the election or voting.

Bus drivers Albert Lemos and Dennis Boiling both also recalled Fowler making comments which they considered to be supportive of OFT at the April safety meeting. Lemos testified that Fowler said they should "look at the big picture" when deciding who to vote for, because the District was considering contracting out. Lemos interpreted this to mean that "you could lose what you have" if CSEA won the election. Boiling remembered Fowler making similar comments on one occasion to himself and one

or two other bus drivers in the break room at Rio Mesa High School, but he was unsure as to when this conversation took place.

Lemos also recalled a conversation with five bus drivers at the Rio Mesa bus barn in which Fowler opined that the employees would be "stronger" if they stayed with OFT. Lemos was unclear as to when this conversation took place.

Boiling testified that Fowler's statements had no impact on how he voted. Toliver stated that he believed all of the bus drivers voted for CSEA in the election.

Miller also testified regarding Fowler's alleged improper statements. He stated that in early fall of 1997, Fowler expressed support of the decertification effort. However, in January, Fowler began making negative comments regarding CSEA. Miller said that he heard Fowler say that employees would be "fucking stupid to vote for CSEA" once in January or February. He claimed that Fowler made similar comments often, but was unspecific as to the content of the comments or when they were made. Miller stated that he never personally heard Fowler tell anyone they would lose their benefits if CSEA won the election, but that bus drivers would express such concerns to him after speaking to Fowler. Miller testified that a majority of the transportation department employees favored CSEA in the election.

According to Miller, Fowler also made statements to the effect that the District was considering contracting out transportation if the decertification attempt proceeded, but he

could not be specific as to when these comments were made. Miller stated that he was unaware that contracting out was an issue currently being addressed in bargaining between OFT and the District.

Miller testified that Fowler accused him of using work time to conduct CSEA business, while allowing John Harbour, OFT executive director during the 1997-98 school year, free access to the bus yard.¹⁰ He asserted that he saw Harbour at the yard at least once a week during the campaign period, and that Harbour "harassed" CSEA supporters, including himself, while there.

Miller stated that he posted CSEA flyers in the yard, but that they were often defaced and torn down. He testified that the OFT flyers posted by Michael Ferraro, the bus driver trainer, were not defaced or torn down. He accused Ferraro of defacing the CSEA flyers with Fowler's permission, but admitted that he had no evidence to support this accusation.

Ferraro credibly testified that he did not deface or remove the flyers, and that Fowler did not give him permission to do so. In addition, Ferraro stated that he never heard Fowler say that employees would be fools to vote for CSEA or that they would lose benefits if CSEA won the election.

¹⁰During his two years as OFT executive director, Harbour was on full release time from his teaching position with the District. His responsibilities included negotiating contracts for all three units, monitoring the contractual salary formula, processing grievances and, during the decertification period, campaign activities.

Alleged Employer Misconduct

The District and OFT have a complex salary agreement which is contained in Article 16 of the certificated contract and incorporated by reference in the classified contract. The agreement provides a "unit share" salary formula which allows for a share of designated District revenues to be allocated to the units for on-going expenses (salary and benefits).

The formula is based on actual and projected revenues (i.e., state funding, average daily attendance (ADA) and occasional one-time funding sources) as well as unit-related expenditures. The contract provides that if these amounts are greater or less than projected, the parties will meet to determine when and how an adjustment shall be made. If the amount of an adjustment is small, it may be carried over to the following year.

Harbour testified that initial meetings to discuss the unit share projections occur every year in August, when state budget and ADA projections are first available. Subsequent meetings occur at various times throughout the year. Initial estimates are typically conservative in order to avoid a situation in which employees would have to pay monies back to the District.

The District is subject to several audits throughout the year. The first audit takes place in October, when the first ADA count is submitted to the state. Another audit occurs in April, when a second ADA count is submitted. There is also an audit after the end of the fiscal year on June 30.

Over the past five years, application of the unit share formula has resulted in annual on-schedule salary increases (except for 1996-97), as well as off-schedule salary bonuses. The bonuses were issued in July 1993, April and June 1995, October 1995, October 1996, October 1997 and May 1998.¹¹ It is the alleged joint announcement of the May bonus which forms the basis for CSEA's objection.

Harbour testified that he became aware in October 1997 that the initial ADA projections were low. He scheduled a meeting with the District on January 15, to request that a bonus be paid at that time. He testified that the bonus was based on low ADA projections for 1997-98 and one-time equalization money paid by the state¹² in 1997-98 for the 1996-97 school year.¹³ The District was unwilling to grant the bonus in January due to its uncertainty about the numbers, and another meeting was held on March 12. At that meeting, the District stated that it could not finalize the adjustment amount until after the April ADA audit was completed. Another meeting took place on April 29, when the

¹¹Harbour testified that an off-schedule salary payment was made in September 1997. This contradicts Canady's declaration, which stated that the September 1997 increase was on-schedule. In the context of the questioning, it appears that Harbour spoke in error, and that the declaration, admitted into evidence without objection, is more reliable.

¹²This is money paid to districts which received funds below the state average.

¹³The parties stipulated that the May bonus was money allocated for the 1997-98 school year. This does not appear to contradict Harbour's statement.

final amount for the salary bonus was determined, subject to school board approval.

Angelita Dalan, a financial account technician and CSEA supporter, testified that she questioned the District's accountant, Randy Winton, about the timing of the bonus. She thought that the timing was highly unusual since she believed that the bonus was based on unaudited funds for the 1997-98 budget. Winton told Dalan that Harbour had requested an ADA update from him, and that he believed the quick estimate he prepared became the basis for the bonus.

Two memoranda were written regarding the bonus. One was written by Canady and the other by OFT.

Canady wrote a memorandum on District letterhead to all represented employees from the District and OFT dated April 30 announcing a 2.0718 percent salary bonus to be distributed on May 29 and July 10. However, Canady did not distribute the memo; he faxed a copy to Harbour for his information.¹⁴

Vicki Holmbom, OFT classified vice president, testified that she saw Canady's memo on Harbour's desk in the OFT office. Holmbom typed and signed a note on the memo to Dalan. She then sent a copy to Dalan and gave copies to two of her friends at two District high schools and two friends in her office pool.

Dalan testified that she saw the memo at two locations in Hueneme High School, and was also shown a copy by a friend at

¹⁴There was no testimony regarding Canady's intended purpose for the memo.

Channel Islands High School. James Lopez, a custodian at Camarillo High School, testified that he never saw a copy of Canady's memo during the election campaign.

OFT's flyer to certificated, classified and paraeducator staff announced a 2.0718 percent off-schedule salary bonus retroactive to July 1, 1997, to be included in their May 29 or July 10 paychecks pending school board approval.¹⁵ The flyer was distributed to employees on May 1.

RULE OF LAW

Under PERB Regulation 32738 (c) (1), the Board will entertain objections to the conduct of an election when the conduct complained of interfered with the employees' right to freely choose a representative. Such objections, however, must meet the following requirements set forth in PERB Regulation 32738(d):

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

Objections which fail to satisfy these requirements are dismissed. (PERB Regulation 32738(g).)

A party objecting to an election must present a prima facie showing that specific acts took place which interfered with the election process. (San Ramon Valley Unified School District (1979) PERB Decision No. 111.) This burden of proof contains two components, both of which must be established by the objecting

¹⁵The school board approved the bonus on May 13 .

party. The first component is improper conduct, and the second is impact on voters. Thus, even where the objecting party demonstrates conduct constituting an unfair practice,¹⁶ such unlawful conduct is only a threshold question, which will not require that an election be rerun unless impact is also demonstrated.

The basic inquiry is whether, taken as a whole, the various unlawful activities establish a "probable impact in the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.) The determination of probable impact is made based on a consideration of the facts submitted by the objecting party, which may include, for example, the number, nature and timing of the improper acts, and the number of employees affected by or aware of the acts.

It is unnecessary that actual impact be shown. (San Ramon Valley Unified School District, supra, PERB Decision No. 111.) Indeed, to require employees to submit declarations indicating their ballot choice and why they voted for that choice would be contrary to PERB's respect for ballot secrecy. Further, a voter's subjective reaction to alleged improper conduct is essentially irrelevant. The standard is an objective one, that is, whether a voter could reasonably have been influenced. (State of California (Department of Personnel Administration

¹⁶Under earlier Board regulations, the conduct complained of needed to be "tantamount to an unfair practice." Under current regulations, the conduct complained of needs to be at least "improper." (Pasadena Unified School District (1985) PERB Decision No. 530.)

(1992) PERB Decision No. 948-S; Clovis Unified School District
(1984) PERB Decision No. 389.)

The regulations and legal standards which exist to ensure that elections are conducted without undue interference from parties also exist to ensure that employees' votes are not unnecessarily set aside. This results in a need to balance competing interests, as occurred in State of California (Department of Personnel Administration) (1986) PERB Decision No. 601-S (State of California). In that case, the state was found to have violated certain portions of the Ralph C. Dills Act (Dills Act)¹⁷ by the actions of its agents, including comments which were found to constitute advocacy on behalf of one of the competing organizations. The state was also found to have interfered with the objecting organization's access rights. Nevertheless, the Board concluded that

[t]he record does not support setting aside the election and denying employees the free choice to select another representative because of the limited, almost minimal, nature of the violations.

It is against these standards that the objections in this case have been measured.

DISCUSSION

As noted above, CSEA filed four objections to the election. Objection #3 alleged that an OFT flyer contained a threat of loss of benefits. CSEA presented no testimony to support this

¹⁷The Dills Act is codified at Government Code section 3512 et seq.

allegation, nor was it addressed in CSEA's brief. Furthermore, on its face, the flyer contained no such threat. Objections #3 is therefore dismissed.

In its brief, CSEA relies on evidence it introduced concerning several events outside the scope of the four objections to support its contention that the election should be set aside.¹⁸ These events include (1) the attendance of District employees at an OFT meeting in a pizza parlor in November 1997 and February; (2) the alleged campaign activities of Harbour at the bus yard; (3) the meeting of Superintendent Studt with Toliver and Fowler; and (4) the occasions at which Fowler made remarks to bus drivers concerning contracting out transportation. CSEA's statement of objections was never amended to include allegations arising from these events.

OFT argues that allegations arising from events outside the scope of the objections filed by CSEA are irrelevant and should be dismissed. In addition to those stated above, OFT asserts that CSEA's allegations regarding Gallagher's conduct surrounding the 1998 CSEA meeting are also outside the scope of the objections and should be disregarded.

OFT points out that PERB Regulation 32738 requires that objections to the conduct of an election must contain specific

¹⁸Testimony regarding these events was admitted into evidence over the consistent relevance objections of OFT and the District, and with the admonition by the undersigned that the testimony would be given its appropriate weight in this decision. The parties were also instructed that they could submit argument in support of their relevance objections in their briefs.

facts and supporting argument and must be filed within a 10-day period following the service of the tally of ballots. In addition, if declarations are required, as they were in this case, the declarations must give a detailed description of the objectionable conduct. OFT argues that these rules do not allow for adjudication of new allegations which have not been processed administratively. Furthermore, OFT claims that basic due process requires notice of the alleged misconduct prior to the commencement of the hearing.

While PERB has not expressly addressed this issue, case law under the National Labor Relations Board (NLRB) is instructive. In Clark Manor Nursing Home Corp. (1982) 254 NLRB 455 [106 LRRM 1231], enforced in part and reversed in part on other grounds, 671 F.2d 657 [109 LRRM 3151], the NLRB determined that an election may be set aside based on conduct discovered during the investigation of objections to an election, even though the specific conduct was not raised in the statement of objections. However, this policy is a restricted one.

In Burns International Security Services (1981) 256 NLRB 959, 960 [107 LRRM 1425], the NLRB held that this policy does not allow consideration of evidence raised in untimely "supplementary" objections based on newly discovered evidence which had no bearing on the timely objections, and which was discovered by the filing party after the timely objections were filed. The board noted that

The line between evidence discovered during the investigation and new, untimely

objections will not always be glaringly clear. The difficulty lies in balancing the desirability of insuring that the election results truly reflect the free choice of the employees against the potential mischief inherent in permitting an objecting party to take control over the investigation away from the Regional Director. [Id.]

While it may be appropriate to consider new evidence that bears directly on timely objections, such consideration may cause delay in the investigation. Therefore, allegedly newly discovered evidence should normally be considered only upon clear and convincing proof that it is not only newly discovered, but also previously unavailable. [Id.]

The NLRB has also refused to consider new allegations unrelated to the timely filed objections even though they were submitted prior to the initiation of the investigation and within the timelines for submission of supporting evidence.¹⁹

None of the allegations of objectionable conduct arising from the four events listed on page 18 was raised prior to formal hearing. CSEA made no showing that evidence concerning these events was newly discovered or previously unavailable. On the contrary, each of these events involved District employees who were active CSEA organizers during the decertification campaign. Therefore, in light of PERB regulations, NLRB precedent and due process considerations, no findings in this decision shall be based on the following events: (1) the attendance of District employees at the OFT pizza parlor meetings; (2) Harbour's

¹⁹Rhone-Poulenc, Inc. (1984) 271 NLRB 1008 [117 LRRM 1164], enforced (1986) 789 F.2d 188 [122 LRRM 2193].

activities at the bus yard; (3) the meeting of Superintendent Studt with Toliver and Fowler; and (4) Fowler's comments regarding contracting out.²⁰

What distinguishes the allegations of misconduct by Gallagher is that they were raised in CSEA's supporting declaration and addressed in the District's responding declaration, thereby arguably putting OFT on notice that they

²⁰Even if these allegations had been raised in CSEA's statement of objections, they do not rise to the level of objectionable conduct for the following reasons.

Miller was the only witness who testified regarding (1) the alleged attendance on work time of District employees at the OFT pizza parlor meetings and (2) Harbour's alleged harassment and unfettered access to the bus yard for campaign activities. Miller's demeanor while testifying, including unsolicited hostile remarks to the OFT attorney, revealed his antagonism toward OFT. In light of this, his unsubstantiated testimony regarding these matters is found to be unreliable. In addition, as discussed infra, the OFT meetings occurred prior to the filing of the decertification petition and the commencement of the employer's obligation of strict neutrality.

There is no evidence to support CSEA's allegations that the superintendent's meeting with Fowler and Toliver was threatening or exhibited favoritism to one organization over another. No action was taken against Toliver, and, in fact, Fowler believed the superintendent's instructions were directed at him as well as Toliver. Furthermore, the superintendent's instructions regarding access and use of District equipment were consistent with PERB case law. (Long Beach Unified School District (1980) PERB Decision No. 130; Marin Community College District (1980) PERB Decision No. 145.)

Finally, Fowler's statements that the District was looking into contracting out transportation were supported by the fact that the issue was known to be a current topic of discussion at the bargaining table. Under the NLRB, an employer may lawfully offer noncoercive opinion and make predictions based upon "objective fact" about "demonstrably probable consequences beyond his control." (NLRB v. Gissell Pacing Co. (1969) 395 U.S. 575, 618 [71 LRRM 2481].) Fowler's remarks were based on objective fact and did not specifically inform employees that they would lose their jobs if CSEA won the election.

would be addressed at the hearing. These allegations are also related to the alleged misconduct contained in Objection #2. Therefore, Gallagher's conduct regarding the 1998 CSEA meeting will be considered herein.

For the reasons stated above, the allegations which will be discussed below are limited to Gallagher's alleged misconduct as contained in Objection #2 and in the allegations concerning the January 1998 CSEA meeting, the alleged improper statements made by Fowler in Objection #1, and the announcement and issuance of the May 1998 salary bonus as stated in Objection #4.

Gallagher's Alleged Misconduct

No evidence was presented to support the specific allegations in Objection #2, i.e., that Gallagher told his subordinates that they would be "fools for voting for CSEA," that they would lose benefits if CSEA won the election, and that he queried unit employees as to which union they supported. These allegations are therefore dismissed.

It is undisputed that Gallagher informed the custodians the night before the January 1998 CSEA meeting that they could not attend the meeting on personal leave, since 24-hour notice was required to approve such time off. Gallagher's instructions were in line with District policy, and, therefore, not objectionable.²¹

²¹CSEA alleges that the custodians were intimidated by Gallagher during these meetings. According to witnesses, however, this is nothing new. Gallagher is generally perceived as an intimidating supervisor.

It is also undisputed that he parked his car near the meeting site for a few minutes as people were arriving. This type of surveillance is generally found to constitute an unfair labor practice under the National Labor Relations Act. (Harbin, The Developing Labor Law (3d Edition, 1997 Cumulative Supplement), pp.127-128.) However, it is axiomatic under NLRB case law that conduct occurring prior to the filing of a representation petition will not be considered in post-election objections.²² This is true even when such conduct constitutes an unfair labor practice.²³ In certain circumstances, where pre-petition conduct is so egregious as to not only constitute an unfair labor practice but also abuse the electoral process, the NLRB has considered such conduct and found it sufficient to overturn an election.²⁴

In this case, while Gallagher's surveillance of the January 1998 CSEA meeting was improper, it lasted only a few minutes and occurred more than one month prior to the filing of the decertification petition (and over three months prior to the election). There is no evidence that this incident was part of a

²²This rule was enunciated in Ideal Electric & Mfg. Co. (1961) 134 NLRB 1275 [49 LRRM 1316]. PERB has similarly held that an employer's obligation to maintain strict neutrality during the pendency of a question concerning representation is initiated by the filing of a representation petition. (Pittsburg Unified School District (1983) PERB Decision No. 318; Santa Monica Community College District (1979) PERB Decision No. 103.)

"Allied Stores Corporation (1992) 308 NLRB 184 [141 LRRM 1009]; Mountaineer Bolt (1990) 300 NLRB 667 [135 LRRM 1228, 1229].

²⁴Ron Tirapelli Ford (1993) 987 F.2d 433 [142 LRRM 2655].

pattern of misconduct, nor was it so egregious as to be considered abusive of PERB's electoral process. Therefore, the allegations concerning Gallagher's surveillance of the January 1998 CSEA meeting are dismissed.

Fowler's Alleged Improper Statements

In Rio Hondo Community College District (1980) PERB Decision No. 128,²⁵ the Board concluded that an employer has the right

. . . to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. . . .

But the right of employer speech is not unlimited and

. . . speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection

Several witnesses testified that Fowler made remarks to bus drivers under his supervision during the pre-election period suggesting that they should "look at the big picture" when considering whether to vote for CSEA or OFT. He stated that they could "win the battle but lose the war" if they voted for CSEA, and that they would be "stronger" if they stayed with OFT because it also represents certificated employees. One employee testified that Fowler stated on one or two occasions that employees would be "fucking stupid if they voted for CSEA," and continued to make similar comments during the election period.

²⁵See also Kern Community College District (1985) PERB Decision No. 533.

In State of California, the Board held that remarks similar to Fowler's made by supervisory employees stepped beyond the bounds of opinion and constituted advocacy on behalf of one of the competing organizations. In that case, such remarks included statements that one of the competing organizations was a much better organization than the other, and "I hope they beat the hell out of you." The Board found that those statements were improper in the context of the election (and also constituted unfair practices) since they had the "natural effect of discouraging an employee from engaging in protected conduct." Because these statements were made to a very small group of employees, however, the Board held that their impact was minimal and, along with the other objectionable conduct, did not warrant setting aside the election.

In this case, Fowler's remarks supportive of OFT were also made to a small group of employees in the transportation department, albeit a much larger percentage of the bargaining unit (6 percent) than in State of California. His remarks were repeated at various times during the election period.

Fowler's repeated statements to his subordinates that they would be better off with OFT rather than CSEA were clearly improper under State of California. However, in light of the small number of employees to whom they were addressed and the fact that two of those employees were CSEA activists throughout the campaign, it is determined that the probable impact of

Fowler's statements was minimal and insufficient to warrant setting aside the election.

The May 1998 Salary Bonus

No evidence was presented regarding the District's past practice of announcing the issuance of off-schedule salary adjustments (bonuses). In this instance, although an announcement was prepared by Canady, neither he nor any other District official distributed it. Canady did fax a copy to the OFT office for Harbour's review. Holmbom typed a note to Dalan on a copy of the announcement, and sent it to Dalan and to four other friends in the District.

CSEA alleges that Canady's memo is objectionable since it appeared to be from the District and OFT (thus giving OFT credit for the bonus), and was suitable for distribution, even though it was distributed by an OFT agent rather than the District. CSEA contends that the memo had a probable effect on the election, and the fact that it was not distributed by the District is immaterial.

On the contrary, since Canady's memo was not distributed to employees by the District, and was, in fact, sent only to the OFT office, the District can hardly be found to have violated its obligation of strict neutrality by merely writing it. Even a finding that the memo was improperly distributed to five individuals by OFT would not constitute objectionable conduct, since there was no showing that more than a few individuals saw the memo. Therefore, this allegation is dismissed.

It is undisputed that the District and OFT reached agreement on April 29 on the amount (2.0718 percent) of the bonus to be issued to all District employees on May 29 or July 10, subject to Board of Education approval. It is also undisputed that OFT announced this bonus in a memo to all employees dated May 1, shortly after the ballots were mailed to classified employees on April 27. The District's Board of Education subsequently approved the issuance of the bonus at its May 13 meeting.

The record reflects that the agreement on the May bonus was reached pursuant to the contractual salary formula and the established bargaining relationship between OFT and the District. The practice, in short, is for OFT to review ADA figures periodically and to seek an off-schedule salary adjustment when and if it determines that on-schedule increases based on preliminary ADA figures were low. While the bonuses for the past three years were issued in October, bonuses have previously been issued at other times, i.e., in July 1993, and April and June 1995.

OFT began to pursue the bonus at issue in this case after October 1997, when the first ADA audit was sent to the state by the District. OFT met with the District in January in an effort to have the bonus issued that month, but the District's numbers were not yet certain. At the next meeting, held in March, the District stated that the figures on which the adjustment would be based could not be finalized until after its second ADA audit was

completed in mid-April. The figures were finalized and agreement reached on April 29.

CSEA contends that the issuance of the May bonus was highly unusual given that the District was facing a deficit budget. This contention is misplaced. As explained fully on the record, the salary formula is based on specific revenues not related to the District's expenditures and ending balance. The amount of an off-schedule salary adjustment is determined by comparing the District's actual ADA numbers with initial projections, as well as other one time allotments. The May bonus was based on ADA money for that year as well as state equalization money based on prior year figures but paid in 1997-98.

CSEA also claims that the bonus was given at an unusual time, that is, before the end of the fiscal year on June 30. As noted above, salary adjustments have previously been paid prior to the end of the fiscal year. The determining factor is the amount of available money; small amounts are typically carried over to the next year. Although one CSEA witness testified that she believed the timing of the bonus was suspicious, the District's past practice during the last five years belies these suspicions. In addition, no other evidence was presented to show that timing of the bonus was intended to impact the election.

In Pittsburg Unified School District (1983) PERB Decision No. 318, the Board upheld the NLRB rule that an employer is not relieved from its bargaining relationship with an incumbent union by the filing of a decertification petition.

. . . While the filing of a valid [decertification] petition may-raise a doubt as to majority-status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim. [RCA del Caribe (1982) 262 NLRB 963 [110 LRRM 1369.]

Under the terms of the collective bargaining agreements for all three units represented by OFT as well as its past practice, the District was required to fulfill its contractual obligation with OFT by meeting to determine the amount of the salary adjustment, if any, to be issued. Once the District's figures were certain, it was obligated to distribute the bonus, which it did. Given past practice, it is reasonable to assume that all employees had an expectation of a salary bonus at some time during the year. OFT's May 1 announcement made it clear that all employees, including classified, would receive the bonus, if board approved, after the election. Approval by the school board was also not scheduled until balloting was completed. Based on these factors, it is safe to assume that the classified employees knew they would be entitled to the bonus, like all other employees, regardless of who won the election.

For these reasons, it is determined that the District did not engage in objectionable conduct when it agreed on April 29 to the off-schedule salary adjustment for all employees and approved that adjustment by board action on May 13.

CONCLUSION

Based on the entire record in this matter and applicable case law, the objections to the election are hereby DISMISSED.

Appeal Language

Pursuant to California Code of Regulations, title 8, section 323 05, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135 (a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last

day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

**Jerilyn Gelt
Hearing Officer**