STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 399,

Charging Party,

v.

ANTELOPE VALLEY HEALTH CARE DISTRICT,

Respondent.

Case No. LA-CE-196-M

PERB Decision No. 1816-M

February 10, 2006

Appearances: Weinberg, Roger and Rosenfeld by Bruce A. Harland, Attorney, for SEIU Local 399; O'Melveny and Myers, by Bryan S. Westerfeld, Attorney, for Antelope Valley Health Care District.

Before Duncan, Chairman; Whitehead and Neuwald, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Antelope Valley Health Care District (District or AVHD) to the administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] by unlawfully refusing to recognize SEIU Local 399 (SEIU) as the exclusive representative after a card check.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the District's position statement, the complaint, the answer, the parties' pre-hearing briefs, the ALJ's proposed decision, the transcripts and exhibits, the parties' post-hearing briefs, the District's exceptions, SEIU's responses to the exceptions, and the parties' reply

[1]MMBA is codified at Government Code section 3500, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

briefs. As a result of our review, the Board adopts the ALJ's proposed decision subject to the discussion below.

BACKGROUND

In November 2003, SEIU competed with the Caregivers and Healthcare Employees Union (CHEU) to represent the District's unit of "all other employees," those employees who were not defined as professional employees, supervisors, management, confidential employees or guards. The ballot also contained an option to vote for "Neither." None of the parties received a majority so that normally, under District policy, the parties would participate in a runoff election between the top two choices. In December 2003, CHEU withdrew and then SEIU asked that the matter be resolved by card check. SEIU asked that the "no union" selection be expressed by failure to sign a card. When the District took the position that there should be a runoff election, SEIU withdrew without prejudice on January 8, 2004. SEIU continued to collect authorization cards. In addition, employee Leo Ward (Ward) and unknown other employees were collecting "No Union" cards. On January 28, 2004, the District issued an e-mail to all employees, which included instructions on how to revoke an existing authorization card, a discussion about voting "No Union" and which directed employee questions to the District's Human Resources department. Between January 28 and March 8, 2004, only five employees submitted revocations letters in compliance with the instructions in the January 28 e-mail.

On March 8, 2004, SEIU formally requested recognition as the exclusive representative on the basis of a card check under MMBA section 3507.1(c). The card check was administered by State Mediation and Conciliation Service (SMCS) presiding mediator Draza Mrvichin (Mrvichin). The parties disputed how long an authorization card remained valid. On

June 6, 2004, Mrvichin advised the parties to count authorization cards dated within one year before March 8, 2004. Both parties ultimately agreed with this advice.

However, the parties could not agree on whether or how employees could revoke authorizations cards. Notwithstanding the lack of agreement, Mrvichin conducted a card check and provided the following tally:

Total names on eligibility list	1100
Total valid SEIU cards	569
Total valid revocation cards	5
Total valid "No Union" cards	280
Total "No Union" cards matched with SEIU cards	84

The parties have stipulated to the definition of the word "valid," i.e., that the card was signed by an employee on the eligibility list during the year before March 8, 2004. With regard to revocations, "valid" also meant that the employee had signed an SEIU card before the revocation. The total "No Union" cards that matched up with SEIU cards were also deemed to be "valid."

The SEIU cards included the statement:
I choose the Service Employees International Union (SEIU) to represent me in collective bargaining with my employer.

The revocation letters contained the statement:

I hereby revoke the authorization card which I previously signed for your union.

The above revocation language matched the language provided by the District in the January 28 e-mail to employees. Besides the employee's name, department, employee number, and dated signature, the "No Union" cards contained only two words, "No Union." Mrvichin's tally of the "No Union" cards that matched up with SEIU authorization cards did not indicate when the cards were signed.

The parties further stipulated that the SMCS did not rule on the legal effect of the revocation letters and the "No Union" cards, and that SMCS did not verify the majority status of any employee organization.

On September 22, 2004, the District's Board of Directors voted not to recognize SEIU as the exclusive representative.

ALJ'S PROPOSED DECISION

The ALJ found that the District improperly withheld recognition of SEIU. Given that there were 569 valid SEIU cards out of a total of 1100 eligible employees, SEIU has shown that a majority of employees want SEIU to be their representative. However, the tally also included 280 valid "No Union" cards, of which 84 matched with SEIU cards. The District's board had subtracted the 84 from the 569 to conclude that SEIU did not receive majority support. Since he found that the "No Union" cards were not valid revocations, the ALJ found it was unnecessary to determine whether the SEIU cards were revocable at all. The ALJ reasoned that the "No Union" cards did not comply with the instructions in the District's January 28, 2004 e-mail to all employees regarding how to revoke SEIU authorization cards. In that e-mail, the District had specifically advised the employees where to send revocation letters and what language to use. Between January 28 and March 8, when SEIU requested recognition, only 5 employees followed the instructions from the e-mail to revoke their SEIU cards. The five revocation letters do not affect the SEIU's majority showing. The other employees who signed SEIU cards chose not to revoke those cards as instructed in the January 28 e-mail. Neither the District nor the employees had any reasonable basis to believe that the "No Union" cards revoked the SEIU cards.

The ALJ thus concluded that the District violated MMBA section 3507. l(c),[2] by treating the "No Union" cards as revoking the SEIU cards and thereby depriving SEIU of its majority of employees, and Section 3507(c),[3] by unreasonably withholding recognition of SEIU, as well as derivative violations of Sections 3502 and 3503. As a remedy, the ALJ ordered the District to cease and desist from treating the "No Union" cards as revoking the SEIU cards and to resubmit the matter to SMCS with instructions that the "No Union" cards not be treated as revoking the SEIU cards.

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[2]Section 3507. l(c) requires:

> (c) A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. <u>Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or majority status of the employee organization. In the event the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations shall be the neutral third party and shall verify the exclusive or majority status of the employee organization.</u> In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status. [Emphasis added.]

The "Division of Conciliation" is now known as the SMCS.

[3]Section 3507(c) provides:

> (c) No public agency shall unreasonably withhold recognition of employee organizations.

DISCUSSION

The District requests oral argument on its exceptions to the ALJ's proposed decision. Its request is based upon the following rationale:

> AVHD makes this request because the issues presented before the Bord (sic) are a matter of first impression, and the resolution of these issues will profoundly affect all public agencies and their employees in California.

PERB Regulation 32315,[4] which governs such requests, provides:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

The District's request was filed with its statement of exceptions and provided a general reason for the request, and so met procedural requirements. SEIU did not comment upon this request.

Historically, the Board has denied most requests for oral argument without comment. The reasons for denial are: the record and briefs adequately present the issues (Fresno Irrigation District (2003) PERB Decision No. 1565-M; Mt. Diablo Unified School District (1984) PERB Decision No. 373b); the matter was thoroughly litigated and there was sufficient information in the record to allow the Board to reach its decision (Monterey County Office of Education (1991) PERB Decision No. 913); the record was sufficiently clear to make oral argument unnecessary (Los Angeles Community College District (1985) PERB Decision No. 489); no novel issues were presented (Modesto City Schools and High School District (1984) PERB Order No. Ad-143); and the Board conducted a full and fair hearing, the parties

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

had an extensive opportunity to present briefs that supported their arguments, the parties availed themselves of that opportunity, and the issues were sufficiently clear to make oral argument unnecessary (Arvin Union School District (1983) PERB Decision No. 300).

In this case, the District very generally asserts that this is a case of first impression. The District has provided no specifics as to why this is the case. After a review of the case, it appears that an adequate record has been prepared, that the parties had ample opportunity to prepare briefs supporting their positions and availed themselves of that opportunity, and that the issue before the Board, whether the District unlawfully withheld recognition of SEIU after a card check, is sufficiently clear to make oral argument unnecessary. We therefore deny the District's request for oral argument.

Regarding the merits of this matter, MMBA section 3507.1(c) expressly requires that a "public agency shall grant exclusive or majority recognition to an employee organization based on ... authorizations cards . .. showing that a majority of the employees in an appropriate bargaining unit desire the representation .. . ." Section 3507(c) provides that "[n]o public agency shall unreasonably withhold recognition of employee organizations." The issue thus becomes whether the District unreasonably withheld recognition of SEIU by subtracting the 84 "No Union" slips from the total of 569 valid SEIU authorization cards and concluding that SEIU lacked majority support.[5]

[5]In contrast, under the Higher Education Employment Relations Act (HEERA), Government Code section 3560 et seq., the applicable query is whether the employer reasonably doubts that the employee organization has majority support. (HEERA sec. 3574(a).) It should be noted that the "reasonable doubt" exception to the recognition requirement is also absent from the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., and the District has not cited any cases to show the application of this "reasonable doubt" standard to similar claims under EERA.

In its exceptions, the District argues that employees may revoke the SEIU authorization cards and that the 84 "No Union" slips represented valid revocations of SEIU's authorization cards. As a result, SEIU did not obtain majority support through its collection of authorization cards and the District could not recognize SEIU as the exclusive representative of the unit comprised of "all other employees." Alternatively, the District argues that if the "No Union" slips are of questionable validity, they still confer "reasonable doubt" as to whether SEIU has obtained majority status. The District cites the legislative history of AB 1281 (Cedillo) that enacted MMBA section 3507.1(c) as support for the notion that an employer may refuse to recognize an employee organization if it has reasonable doubt as to its majority status.

On the other hand, SEIU, in agreement with the ALJ, asserts that the 84 "No Union" slips are not valid revocations of the SEIU authorization cards and so the District's refusal to recognize SEIU as the exclusive representative was unreasonable and thus violates the MMBA. According to SEIU, Section 3507.1(c) is clear on its face in its mandate that the employer must recognize the union if the total authorization cards indicate majority support. Courts do not look at legislative history when the statutory mandate is clear and unambiguous. SEIU contends that even if the Board were to consider the legislative history of AB 1281, it does not support an exception to Section 3507.1(c) for "reasonable doubt." The District took the statements of legislative history out of context; the committee reports and author's comments actually support SEIU's position. Further, the National Labor Relations Act (NLRA) does not contain a provision similar to Section 3507.1(c) and the National Labor Relations Board (NLRB) cases cited are not on point.

We find that the District unreasonably withheld recognition of SEIU as exclusive representative for the unit of "all other employees" for the reasons which follow. It is well-established that when a statute is clear and unambiguous, the intent of the Legislature is

reflected in the plain meaning of the statute (Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow)) and it is unnecessary to look at legislative history. (North Orange County Regional Occupational Program (1990) PERB Decision No. 857 (NOCROP); California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817].) As stated by the Board in NOCROP:

> In construing a statute, we begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' (Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230.) Further, it is a fundamental maxim of statutory construction that, where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. Thus, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. [Citations omitted.] [NOCROP. at p. 7.]

In NOCROP, the Board was faced with a situation in which the employer was a joint powers agency. The definition of "public school employer" under EERA section 3540.1(k) did not include joint powers agencies. The Board found in that case that under the plain language of the statute, Section 3540.1(k) should not be expanded to include joint powers agencies. The Board's reasoning was based in part on comparisons with Education Code provisions that expressly included joint powers agencies as part of the definition of public school employer. EERA's silence was indicative of legislative intent not to include these entities within the definition. This case is analogous. HEERA provides that the employer may refuse to grant a request for recognition if it "reasonably doubts that the employee organization has majority support or reasonably doubts the appropriateness of the requested unit." (HEERA sec. 3574(a).) There is no such provision in the MMBA. "A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion

of other things not expressed." (Los Angeles Unified School District (1990) PERB Decision No. 852, p. 5; Hacienda La Puente Unified School District (1988) PERB Decision No. 685, discussion beginning at p. 13, that "applicants" are not covered under the definition of "employee" under EERA.)

The District, however, citing Webster v. State Bd. of Control (1987) 197 Cal.App.3d. 29, 35-37 [242 Cal.Rptr. 685], contends that this latter principle does not apply for contemporaneous construction of related statutes that serve the same purpose. Yet, as previously noted, EERA also does not contain an exception for "reasonable doubt" as to majority status and the statute has never been construed to authorize that exception. The District argues that the legislative history of AB 1281 (Cedillo), the statute enacting Section 3507.l(c), supports the exception. But under the authorities cited above, the plain language of this provision connotes its meaning. (Barstow; NOCROP.)

MMBA section 3507. l(c) states that "[a] public agency shall grant exclusive or majority recognition to an employee organization based . . . authorization cards . . .showing that a majority of the employees in an appropriate bargaining unit desire the representation ....". (Emphasis added.) Section 3507(c) requires that "[n]o public agency shall unreasonably withhold recognition of employee organizations." (Emphasis added.) Also, under Section 3507.1(c), the neutral third party, in this case the SMCS, has the responsibility to verify SEIU's majority status. It is therefore up to the SMCS to determine whether the 84 "No Union" slips in fact have served to negate the majority formed by the 569 SEIU authorization cards. However, in this matter the SMCS has only provided the parties a tally and apparently has relinquished this responsibility in this matter. Because SMCS failed to act, no final decision on recognition was made. As a result, SEIU filed this charge and compelled

PERB to act to ensure stable employer-employee relations. It is now up to the Board to determine whether the District has unreasonably withheld recognition under Section 3507(c).

We find the statute to enunciate a clear requirement that the employer must grant recognition upon a showing of majority support. Here, the District has refused to grant recognition notwithstanding that the SMCS tally produced a showing that SEIU enjoyed the support of the majority of members of the bargaining unit. The District's excuse for its refusal is its argument that the "No Union" slips comprise valid revocations of the SEIU authorization cards. We find the arguments proffered by SEIU regarding the requirements for revocation of authorization cards to be persuasive. Under the MMBA, when a petition for certification is filed with the Board, the Board evaluates the accompanying "proof of support" to determine the intent of the employees involved. (See PERB Regs. 61210 et seq.) One form of proof of support is an authorization card. (PERB Regs. 32700(e); San Juan Unified School District (1995) PERB Decision No. 1082.) Under PERB Reg. 61020(a):

> Except as required in Section 61350(b)(1) or 61600, proof of employee support for all petitions requiring such support shall clearly demonstrate that the employee desires to be represented by the employee organization for the purpose of meeting and conferring on wages, hours and other terms and conditions of employment. [Emphasis added.]

Conversely, a revocation of an authorization card or other proof of support should meet the same requirements in order to determine employee intent. We therefore recognize the right to revoke authorization cards or other proof of support so long as the employee clearly demonstrates the desire NOT to be represented by the employee organization for the purposes of meeting and conferring on wages, hours and other terms and conditions of employment.[6]

[6]The facts of this case do not raise the issue of reasonableness of a local rule dealing with revocation adopted under the MMBA.

In this case, the District provided no authority that slips of paper with the words "No Union" without any statement of intent to revoke the SEIU authorization cards comprise a valid revocation of these cards. On the other hand, five employees provided revocation letters which clearly expressed their intent to revoke the authorization cards previously signed for SEIU. For the Board to make a determination as to whether the District unreasonably withheld recognition of SEIU, we must evaluate whether the employees who signed "No Union" slips clearly intended to revoke the SEIU authorization cards. As the "No Union" slips did not include any specific statement of intent to revoke the SEIU authorization cards, we find that the slips were not valid revocations of the SEIU authorization cards. Further, there was no evidence of any effort by the signers of the "No Union" slips to convey their desire to revoke the authorization cards.[7] In the January 28 e-mail, the District instructed employees regarding how to properly revoke authorization cards by notices to SEIU in which the employees expressed their intent to rescind the previously signed authorization cards for representation by SEIU. Thus, the District sanctioned a method for employees to show their intent to no longer be represented by SEIU. The District's discussion of the "No Union" slips did not identify them as a valid means to revoke the SEIU authorization cards. Further, the January 28 e-mail was provoked by the collection of "No Union" slips by Ward and issued to avoid confusion. Thus, the District by its own conduct appears not to believe that the "No Union" slips were valid revocations of the SEIU authorization cards when it issued the January 28 e-mail.

The District cites various NLRB cases in support of its notion that the NLRB carefully evaluates employee intent before issuing a bargaining order. However, these cases may be

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[7] The only exception involves the testimony of Ward and his letter to SMCS. (Respondent's Ex. VI.) However, these items only provide evidence of Ward's intent in signing the "No Union" slips. His testimony regarding the other 83 employees comprises uncorroborated hearsay.

distinguished from the matter before us. NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 595-597 [89 S. Ct. 1918] stands for the principle that, although the NLRA does not provide for a card check procedure that, instead of an election, a union may obtain union authorization cards to demonstrate its majority status. In Struthers-Dunn, Inc. v. NLRB (3rd Cir. 1978) 574 F.2d 796, 798 [98 LRRM 2385], the statement revoking the authorization cards collected by the union read:

> We the undersigned have signed cards petitioning a Union into Struthers-Dunn, Inc. We now feel that we would like to withdraw our names from any such petition.

This revocation unequivocally declares the intent of the employee/signers of the petition. As a result of this specific statement, the cards of those employees were not counted. This may be contrasted with the "No Union" slips provided by Ward, which do not evidence any specific intent on the part of the employees to revoke previously signed authorization cards. In Blue Grass Industries, Inc. (1987) 287 NLRB 274, 290-291 [130 LRRM 1131], the NLRB held to be valid revocations situations in which the employees wrote to the union or the NLRB specifically asking that their authorization cards be returned because they changed their minds about the union. In this case, the NLRB also invalidated an alleged revocation where the employees discussed the issue with other employees or verbally expressed a change of mind but took no further action. This is contrasted with the "No Union" slips, which do not specifically communicate the employees' desire to revoke the SEIU authorization cards.

In light of the above discussion, we conclude that the District unreasonably withheld recognition of SEIU by treating the "No Union" slips as revoking the SEIU authorization cards. The "No Union" slips do not show the signers' specific intent to revoke the SEIU authorization cards and therefore, should not be deducted from the tally of SEIU authorization

cards. The District thus violated MMBA sections 3507.l(c) and 3507(c). We therefore adopt the ALJ's proposed decision, consistent with this discussion.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Antelope Valley Health Care District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, 3507(c) and 3507.1(c), by treating "No Union" cards as revoking SEIU Local 399 (SEIU) cards.

Pursuant to section 3509(b), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Treating "No Union" cards as revoking SEIU cards.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Resubmit the matter of determining exclusive or majority representation to the State Mediation and Conciliation Service with instructions that the "No Union" cards not be treated as revoking SEIU cards.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General

Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

It is further Ordered that the Administrative Law Judge's proposed decision in Case No. LA-CE-196-M is hereby affirmed consistent with this decision.

Chairman Duncan and Member Neuwald joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-196-M, SEIU Local 399 v. Antelope Valley Health Care District, in which all parties had the right to participate, it has been found that the Antelope Valley Health Care District violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, 3507(c) and 3507.1(c), by treating "No Union" cards as revoking SEIU Local 399 (SEIU) cards.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Treating "No Union" cards as revoking SEIU cards.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Resubmit the matter of determining exclusive or majority representation to the State Mediation and Conciliation Service with instructions that the "No Union" cards not be treated as revoking SEIU cards.

Dated:______________________________ ANTELOPE VALLEY HEALTH CARE DISTRICT

By: ______________________________
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 399, Charging Party, v. ANTELOPE VALLEY HEALTH CARE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-196-M PROPOSED DECISION (05/26/05

Appearances: Tosdal, Smith, Steiner & Wax by Thomas Tosdal, Attorney, for SEIU Local 399; O'Melveny & Myers LLP by Bryan S. Westerfeld, Attorney, for Antelope Valley Health Care District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that a public employer unlawfully refused to recognize it as an exclusive representative after a card check. The employer denies that its conduct was unlawful.

SEIU Local 399 (SEIU) filed an unfair practice charge against the Antelope Valley Health Care District (District) on September 27, 2004. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the District on October 29, 2004. The District filed an answer on November 19, 2004.

PERB held an informal settlement conference (by telephone) on November 22, 2004, but the case was not settled, so PERB held a formal hearing on January 13, 2005.[1] With the receipt of the final post-hearing briefs on May 16, 2005, the case was submitted for decision.

[1] It is noteworthy how quickly this case moved through the PERB process: from charge to hearing in three-and-a-half months.

FINDINGS OF FACT

The District is a public agency within the meaning of Government Code section 3501(c) of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32016(a).[2] SEIU is an employee organization within the meaning of MMBA section 3501(a). At the time of the hearing, it was using a new name: United Healthcare Workers West - California.

Although the factual background of this case is somewhat complicated, the most relevant events can be summarized fairly simply. In November 2003, SEIU competed in an election with the Caregivers and Healthcare Employees Union (CHEU) to represent the District's unit of "all other employees."[3] Of the 899 valid ballots, 336 (37.4 percent) were for SEIU, 333 (37.0 percent) were for CHEU, and 230 (25.6 percent) were for "Neither." Under District policy, this result, with no choice receiving more than 50 percent, would normally have led to a runoff election between the top two choices.

SEIU and CHEU, however, decided to end their competition. In December 2003, CHEU withdrew, and SEIU asked that the matter be decided by a card check. SEIU asserted in part:

> The wishes of any "No Union" supporter will be heard through his/her failure to sign a card.

When the District took the position that there should still be a runoff election, between SEIU and "No Union," SEIU also withdrew, without prejudice, on January 8, 2004.

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[2] MMBA is codified at Government Code section 3500 and following. PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.

[3] According to District policy, this unit consisted of employees who were not defined as professional employees, supervisors, management, confidential employees or guards.

SEIU continued to collect authorization cards, at least in part because some of its older cards might be deemed to have expired. Meanwhile, a small group of independent employees began to collect "No Union" cards. The District became aware of both efforts, and on January 28, 2004, it issued an e-mail to all employees, part of which included the following questions and answers:

> Question: Why is the SEIU continuing to ask employees to sign authorization cards?
>
> Answer: Now that it has arranged for the CHEU to go away, the SEIU believes that it can file a new petition and avoid having employees actually vote on representation in a secret ballot election. Instead, the SEIU hopes to use the card-check law to file a new petition for recognition based solely on authorization cards, using authorization cards as a substitute for employee votes. In a recent letter to the Hospital the SEIU claimed that "the wishes of any 'No Union' supporter will be heard through his/her failure to sign a card."
>
> Question: Can I revoke an authorization card that I have already signed for the SEIU?
>
> Answer: Yes, an employee does have the right to revoke an authorization card signed for a union. The decision of whether or not to revoke your card is strictly yours to make. The Hospital simply wants to be sure you know about, and understand, your rights and privileges. Whether you revoke your card or not will not make any differences in your wages, benefits, position held, or treatment by the Hospital.
>
> If you want to revoke your authorization card:
>
> 1. You should prepare a letter to the SEIU that reads as follows:
>
>   "Dear Sir/Madam:
>
>   I hereby revoke the authorization card which I previous signed for your union."

The letter should be signed by you and dated. Also, make at least one copy of the same letter.

2. The letter should be mailed to the union at the following address:

   [Address omitted.]

3. The first copy of the letter should be kept by you and put in a safe place where it will not be lost. If you desire, you can send a copy to the Hospital and the SMCS [State Mediation and Conciliation Service] as well, but it is not necessary. The SMCS is at the following address:

   [Address omitted.]

If you follow these three steps, your card will be revoked automatically. It is not necessary for you actually to get your card back.

We repeat, the Hospital is not urging you to either do this or not do this. As far as the Hospital is concerned, that is a matter for each person to decide for himself/herself without pressure from either the Hospital or the union.

Question: Why are some employees circulating "No Union" cards?

Answer: We understand that some employees are concerned that the SEIU may attempt to use an old or stale authorization card that they signed a long time ago or that someone else may have inappropriately put their name on an authorization card. These cards have not been circulated by the Hospital, and the Hospital is not urging employees to sign them or not sign them. As far as the Hospital is concerned, that is a decision for each employee to make without pressure from the Hospital or a union.

Question: If I sign a "No Union" card, what should I do with it?

Answer: Employees who want to put their position on record by signing a "No Union" card should do whatever they feel is appropriate. As with revoking an authorization card, the employee should keep a copy of the card for

> themselves. Employees may also want to send a copy of the card to the SEIU, and in the event the SEIU attempts to submit cards to the Hospital again, send a copy to the SMCS or the Hospital to make sure it is forwarded to the SMCS. Again, it is completely up to each individual employee whether or not they want to sign a "No Union" card and, if so, what they want to do with it. The Hospital simply wants to be sure you know about, and understand, your rights and privileges.

The e-mail told employees to direct any further questions to the Human Resources department.

On March 8, 2004, SEIU formally requested that it be recognized as an exclusive representative on the basis of a card check. SEIU invoked "California State Law," that is, MMBA section 3507.l(c), which states:

> A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or majority status of the employee organization. In the event the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations shall be the neutral third party and shall verify the exclusive or majority status of the employee organization. In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status.

The referenced Division of Conciliation is more commonly known as the State Mediation and Conciliation Service (SMCS).

In this case, the card check was handled by SMCS Presiding Mediator Draza Mrvichin (Mrvichin). For a time, SEIU and the District could not agree on how long an authorization card remained valid. On June 6, 2004, Mrvichin advised them:

> It is my opinion that we count the signed union authorization cards dated within one year of March 8, 2004, understanding that PERB is the final authority on this matter.

SEIU agreed with Mrvichin. The District later also agreed: on June 30, 2004, its Board of Directors decided that valid cards obtained during the period March 8, 2003, to March 8, 2004, should be counted.

SEIU and the District could not agree, however, on whether or how employees could revoke authorization cards. Mrvichin ultimately conducted a card check without an agreement. On August 31, 2004, he provided the following tally:

Total number of names on the Eligibility List	1100
Total valid SEIU cards	569
Total valid revocation letters	5
Total valid "No Union" cards	280
Total "No Union" cards that matched up with SEIU cards	84

With regard to this tally, SEIU and the District have stipulated in part as follows:

> The word "valid" .. . means (1) the card was signed by an employee on the eligibility list and (2) the card was signed at some point during the one year time period before March 8, 2004, which was the date of SEIU's petition for recognition. As to revocations, the word "valid" additionally means the employee had signed a SEIU card before the revocation. The total "No Union" cards that matched up with SEIU cards reported by the SMCS are also "valid" cards as defined in this paragraph.

SEIU and the District have further stipulated:

> [SMCS] has declined to rule on the legal effect of revocation letters and/or the "No Union" cards. [SMCS] has not verified the exclusive majority status of any employee organization per Govt. Code §3507.1(c).

On September 22, 2004, the District's Board of Directors voted 3-2 not to recognize SEIU as an exclusive representative.

The SEIU cards tallied by Mrvichin included the statement:

> I choose the Service Employees International Union (SEIU) to represent me in collective bargaining with my employer.

The revocation letters tallied by Mrvichin included the statement:

> I hereby revoke the authorization card which I previously signed for your union.

This was the revocation language provided by the District in its January 28 e-mail to employees. The "No Union" cards tallied by Mrvichin contained only those two words, "No Union," in addition to the employee's name, department, employee number and dated signature. With regard to the "No Union" cards that matched up with SEIU cards, the tally does not actually indicate which of the two cards was signed more recently.

ISSUE

Did the District unlawfully refuse to recognize SEIU?

CONCLUSIONS OF LAW

As quoted above, MMBA section 3507.1(c) states:

> A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or majority status of the employee organization, hi the event the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations shall be the neutral third party and shall

> verify the exclusive or majority status of the employee organization. In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status.

In the present case, the Division of Conciliation, better known as the State Mediation and Conciliation Service (SMCS), provided a tally indicating in part:

Total number of names on the Eligibility List	1100
Total valid SEIU cards	569
Total valid revocation letters	5

From this portion of the tally, it would appear that SEIU has met its burden of showing that a majority of employees (in this case, more than 550 employees) desire SEIU representation.

The problem is that the tally also indicates as follows:

Total valid "No Union" cards	280
Total "No Union" cards that matched up with SEIU cards	84

The District Board of Directors effectively decided, by a 3-2 vote, that the 84 "No Union" cards that matched up with SEIU cards validly revoked those SEIU cards, depriving SEIU of its majority showing.

These facts raise the issues of whether the SEIU authorization cards were revocable at all and, if so, whether the "No Union" cards that matched up with SEIU cards were valid revocations. I find it unnecessary to decide the first issue, because I conclude that in the context of this case the "No Union" cards cannot be regarded as valid revocations.

The determining fact in this case is that on January 28, 2004, the District issued an e-mail to all employees specifically advising them how to revoke SEIU authorization cards. The District specifically advised employees where to send revocation letters and what language to use. Between January 28, 2004, when the e-mail was issued, and March 8, 2004, when SEIU

requested recognition on the basis of a card check, exactly 5 employees who had previously signed SEIU cards chose to follow the District's advice on how to revoke those cards. Their 5 revocation letters are not enough to affect SEIU's majority showing.

All the other employees who had previously signed SEIU cards chose not to revoke those cards as the District advised they could. Whatever the employees who signed both SEIU and "No Union" cards intended, they had no reasonable basis to believe that the "No Union" cards revoked the SEIU cards. Furthermore, the District, which had specifically advised employees how to revoke SEIU authorization cards, had no reasonable basis to decide later that the "No Union" cards, which did not conform to the District's advice, revoked the SEIU cards.

I therefore conclude that the District violated MMBA section 3507.l(c) when it treated the "No Union" cards as revoking SEIU cards, thus depriving SEIU of its majority showing. Because this conduct unreasonably withheld recognition of SEIU, it also violated MMBA section 3507(c). Because this conduct interfered with the right of employees to be represented by SEIU, and denied SEIU's its right to represent them, it also violated MMBA sections 3502 and 3503.

REMEDY

MMBA section 3509(b) in part gives PERB jurisdiction to determine "whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter [MMBA]." In the present case, the District has been found to have violated MMBA by treating "No Union" cards as revoking SEIU cards. It is therefore appropriate to order the District to cease and desist from this conduct.

In its post-hearing briefs, SEIU asks that the District also be ordered "to immediately recognize [SEIU] as the exclusive representative of the employees in the All Other Employees

bargaining unit." The problem is that MMBA section 3507.1(c) states in part, "Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization." In the present case, the neutral third party is SMCS, not PERB, and SMCS has not yet made the necessary determination. The best that PERB can do, therefore, is to order the District to resubmit the matter to SMCS with instructions that the "No Union" cards not be treated as revoking the SEIU cards.

It is also appropriate to order the District to post a notice incorporating the terms of the order in this case. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Antelope Valley Health Care District (District) violated the Myers-Milias-Brown Act (Act), Government Code sections 3502, 3503, 3507(c) and 3507.1(c), by treating "No Union" cards as revoking SEIU Local 399 (SEIU) cards.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Treating "No Union" cards as revoking SEIU cards.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Resubmit the matter of determining exclusive or majority representation to the State Mediation and Conciliation Service with instructions that the "No Union" cards not be treated as revoking SEIU cards.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted,

copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or 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. (Cal. Code Regs., tit. 8, secs. 32135(a) and 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 California Code of Regulations, title 8, section 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, sec. 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).)

Thomas J. Allen
Administrative Law Judge