STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSEPH DOHERTY, Charging Party, v. SAN JOSE/EVERGREEN COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2312-E PERB Decision No. 1928 November 16, 2007
JAMES O'NEIL, Charging Party, v. SAN JOSE/EVERGREEN COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2313-E

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Joseph Doherty and James O'Neil; Shupe & Finkelstein by John A. Shupe, Attorney, for San Jose/Evergreen Community College District.

Before Shek, McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the San Jose/Evergreen Community College District (District) of a proposed decision by an administrative law judge (ALJ). The charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by retaliating against

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Joseph Doherty (Doherty) and James O'Neil (O'Neil) (collectively Charging Parties) for seeking and receiving the assistance of the San Jose/Evergreen Faculty Association, American Federation of Teachers, Local 6157 (Association). The Charging Parties claim this conduct constituted a violation of EERA sections 3543(a) and 3543.5.

This is a consolidated case arising from the filing of unfair labor practice charges by Doherty on January 21, 2003 and O'Neil on January 22, 2003. The Charging Parties are part-time instructors who have taught various classes offered by the South Bay Regional Public Safety Training Consortium (Consortium) since its inception. The Charging Parties allege the District retaliated against them for obtaining assistance from the Association to assert a statutory right to convert from temporary to probationary employees. In particular, the charges allege the District, through the actions of the Consortium, reduced the Charging Parties' hours and eventually ceased to employ Doherty at all because of their protected activity.

Although the alleged acts of retaliation were performed by employees of the Consortium, the ALJ held the District retaliated against the Charging Parties in violation of EERA. The ALJ imputed liability to the District under a "joint employer" theory.

We have reviewed the entire record, including the unfair practice charge, the response thereto, the amended unfair practice charge, the complaint, the post-hearing briefs, the proposed decision, the District's exceptions and the Charging Parties' response and conclude the ALJ erred in finding the existence of a joint employer relationship. Accordingly, for the reasons set forth below, we reverse the proposed decision and dismiss the case.

FINDINGS OF FACT

The District is comprised of two colleges, Evergreen Valley College, established in 1975, and San José City College, established in 1921. Throughout the 1980's and early 1990's, several community college districts in the Bay Area independently operated training academies for police officers, firefighters and other public safety personnel. The District and Gavilan Community College District (Gavilan CCD) operated such academies. During this time, local public safety agencies sought to enroll larger numbers of recruits and regular personnel into these programs. The districts, however, faced constraints in meeting the increased demand for instruction. Two major constraints were the high cost of facilities and overhead and the inability of districts to recapture such costs due to legal restrictions in the state funding formulae for community colleges. Under a special grant in the early 1990's, Evergreen Valley College studied a regional training cooperative as a possible solution. The resulting study suggested the formation of a joint venture operating through a joint powers agreement between member community college districts.

Creation of the Consortium

In 1995, the District and the Gavilan CCD agreed to create a joint powers agency that became known as the Consortium. The organizing document for the Consortium was a joint powers agreement (JPA Agreement) effective July 1, 1995. The JPA Agreement required the Consortium to be governed pursuant to its bylaws. The Consortium bylaws (Bylaws) authorized the addition of other community college districts and included a formula for voting rights based on each member's level of financial commitment.

The Bylaws provide that all member districts are obligated each year to commit an amount of "FTES they wish to generate" through the Consortium. An FTES (full time

equivalent student) is a unit of community college district funding allocated by the State based on a full-time student equivalent. Each member district is required to provide a minimum of twenty five (25) FTESs for continuing participation in the Consortium.

The JPA Agreement states that the member districts entered into the joint venture for their mutual benefit.[2] Relevant to this discussion, Section 3.C of the JPA Agreement provides:

> Instructional personnel recommended by the SBRPSTC[3] staff to teach a course(s) offered through the Consortium shall be employed via a contract with one of the participating college districts. All personnel so approved via such contract, shall meet the minimum qualifications for teaching in the appropriate discipline(s) per Title Five of the California Administrative Code of Regulations. Such personnel shall be designated as the instructor of record for courses approved and offered by each member college. [Emphasis added.]

In addition to the staffing provisions in the JPA Agreement, the Bylaws provide that the Consortium has the power "to contract with member districts for the employment of faculty or staff or to directly employ non-teaching staff." The Bylaws also state "[a]ll instructional staff shall be contracted from member districts via a written agreement with the [Consortium]."[4] The District executed such a staffing agreement (Staffing Agreement) with the Consortium, effective July 1, 1995. Under the "Scope of Services" section in the Staffing Agreement, the District "agrees to provide, through its established employment policies and procedures,

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[2]The JPA cites the California Joint Exercise of Powers Act. (Gov. Code sec. 6500, et seq.) Section 6502 thereof authorizes public agencies by agreement to "jointly exercise any power common to the contracting powers." In terms of agreements to provide services, Section 6506 provides that any of the parties may provide "all or a portion of the services to the other parties," or "provide for the mutual exchange of services without payment of any consideration other than such services."

[3]South Bay Regional Public Safety Training Consortium.

[4]By August 1998, there were seven member districts in the Consortium. As a matter of policy, the curriculum of the Consortium must be approved by all of the member districts.

academic and classified employees to perform duties and responsibilities as required by the JPA within [established] District job classifications." Also under the Staffing Agreement, the District is required to pay all the salaries and benefits for such employees. However, all these costs are reimbursed by the Consortium.

The Staffing Agreement, consistent with the JPA, requires all employees furnished by the District to meet District qualifications as specified in "District position descriptions" and be "boarded" by the District. Boarding is a certification by the District that confirms an instructor meets the Title 5 minimum qualifications in a particular "faculty service area" (i.e., academic discipline). Being boarded is necessary for the reimbursement of an instructor's services. While community college districts have the power to board instructors, the Consortium does not. Thus, the Consortium is dependent upon its member districts to board its instructors.

As discussed below, however, the District and the Consortium have apparently disregarded most of the provisions in the JPA Agreement, the Staffing Agreement and the Bylaws (collectively Operational Documents) regarding the employment, management and supervision of the Consortium's faculty.

Organization of the Consortium

Dr. Rene Trujillo, Jr. (Trujillo) is the current executive director of the Consortium. Cindy Bevan (Bevan), the Consortium's dean of instruction, reports to Trujillo. Bevan supervises the Consortium's training coordinators. The coordinators are responsible for both scheduling instructors and ensuring the instructor pool is adequate to satisfy the needs of the academies. They are also responsible for ensuring the instructors in the pool have the necessary credentials, such as being boarded by a community college district and having

appropriate state certifications. Presently, the selection, hiring and retention of instructors is the sole responsibility of the Consortium.

After recruiting the instructors, the coordinators pass them on to one of the community college districts for boarding. At present, 90 percent of the instructors are boarded through the District. The instructors, of which there are approximately 250 to 300, are assigned by the coordinators to teach various classes. Certain courses, such as Basic Academy, consist of several blocks of instruction covering different topics. These blocks of instructional hours are scheduled up to six months in advance.

Hiring Activities by the Consortium

District Vice-Chancellor for Administrative Services, Michael Hill (Hill), testified about the development of the Consortium. Hill explained that initially, a core group of employees who were drawn from the District and Gavilan CCD served as the Consortium's administrative employees. The founding members believed that to sever existing academy employees and require them to be hired by the Consortium would undermine employee organization support for the fledgling effort. Thus, the academies were initially run with existing employees of the two districts. This arrangement also assisted the Consortium in controlling costs.[5]

Notwithstanding the employment provisions in the Operational Documents, the Consortium began to hire instructors on its own in 1997.[6] The District never challenged this

[5]Currently the Consortium conducts training at three academy sites, located at Evergreen College, Gavilan CCD and College of San Mateo.

[6]The District claims the July 1995 contract, in particular the provisions stating that employees provided by the District were not Consortium employees, was rescinded in a de facto fashion by this new hiring practice. Clearly, these provisions were disregarded by the District and the Consortium. However, since we conclude below that the conduct of the parties

practice. Also in 1997, the Consortium asked classified employees provided by the District to become Consortium employees. Two elected to remain District employees, but only one continues to work for the Consortium. Currently, there are approximately 30 classified employees of the Consortium.

The District's Control Over Consortium Faculty

The District recognizes the Association as the exclusive representative for the District's faculty.[7] The District's faculty, including its part-time faculty, are paid in accordance with the collective bargaining agreement (CBA) between the District and the Association.

The Staffing Agreement states that employees provided to the Consortium "shall not be considered employees of the [Consortium], but of the District, for purposes of seniority, placement or advancement on the District salary schedule or accruing any other rights or privileges afforded District employees under District Collective Bargaining Agreements and Policies." However, the Consortium's instructors are not paid in accordance with the salary schedule in the CBA. Rather, their rate of pay is set by the Consortium.[8]

Consistent with the Staffing Agreement, the District provides payroll services to the Consortium. Thus, the Consortium's instructors are paid by a check issued by the District. However, the Consortium sets salaries, notifies the District of these salaries and reimburses the District in full for the salaries remunerated by the District to the Consortium instructors. This

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in this case better reflects the true nature of employment relationship between the parties, we need not decide whether these provisions were actually rescinded by this new hiring practice.

[7]The Consortium's faculty is excluded from the bargaining unit for the District's faculty.

[8]The parties stipulated that any similarity in compensation between the Consortium's instructors and the District's instructors is by coincidence.

includes reimbursement for benefits, including, but not limited to, California State Teachers Retirement System (STRS) contributions, workers compensation insurance and medical benefits. The Consortium also pays the District for its costs incurred in performing its payroll services.

With regard to record keeping, the District does not maintain payroll records for the Consortium's faculty. Those records are maintained by the Consortium. Similarly, the District does not maintain personnel files for the Consortium's faculty. Rather, those files are maintained by the Consortium. Indeed, the District does not even have access to those personnel files.

The Staffing Agreement also provides that evaluations of Consortium faculty will be done in accordance with District policies. However, the District does not participate in the evaluation of the Consortium faculty. Moreover, although the CBA contains provisions regarding the review of the District's faculty, those evaluation procedures have not been utilized for the Consortium's faculty.[9]

Further, the District does not participate in hiring and/or firing decisions, setting schedules, setting salaries, disciplining, managing or otherwise supervising the Consortium's faculty.[10] These actions are all performed by Consortium staff, and they are performed without reference to the CBA. Indeed, there is nothing in the record to suggest that the Consortium's instructors enjoy any of the rights or privileges granted the District's faculty under the CBA.

[9]It is noteworthy that the Consortium does not evaluate its instructors in any formal sense. However, student evaluations are handed out, collected and reviewed by the training coordinators.

[10]The District did, however, initially hire the Charging Parties prior to the creation of the Consortium.

Joseph Doherty's Employment History

Doherty was a firefighter employed by the Redwood City Fire Department until he took a work-related, disability retirement from service. Doherty has experience as a firefighter, fire truck engineer and hazardous materials specialist. Doherty was boarded by the District's governing board in December 1994. He was hired by the District in January 1995 after submitting an employment application form to Evergreen Valley College for a position at the Criminal Justice Training Center. His first teaching assignment was in the District's public safety training academy. Doherty later accepted teaching assignments in the Gavilan CCD and the San Mateo Community College District. He was a training coordinator for the Consortium from 1998 to early 2002.

Doherty testified that all of his work for the District since July of 1995 has been in connection with the Consortium. For this work, Doherty was paid through payroll checks issued by the District. He also received a yearly W-2 statement from the District. Both the District and Gavilan CCD have made contributions to his STRS account, but these contributions are fully reimbursed by the Consortium.

James O'Neil's Employment History

O'Neil has been employed as a reserve police officer with the Brisbane Police Department. O'Neil has an associate degree in general education from College of San Mateo and a bachelor's degree in management from St. Mary's College. In 1994, he was hired by the District to be an instructor in the communications dispatcher academy. O'Neil is boarded through the District. His teaching locations and method of compensation have been similar to those of Doherty's. As with Doherty, the District contributed to O'Neil's STRS account. O'Neil was also a training coordinator for a brief period in 2002.

The 190-Hour Rule

The basis for this dispute is an unwritten Consortium policy that imposes a 190-hour cap on instructional time by instructors within any college semester. This is the equivalent to a 60 percent full-time load at a community college. Although Trujillo testified that the rule was enforced primarily in deference to the member districts because of unspecified "audit concerns," Doherty apparently understood, or was told by Bevan, that the rule was for the benefit of the member districts. However, according to Bevan, during a discussion regarding the applicability of the rule, Doherty told her that the rule should not apply to him because he was an employee of the Consortium, not the District.

The genesis of this rule is likely Education Code section 87482.5(a)[11] which provides as follows:

> Notwithstanding any other provision of law, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604.

The Consortium's payroll department monitors the hours worked by its instructors. When an instructor reaches 90 to 100 hours, the instructor's name is put on a watch list. Typically, when the limit is reached, the problem is resolved by some type of voluntary compliance on the part of the instructor. However, on certain occasions, coordinators have been required to go to a classroom and remove instructors from the training to prevent them from going over the limit.

[11]On August 7, 2003, the Charging Parties filed a Verified Petition for Writ of Mandamus seeking reclassification to probationary status based on, among other sections, Education Code section 87482.5(a).

Basis of Dispute

In early 2002, the Charging Parties began to question the 190-hour rule. Eventually, by letter dated August 26, 2002, Association Attorney, Robert Bezmek, sent a letter to both the District and the Consortium asserting the Charging Parties should be reclassified to probationary employees because they worked in excess of the 60 percent limit in several of the preceding semesters. It is the alleged conduct of several Consortium employees both before and after the issuance of the August 26, 2002, letter that forms the basis of the Charging Parties' retaliation claim. Specifically, the Charging Parties claim that their teaching hours were reduced by certain Consortium employees in retaliation for the Charging Parties' claim to be reclassified.[12] However, because we conclude below there is no joint employer relationship between the District and the Consortium, the District may not be held accountable for the alleged acts of the Consortium employees. Accordingly, we need not include a full recitation of those events herein.

ISSUES

1. Is the Consortium a joint employer with the District for purposes of PERB's ability to provide a remedy in this case?
2. Did the District retaliate against Doherty and O'Neil because of protected activity related to the enforcement of the 190-hour rule?

DISCUSSION

As stated above, the actions of certain Consortium employees form the basis of the Charging Parties' retaliation claim. Thus, the threshold issue in this case is whether the

[12]The Charging Parties' claim is based solely on the alleged acts of Consortium employees and not the conduct of the District employees.

District can be held accountable for the actions of the Consortium. The Charging Parties assert the District is accountable under a joint employer theory. We disagree.

The District and the Consortium are not Joint Employers

It is well established that an employee may have more than one employer controlling the terms and conditions of his or her employment. A "joint employer" situation arises "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (United Public Employees v. Public Employment Relations Bd. (1989) 213 Cal.App.3d 1119, 1128 [262 Cal.Rptr 158], quoting NLRB v. Browning-Ferris Industries, Inc. (3rd Cir. 1982) 691 F.2d 1117, 1124 [111 LRRM 2748] (Browning-Ferris); Regents of the University of California (1999) PERB Decision No. Ad-293-H.) A joint employer theory does not depend upon the existence of a single integrated enterprise; rather, it assumes the enterprises are independent legal entities that have "historically chosen to handle jointly . . . important aspects of their employer-employee relationship." (Browning-Ferris, at p. 1122, quoting NLRB v. Checker Cab Co. (1966) 367 F.2d 692, 698.) Consequently, these cases focus on the level of control exerted over the employees by the enterprises in question.

In the instant case, the Consortium, without input or assistance from the District, selected, evaluated, scheduled, supervised and counseled the Charging Parties. The Consortium set policies, determined what classes were offered, assigned instructors to teach the classes, and managed most, if not all aspects of the Charging Parties' employment as instructors at the Consortium. Additionally, the Consortium, and not the District, controlled

and maintained the Charging Parties' personnel files and payroll records. Indeed, according to Trujillo, the District does not even have access to the Charging Parties' personnel records.

With regard to salaries, the Consortium set the rate of pay for the Charging Parties without reference to the District's salary schedule, and those rates are different than the rates paid to the District's instructors. Although the Charging Parties were paid by checks issued by the District, the District's role was that of a payroll service provider. The Consortium reimbursed the District for all costs associated with the checks, including salary, benefits and administrative costs. Thus, the Consortium, and not the District, actually bore the burden of paying the costs associated with Charging Parties.

Based on the foregoing, we find the District, although it initially hired and boarded the Charging Parties, ceded virtually all control over them to the Consortium. Accordingly, we conclude the District and the Consortium are not joint employers under the facts of this case.

Boarding by the District

As noted above, the District "boarded" both Doherty and O'Neil and continues to board the vast majority of the Consortium's instructors. Boarding is a process whereby the District determines whether a prospective instructor meets the minimum qualifications to teach a class. Admittedly, boarding is significant because it is a necessary prerequisite to drawing state apportionment. However, being boarded does not automatically qualify a prospective instructor to teach a class. In some cases, additional requirements must be met. For example, the Commission on Peace Officer Standards and Training (POST) requires an additional certificate to teach certain classes. Consequently, boarding is only one aspect of the overall hiring process.

Clearly, the boarding process constitutes legitimate indicia of District control over the Charging Parties. When coupled with the fact that the District initially hired the Charging Parties, there is no question that the District exercised some initial control over the Charging Parties. However, that control ceased when the Charging Parties began working for the Consortium. In light of the fact that the Consortium exerted almost exclusive control over the Charging Parties during the seven years they taught Consortium classes, we conclude the District's initial acts of control over the Charging Parties fail to meet the level of substantial control necessary to support a finding of a joint employer relationship in this case.

The Contract Language is not Controlling in this Case

In concluding the District and the Consortium were joint employers, the ALJ relied heavily on the language in the Operational Documents. As stated above, both the JPA Agreement and the Bylaws require the Consortium to employ instructors via contract with one of the member districts. Moreover, the Staffing Agreement provides as follows:

> Employees provided to the JPA shall not be considered employees of the JPA, but of the District, for purposes of seniority, placement or advancement on the District salary schedule or accruing any other rights or privileges afforded District employees under District Collective Bargaining Agreements and Policies.

The Board, however, is not necessarily bound by contract language when determining the existence of a joint employer relationship. As explained in Ventura County Community College District (2003) PERB Decision No. 1547 (Ventura):

> The rights guaranteed to employees by EERA cannot be abrogated unilaterally by an employer through a cleverly written contract with a third party. The issue of whether the academy instructors are 'employees' is an issue for the Board to decide by examining the record in light of the statutory language of EERA.

In this case, notwithstanding the JPA Agreement, the Consortium has been hiring instructors since 1997. Further, notwithstanding the Staffing Agreement, the instructors are not paid in accordance with the District's salary schedule, nor do they derive any other rights or privileges from the District's CBA.

Clearly, the actions of the parties since 1997 has been inconsistent with the express language of the Operational Documents. In our opinion, these actions better reflect the true nature of the employment relationship between the parties. Here, the District and the Consortium have consistently and repeatedly disregarded the employment provisions in the Operational Documents. Thus, the mere fact that the Operational Documents describe the instructors as employees of the District does not, in light of this conduct, manufacture a joint employer situation. As stated above, the key issue in joint employer cases is the level of control over the shared employees. Because we conclude the District exercised little control over the Charging Parties, this contract language, which has been largely ignored and routinely breached, is insufficient to create a joint employer situation between the District and the Consortium.

The Primary Focus in Joint Employer Situations is Control of the Employees

In addition to the contract language, the ALJ found the interrelationship between the parties persuasive. According to the ALJ:

> [T]he short answer here is that the Consortium and the District have a necessarily co-dependent relationship: without the District to board the instructors, sanction the courses, and commit its FTES funding, the Consortium would be unable to assign or compensate instructors in the academies' courses. . . .While it is true that the question of for whose primary benefit the academies serve, the District or Consortium, may be a debatable point at this juncture, the Consortium would cease to operate but for its

> continued affiliation with the member community college districts.[13]

A joint employer situation, however, does not exist merely because there is an intimate connection between the purposes of an exempt employer and the services provided by a non-exempt employer. As stated above, when assessing whether a joint employer situation exists, the central focus is the level of control each entity exerts over the shared employees.

The "co-dependent" relationship discussed in the proposed decision addresses the relationship between the parties, and not the level of control the District imposes on the Charging Parties. Because it only tangentially addresses the District's control over the Charging Parties, exploration of the "co-dependent" relationship has limited probative value in determining whether a joint employer situation exists. Consequently, we conclude the ALJ's reliance on these factors is misplaced.

In reaching his conclusion, the ALJ also relied on Ventura. In that case, PERB held that a county sheriff and a community college district were joint employers of instructors teaching in a basic police training, POST-certified academy, which had been previously operated solely by the sheriff. The two employers negotiated an affiliation agreement. The agreement purported to treat the instructors as not being employees of the community college district. However, PERB noted other factors to support the proposition that the community college district treated the instructors as employees. In so doing, the Board in Ventura found that the instructors were "Sheriff's employees in many respects" and also community college district employees within the meaning of EERA.

[13]Joint powers authorities, by their very nature, owe their existence to the continued support of their member agencies. We, therefore, find this factor to be of little probative value.

Relying on Ventura, the dissent argues the Consortium and the District should be deemed joint employers based on the Operational Documents and the FTES regulations. We disagree.

As discussed above, the mere existence of the Operational Documents is not dispositive in this case. Rather, the key inquiry in joint employer cases is the level of actual control exerted over the shared employees. Actual control, however, was not at issue in Ventura. Rather, Ventura merely assumes that the community college district exercised a significant level of "actual control" over the employees in question.

In marked contrast, the District's actual control over the Charging Parties is the central issue in this case. Here, the District ceded to the Consortium most, if not all, "actual control" over the terms and conditions of the Charging Parties' employment. Thus, while the Operational Documents provide legitimate indicia of control by the District they do not compel the finding of a joint employer relationship in light of the District's conduct.

In addition to the Operational Documents, the dissent relies, in part, on the FTES regulations in finding the existence of a joint employer relationship. According to the dissent, our decision would create an "unwarranted safe harbor" which would provide school employers with "an excuse not to fulfill its duties to control and direct District employee who are consortium instructors, obligations which are concomitant to its receipt of state funding."

The District's compliance with its state funding obligations, however, is far beyond PERB's jurisdiction. (See Wilmar Union Elementary School District (2000) PERB Decision No. 1371.) Therefore, what the District should or should not be doing in connection with these obligations is irrelevant to our resolution of this matter. Instead, the issue in this case is

whether a joint employer situation exists between the District and the Consortium, and that determination is made by examining the level of control the parties exert over the employees.

It is also noteworthy that the impact of the FTES regulations on the instant case was never alleged in the moving papers, argued by the parties or considered by the ALJ. As discussed above, an FTES is a unit of community college district funding allocated by the state based on a full-time student equivalent. Clearly, community college funding mechanisms fall well outside PERB's area of expertise. Thus, we believe the dissent's sua sponte analysis of the FTES regulations is unpersuasive.

As stated above, the key inquiry in this case is the level of control exerted by the District over the employees. Based on our review of the relevant facts, including, but not limited to, the impact of the Operational Documents, we find the District did not exert a significant degree of actual control over the Charging Parties. Accordingly, we hold a joint employer situation does not exist in this case.

CONCLUSION

In order to establish a joint employer situation, it must be shown that the District exerted a significant degree of control over the Charging Parties' terms and conditions of employment. When looking at the totality of the evidence, the Charging Parties have simply failed to establish that the District exerted such control. Indeed, based on our review, we find the District, after boarding Doherty and O'Neil, essentially became little more than a payroll service provider to the Charging Parties. Accordingly, we conclude there is no joint employer relationship between the Consortium and the District. Because the underlying retaliation charge is based solely on the alleged acts of certain Consortium employees, the lack of a joint

employer relationship is fatal to the Charging Parties case. Accordingly, we reverse the decision of the ALJ and dismiss the case.

ORDER

The unfair practice charges and complaints in Case Nos. SF-CE-2312-E and SF-CE-2313-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Wesley joined in this Decision.

Member Shek's dissent begins on page 20.

SHEK, Member, dissenting: I respectfully dissent from the majority decision and order to dismiss the unfair practice charge in this case. The majority finds that the San Jose/Evergreen Community College District (District) was not an employer of the charging parties, Joseph Doherty (Doherty) and James O'Neil (O'Neil), in their capacities as instructors at the South Bay Regional Public Safety Training Consortium (Consortium or JPA).

The majority's position is summarized poignantly in the following passage:

> Clearly, the actions of the parties since 1997 has been inconsistent with the express language of the Operational Documents. In our opinion, these actions better reflect the true nature of the employment relationship between the parties. Here, the District and the Consortium have consistently and repeatedly disregarded the employment provisions in the Operational Documents. Thus, the mere fact the Operation Documents describe the instructors as employees of the District does not, in light of this conduct, manufacture a joint employer situation. As stated above, the key issue in joint employer cases is the level of control over the shared employees. Because we conclude the District exercised little control over the Charging Parties, this contract language, which has been largely ignored and routinely breached, is insufficient to create a joint employer situation between the District and the Consortium.
> (Majority opn., at p. 15, emphasis added.)

In my opinion, the majority's rationale stated above would provide an unwarranted safe harbor for the District, which would otherwise be subject to the jurisdiction of the Educational Employment Relations Act (EERA) pursuant to the provisions of full time equivalent student (FTES) regulations[1] and the Operational Documents,[2] if not for the fact that it had "consistently and repeatedly disregarded . . . largely ignored and routinely breached" the contract language of the employment provisions in the Operational Documents.

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[1]California Code of Regulations, title 5, section 58051(a)(1) and section 58058(b).

[2]By "Operational Documents," the majority refers to the: (1) Staffing Agreement between the Consortium and the District (Staffing Agreement), (2) Consortium Bylaws (Bylaws), and (3) Joint Powers Agreement among multiple community college districts establishing the Consortium (JPA Agreement).

(Majority opn., at p. 15.) Based on the analysis that follows, I believe that the majority's interpretation of the law and the Operational Documents would give the District an excuse not to fulfill its duties to control and direct District employees who are Consortium instructors - obligations which are concomitant to its receipt of state funding. There is no allegation that the parties officially terminated[3] any of the agreements, notwithstanding the District's alleged abandonment of the governing terms of the Operational Documents. I would thus find these agreements to be still operative since the Consortium's share of state FTES funding depends upon the District's retention of control over the employees. More significantly, the charging parties would lack protection in the absence of PERB's[4] assertion of jurisdiction. The majority's finding that the District is not an employer of the charging parties may leave them without a PERB remedy.[5] I submit this would frustrate the intent of the law.

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[3]The Staffing Agreement provided that the term of the agreement shall be for a period commencing on July 1, 1995 and will continue thereafter, until terminated by either the District or the JPA. Either party may terminate this agreement by providing written notification . . . at least 60 days prior to June 30th of any year. (Staffing Agreement, sec. 2.)

The JPA Agreement provides that a two-thirds majority of the members of the agreement may terminate the agreement with 60 days advanced notice. (JPA Agreement, sec. 11.A.)

[4]Public Employment Relations Board (PERB or Board).

[5]The Consortium, as a public joint powers agency, has heretofore been outside of PERB's jurisdiction because they are not "employers" under the EERA definition. (North Orange County Regional Occupational Program (1990) PERB Decision No. 857.) Although there is pending legislation to amend the EERA to include public school district JPA's within the definition of "employer" (A.B. 1463 (2007)), such legislation would have to apply retroactively to affect this case. I would therefore echo the concerns of the Board in Clovis Unified School District (2002) PERB Decision No. 1504, which stated in dicta that "It is troubling that a group of school districts may legally join together in a way that evades EERA and results in the loss of employees' statutory rights." (Id., at p. 15, fn. 11.)

Furthermore, I would note that the administrative law judge's (ALJ) proposed remedy did not include reinstatement of the charging parties. Instead, he ordered the District and its representatives to "recognize Doherty and O'Neil as instructors in good standing as to all disciplines in which they had previously instructed;" and to make them "whole for lost

I do not disagree with the majority's conclusion that the Consortium is also an employer of the charging parties. I would find, however, that the District is an employer of the charging parties based upon FTES funding regulations and the Operational Documents, and that the Consortium and the District are joint employers.

The Consortium is a joint venture created through the JPA Agreement among member community college districts. Pursuant to the JPA Agreement, the District is to pay all employee salaries and benefits, and simultaneously bill the Consortium for these costs. The Consortium in turn is funded through the yearly financial commitment from member community college districts that obtain their FTES funding from the state.

State regulations provide that to qualify for state funds, a community college district may contract for instruction to be "provided" by a public agency, such as the Consortium, if the courses are provided "under the immediate supervision and control of an academic employee of the district." (Cal. Code Regs., tit. 5, sec. 58051(a)(1), emphasis added.) Such contracts, however, shall specify that the District has the right to control and direct the instructional staff furnished by the Consortium. (Cal. Code Regs., tit. 5, sec. 58058(b)[6].)

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benefits, monetary and otherwise, including back pay from January 1, 2003, and interest at the rate of 7 percent per annum." I believe that this, in addition to the cease and desist order to the District, would have been an appropriate remedy under the circumstances.

[6]California Code of Regulations, title 5, section 58058 provides, as follows:

> (a) A person is an 'employee of the district' within the meaning of subdivision (a)(1) of Section 58051 if:
>
> (1) The district has the primary right to control and direct the person's activities during the time such person is serving the district; and
>
> (2) A contract exists between the person and the district, indicia of which may include provisions which specify the terms and conditions of work, salary and other compensation, work to be performed, and employment classification; and,

"In this manner an individual employed will continue to be an employee of a public or private agency, while at the same time qualifying as an employee of the district." (Cal. Code Regs., tit. 5, sec. 58058(b), emphasis added.)

Based upon these FTES regulations, specifically Cal. Code Regs., tit. 5, secs. 58051(a)(1) and 58058(b), the Board held that a community college district and the county sheriff were joint employers in Ventura County Community College District (2003) PERB Decision No. 1547, at pp. 22-23 (Ventura). In Ventura, the Board primarily relied on the funding prerequisite under Section 58058(b) that requires the District to maintain "the primary right to control and direct the activities of" the instructional staff of the public entity with which it contracts to support its finding of joint employer status. (Ventura, at p. 22.) In correctly finding that Ventura was controlling, the ALJ in the present case stated in the proposed decision that the key point in Ventura was the Board's reliance on the provisions pertaining to qualifications for community college district FTES in determining that instructors of basic police training were employees of the community college district.[7]

> (3) The district compensates the person according to an adopted salary or wage schedule which complies with the provisions of Article 8 (commencing with Section 87801), Chapter 3, Part 51 of the Education Code.
>
> (b) For the purposes of complying with the requirements of this section, a district may also contract for instruction to be provided by a public or private agency. Such contracts shall specify that the district has the primary right to control and direct the activities of the person or persons furnished by the public or private agency during the term of the contract. In addition, the district shall enter into a written contract with each person furnished by the public or private agency; and said contracts shall meet the requirements of subsection (a)(1) and (2) of this section. In this manner an individual employed will continue to be an employee of a public or private agency, while at the same time qualifying as an employee of the district.

[7]The ALJ stated in the proposed decision, in pertinent part:

In the present case, the Staffing Agreement states that the "assignment, direction, evaluation and other supervisory responsibilities of District employees provided to the JPA will be done in accordance with policies and procedures of the District." (Staffing Agreement, sec. 1, emphasis added.) The Staffing Agreement further states that the District is the employer of instructional staff such as Doherty and O'Neill for certain purposes.[8] Moreover, the Operational Documents do not authorize the Consortium to hire instructional staff directly, and instead require instructors to be hired via an agreement with one of the member districts.[9]

> The two employers negotiated an affiliation agreement. While that agreement purported to treat the instructors as not being employees of the community college district, PERB noted that other provisions did treat them as employees, most importantly for the purpose of qualifying for community college district FTES funding. This point was key in the Board's decision. I conclude for reasons explained below that Ventura is controlling.
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> . . . . . .
>
> In my view, the short answer here is that the Consortium and the District have a necessarily co-dependent relationship: without the District to board the instructors, sanction the courses, and commit its FTES funding, the Consortium would be unable to assign or compensate instructors in the academies' courses.

[8]"Employees provided to the JPA shall not be considered employees of the JPA, but of the District, for purposes of seniority, placement or advancement on the District salary schedule or accruing any other rights or privileges afforded District employees under District Collective Bargaining Agreements and Policies." (Staffing Agreement, sec. 1.)

[9]The Bylaws clearly provide that "All instructional staff shall be contracted from member districts via a written agreement with the JPA." (Bylaws, sec. VI.B.) The JPA Agreement establishing the Consortium, effective July 1, 1995, provides that member districts shall recommend instructional personnel for the Consortium, and that such personnel "shall be employed via a contract with one of the participating college districts. All personnel so approved via such contract, shall meet the minimum qualifications for teaching in the appropriate discipline(s)." (JPA Agreement, sec. 3.C.) The District, as a member college, approves and offers courses through the Consortium. The instructional personnel shall be designated as the instructor of record for the approved and offered courses. (JPA Agreement, sec. 3.C.) The JPA Agreement also provides that the District agrees "to provide, through its established employment policies and procedures, academic and classified employees to

Based upon these documents, the argument in favor of finding that the District here is a joint employer of the Consortium instructional staff is even more persuasive than the argument in favor of joint employer status in Ventura.[10]

I would find that under California Code of Regulations, Title 5, section 58051(a) and section 58058(b), the District is not free to ignore the terms of the Operational Documents after accepting state funding that is conditioned upon the District's compliance with the terms and conditions stated therein. In abiding by the provisions of the regulations, the District is obligated to exert the primary right to control and direct the activities of the instructional staff who are furnished by the Consortium and under contract with the District. There is no statutory authorization for the District to delegate or transfer its right to supervise those employees. The right to control therefore legally remains with the District despite its decision to refrain from exercising this right. Considering the plain language of Sections 58051(a)(1) and 58058(b), stating that the District is also an employer, which is required to maintain the primary right to control and direct the activities of the employees, and the conforming language in the Operational Documents, I would find that the District is also an employer for the purposes of the EERA.

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perform duties and responsibilities as required by the JPA within established District job classifications." (JPA Agreement, sec. 1.)

[10]In the present case, the Operational Documents provide that the District shall be the employer. In contrast, there was a contractual provision in Ventura stating that the academy instructors "shall be considered employees of the Sheriff," not the district. (Ventura, at p. 20.) The Board stated in Ventura that "[t]he rights guaranteed to employees by EERA cannot be abrogated unilaterally by an employer through a cleverly written contract with a third party." In the present case, the District issued the instructors' paychecks and W-2 forms, although it was reimbursed by the Consortium, which in turn received its funding from state FTES funds obtained by the member districts. In Ventura, the sheriff paid the instructors. (Id., at pp. 4-8.) Therefore, comparing the facts of this case to those of Ventura, the argument that the District and Consortium were joint employers is even more persuasive than the argument for joint employer status in Ventura.

The majority refers to the decision in United Public Employees v. Public Employment Relations Board (1989) 213 Cal.App.3d 1119, 1128 [262 Cal.Rptr. 158] (United Public Employees), citing NLRB v. Browning Ferris Industries (3d Cir. 1982) 691 F.2d 1117, 1124 [111 LRRM 2748], in stating that a joint employer situation arises "where two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." It is noteworthy that the court in United Public Employees reversed a PERB decision holding that the San Francisco Community College District (SF District) was not an employer of the classified employees. It referred to the language in the Education Code providing that the employees at issue shall be employed "pursuant to the provisions of [the City of San Francisco] charter . . . provided, however, that the governing board of the district shall have the right to fix the duties of all of its noncertificated employees." (Id., at p. 1125, citing Cal. Educ. Code sec. 88000, emphasis added.) Based upon the proviso in the Education Code, the court held that the SF District was also the employer of noncertificated employees working at the college. The court stated, "The only way to give effect to such language is to interpret it to mean that a District can also be the employer of noncertificated employees." (United Public Employees, pp. 1127-1128, emphasis added.) The court reasoned that "such interpretation also adheres to the above cited rules that a proviso conditions the general language of the statute and a specific provision prevails over a general provision." (Id., at p. 1128.) This portion of the United Public Employees decision indicates that the statutory language is controlling.

Similarly, the language in California Code of Regulations, Title 5, section 58058(b) states that if the District maintains the "primary right to control and direct the activities of" a Consortium employee, then the employee "will continue to be an employee of a public or

private agency, while at the same time qualifying as an employee of the district." (Emphasis added.) Additionally, the terms of the Staffing Agreement expressly refer to the instructional staff as "District employees provided to the JPA." (Emphasis added.) Based upon the provisions in both the regulations and the Operational Documents in this case, I would therefore find the District to be also an employer of the charging parties, pursuant to United Public Employees.

Finally, the District's decision to relinquish certain control over the instructional staff to the Consortium during the relevant time should not shield it from liability based upon the decision in Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville). In that case, PERB held that there is no unilateral change if an employer begins exercising a contractual right that it had not exercised in the past. Applying Marysville to the present case, the language of the Operational Documents would allow the District to take over all of the employer functions at any time, even if it does not have a past practice of exercising its contractual rights. The District's status as an employer therefore remains unchanged regardless of the level of actual control it decides to exercise at any given time.

In summary, the language of the pertinent regulations, and the terms and conditions of the Operational Documents define the relationship of the parties. Based on the above analysis, I would conclude that the District and the Consortium are joint employers.