STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. SAN BERNARDINO COUNTY SUPERIOR COURT, Respondent.	Case No. LA-CE-43-C PERB Decision No. 2392-C September 26, 2014

Appearances: Weinberg, Roger & Rosenfeld by Jacob J. White, Attorney, for Service Employees International Union, Local 721; Atkinson, Andelson, Loya, Ruud & Romo by Nate J. Kowalski and Jay G. Trinnaman, Attorneys, for San Bernardino County Superior Court.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Service Employees International Union, Local 721 (SEIU) to a proposed decision (attached) by a PERB administrative law judge (ALJ) dismissing the PERB complaint and underlying unfair practice charge. The complaint alleged that the San Bernardino County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] by denying as untimely SEIU's petition to decertify the incumbent exclusive representative of the support services unit, the San Bernardino Public Employees Association (Association or SBPEA). The complaint further alleged that the Court relied on its decertification petition window period local rule, which local rule was contrary to the Trial Court Act, and that by this conduct the Court

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

violated the Trial Court Act sections 71631, 71633, 71635.1, 71636, and 71639.1(c), and PERB Regulation 32606(a), (b) and (f).[2]

The Board has reviewed the entire record in the case. The ALJ's factual findings are supported by the record, and we adopt them as the findings of the Board itself, except as noted below. The ALJ's conclusions with regard to the Court's local rules for the decertification petition window period filings are in accordance with relevant law, and we adopt them except as noted below.

PROCEDURAL HISTORY

On September 30, 2013, SEIU filed an unfair practice charge with PERB alleging that the Court's local rule regarding the window period for filing a decertification petition violated the Trial Court Act. On October 29, 2013, the Court submitted a response to SEIU's charge. On November 4, 2013, PERB's Office of the General Counsel issued a complaint alleging that the Court violated Trial Court Act sections 71631, 71633, 71635.1, 71636, and 71639.1(c), and PERB Regulation 32606(a), (b) and (f) when it denied SEIU's decertification petition on the basis that it did not comply with section (j) of the Court's Employee Relations Rules (ERR).

On November 6, 2013, the Court filed a supplemental position statement. On November 15, 2013, the Court filed its answer, admitting the factual allegations of the complaint, but denying that it violated the Trial Court Act or PERB regulations by so doing. In its answer, the Court also asserted several affirmative defenses. On December 4, 2013, an informal settlement conference was held, but the matter was not resolved. A formal hearing was scheduled for March 11, 2014.

On January 23, 2014, the Court filed a motion for summary judgment. On February 10, 2014, SEIU filed its opposition to the Court's motion and a cross-motion for summary

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

judgment. On February 20, 2014, the Court filed a reply in support of its motion for summary judgment. Also on February 20, 2014, the ALJ allowed SEIU the opportunity to file a surreply to the Court's reply. On February 28, 2014, SEIU filed its surreply which was labeled as a "reply memorandum" in support of its own motion for summary judgment. On February 28, 2014, the ALJ deemed the matter submitted on the record because neither party objected to the exhibits or declarations of the other party, requested to cross-examine the other party's declarants or requested to present additional evidence.[3]

FACTUAL BACKGROUND

The Court is a "trial court" within the meaning of Trial Court Act section 71601(k) and PERB Regulation 32033(a). The Association is the "recognized employee organization" and exclusive representative of the support services unit within the meaning of Trial Court Act section 71601(h) and PERB Regulation 32033(b). SEIU is an "employee organization" within the meaning of Trial Court Act section 71601(b)(2). (Proposed Dec., p. 3.)

Pursuant to Trial Court Act sections 71636 and 71636.3, the Court adopted its ERR for the administration of employer-employee relations. Section (j) under the heading "Representation Proceedings" addresses the window period for filing a petition for certification, decertification or modification of an "authorized employee representative."[4] The pertinent provisions of section (j) states:

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[3] PERB Regulation 32207 states:

> The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case.

[4] The language of section (j) does not precisely mirror the language of the Trial Court Act. But it seems evident and was undisputed that "recognized employee organization" and "authorized employee representative" are synonymous. Section (j) also contains a third provision, which is inapplicable here, for filing petitions when the memorandum of understanding (MOU) has expired and has not been continued by the terms of the MOU.

> (j) TIMING OF PETITIONS: A petition for certification, decertification, or modification of an authorized employee representation unit <u>may only be filed during</u>:
>
> (1) A period beginning not earlier than two hundred forty (240) days and ending not later than two hundred ten (210) days <u>before the expiration date of any Memorandum of Understanding</u> covering the affected unit(s).
>
> (2) <u>In the event</u> any Memorandum of Understanding covering the affected unit(s) is continued for one (1) year by the terms of said Memorandum, a Petition for certification, decertification or modification of an authorized employee representation unit may only be filed during a period beginning not earlier than two hundred forty (240) days and ending not later than two hundred ten (210) days <u>before the anniversary date of the agreement</u>.

(Proposed Dec., pp. 3-4, emphasis in original.)

On December 1, 2011, the Court and the Association entered into an MOU for the employees in the support services unit which expired by its terms on November 30, 2012. Article 62(a) of the MOU provided, in pertinent part:

> The term of this Memorandum of Understanding shall commence at 12:01 a.m. December 1, 2011 and this Memorandum of Understanding shall expire and otherwise be fully terminated at 12:00 a.m. (midnight) of November 30, 2012. If a successor Memorandum of Understanding has not been reached by 12:00 a.m. (midnight) of November 30, 2012, the terms and conditions of this Memorandum of Understanding shall be extended one (1) year or until a successor Memorandum of Understanding is adopted, <u>whichever occurs sooner</u>.

Since the Court and the Association did not reach an agreement by midnight on November 30, 2012, the terms and conditions of the MOU were extended under Article 62(a) for one year or until a successor MOU was negotiated. (Proposed Dec., p. 5, emphasis in original.)

Under the terms of the MOU entered into on December 1, 2011, and extended by Article 62(a), there were two 30-day window periods during which time a petition for decertification of the Association could be filed under section (j) of the ERR. The first window period occurred between April 4 and May 4, 2012, under ERR section (j)(1) which

pertains to an MOU which is currently in effect. The second window period occurred between April 4, and May 4, 2013, under ERR section (j)(2) which pertains to one-year extensions of expiring MOUs. (Proposed Dec., p. 5.) No decertification petitions were filed during either of these two window periods. (Proposed Dec., p. 10.)

On August 30, 2013, the Court and the Association reached an agreement on a successor MOU with a retroactive effective date of December 1, 2012, and an expiration date of June 30, 2015.[5] Under ERR section (j)(1) the window period for the latest MOU will occur between November 2 and December 2, 2014. (Proposed Dec., p. 5.)

On September 9, 2013, SEIU filed a petition to decertify the Association and become the exclusive representative for the support services unit. On September 17, 2013, Court Executive Officer Stephen H. Nash (Nash) rejected SEIU's petition on the ground that it was untimely and the Court could not act upon it. According to Nash:

> [P]ursuant to the terms of the subject contract with SBPEA, the contract was extended to 12:00 midnight on November 30, 2013. Accordingly, under section (j)(2), a decertification petition must be filed "during a period beginning not earlier than two hundred forty (240) days and ending not later than two hundred ten (210) days before the first anniversary date of the agreement." November 30, 2013, would be the first anniversary date of the one (1) year extension and therefore we calculate that a decertification petition should have been filed between April 5, 2013 and May 4, 2013.

(Proposed Dec., p. 6.)

[5] Although the Court states that the MOU was ratified on August 30, 2013, the MOU was subject to approval by the Court Executive Committee and such approval was not given until November 12, 2013.

PROPOSED DECISION

The ALJ noted that the Trial Court Act allows trial courts to adopt reasonable rules and regulations for the administration of employer-employee relations in much the same manner as the Meyer-Milias-Brown Act (MMBA)[6] allows local government agencies to do so. (Proposed Dec., p. 9, citing *Tehama County Superior Court* (2008) PERB Decision No. 1957-C.) After finding that Trial Court Act sections 71630, 71631, 71636, 71636.3 and 71639.1 were similar to MMBA sections 3500, 3502, 3507, 3507.1, and 3509, the ALJ determined that MMBA precedent should therefore be applied in this matter to determine whether a local rule was unreasonable. (Proposed Dec., p. 9.)

The ALJ determined that the relevant inquiry was "whether a disputed local rule or its application is consistent with and effectuates the purposes of the express provisions of the Trial Court Act." (Proposed Dec., p. 9.) The ALJ determined that the ERR and the MOU extension language, including the possibility that a successor agreement could be reached during the period an MOU extension was in effect, provided for window periods for filing decertification petitions and none of those window periods was ever eliminated or shortened. The ALJ concluded that the ERR did not violate the employees' right to choose an employee organization to represent them before the employer, and that SEIU failed to file a decertification petition during the window period provided by the ERR. The ALJ therefore dismissed the complaint and SEIU's charge.

EXCEPTIONS

SEIU takes four (4) exceptions to the ALJ's proposed decision. SEIU maintains that the ALJ erred by failing to determine: (1) whether the Court's failure to oppose SEIU's motion for summary judgment precluded granting the Court's motion for summary judgment;

[6] The MMBA is codified at Government Code section 3500 et seq.

(2) whether the 2011-2012 MOU between the Court and the Association was a contract of indefinite duration which could not serve as a bar to SEIU's decertification petition; (3) whether the Court's ERR was facially unlawful; and (4) whether PERB's regulations should "fill the gap" in the absence of a local rule governing the subject. In addition, SEIU requests oral argument before the Board[7] and asks the Board to take official notice of the record in this case and of an e-mail exchange between the ALJ and the attorneys for both parties in this matter.[8]

The Court urges us to affirm the proposed decision and argues that its lack of separate opposition to SEIU's motion for summary judgment is not fatal to its own motion for summary judgment.[9]

DISCUSSION

Procedural Posture

While the ALJ states that he will rule on the parties' motion and cross-motion for summary judgment, there is no explicit ruling on these motions in the proposed decision. (See Proposed Dec., p. 3.) While there have been some exceptions,[10] PERB does not generally

[7] SEIU's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties have had an opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

[8] The Board grants SEIU's request to take official notice of its own record in this matter. (*San Ysidro School District* (1997) PERB Decision No. 1198, p. 3 [it is well-settled that the Board may take official notice of its own records].)

[9] The Court's response to SEIU's statement of exceptions was deemed to be untimely filed by PERB's Appeals Assistant. The Court appealed that decision and the Board concluded that the Court's response was, in fact, timely filed. (*San Bernardino Superior Court* (2014) PERB Order No. Ad-416-C.)

[10] See, e.g., *San Diego Unified School District* (1987) PERB Decision No. 610.

follow the summary judgment procedure utilized in California state courts. When facts are not in dispute, as they were not in this case, a matter may be deemed submitted on the record based on stipulated facts, briefs and responsive arguments. (PERB Reg. 32207.) Although both parties have treated the proposed decision as granting a motion for summary judgment in favor of the Court, the proposed decision suggests that the ALJ, in fact, treated this matter as one submitted pursuant to PERB Regulation 32207. (Proposed Dec., p. 3.) In addition, in e-mail correspondence between the ALJ and attorneys for both parties, the ALJ suggested that the matter be treated as a matter submitted without a formal hearing. We shall, therefore, treat this as a matter submitted on the record without a hearing pursuant to PERB Regulation 32207 rather than as a motion and cross-motion for summary judgment.

SEIU's First Exception: Whether failure to oppose a motion for summary judgment requires granting that motion.

SEIU's first exception claims that the ALJ erred by failing to determine whether the Court's refusal to file an opposition to SEIU's cross-motion for summary judgment precluded the ALJ from granting the Court's own motion for summary judgment. Since we are not treating this matter as a motion or cross-motion for summary judgment pursuant to California Code of Civil Procedure 437c, SEIU's first exception is denied as inapplicable to this case.[11]

[11] Even if this matter were treated as a motion for summary judgment, a moving party bears the burden of proving that no disputed issue of fact exists and that it is entitled to judgment as a matter of law. SEIU has cited no legal authority or precedent for the proposition that an unopposed motion for summary judgment is entitled to a default judgment in the absence of opposition, regardless of the merit of the motion. Moreover, the Court's filings in its own motion for summary judgment address and dispute the contentions in SEIU's cross-motion. Thus, while the Court did not file a pleading directly responsive to SEIU's cross-motion, the Court did dispute SEIU's cross-motion in its own pleadings.

SEIU's Second Exception: Whether the 2011-2012 MOU was a contract of "indefinite duration."

In its second exception, SEIU contends that the ALJ erred in failing to determine whether the 2011-2012 MOU between the Court and the Association was a contract of indefinite duration and thus could not serve as a bar to SEIU's decertification petition.

While the ALJ did not explicitly rule on whether the 2011-2012 MOU was a contract of indefinite duration, clearly he rejected SEIU's contention that it was. The ALJ distinguished National Labor Relations Board (NLRB) decisions[12] cited by SEIU wherein employers and incumbent unions agreed to short-term extensions of collective bargaining agreements which had the effect of eliminating part of a decertification window period. The ALJ determined that the extension language in Article 62(a) of the MOU, which addressed the possibility that the parties could negotiate a successor MOU before the expiration of the MOU extension did not eliminate the decertification window period established by ERR section (j)(2). The ALJ determined that ERR section (j)(2) established a "time-certain opportunity to exercise a basic, but limited right" to decertify the incumbent union. (Proposed Dec., p. 11.)

We agree with the ALJ that the extension language of Article 62(a), which provided that the extension would expire on November 30, 2012, or when the parties reached a successor agreement if that occurred sooner, did not render the 2011-2012 MOU or its extension a contract of indefinite duration. The 2011-2012 MOU had a definite expiration date and discernible 30-day window period for the filing of a decertification petition. The contractually agreed-to extension to the 2011-2012 MOU, in turn, also had a definite expiration date upon which a discernible window period was established for the filing of a decertification petition. While it is conceivable that the Court and the Association could have

[12] *Crompton Company, Inc.* (1982) 260 NLRB 417; *Frye & Smith, Ltd.* (1965) 151 NLRB 49; and *White Provision Company* (1956) 116 NLRB 1552.

entered into a successor MOU at an earlier date and eliminated all or part of the decertification window period under ERR (j)(2), that did not occur, and thus, on the present facts, we do not reach that question. We therefore conclude that SEIU's second exception lacks merit.

SEIU's Third Exception: Whether the ERR was facially "unreasonable."

In its third exception, SEIU contends that the ALJ erred by failing to determine whether certain provisions in the Court's ERR are facially invalid and therefore "unreasonable." (*County of Imperial* (2007) PERB Decision No. 1916-M.) SEIU urges that ERR section (j)(2) is facially invalid, because the term "anniversary date" is vague and not defined in the ERR and the language of section (j)(2) requires that a decertification petition be filed before the MOU is automatically extended. In addition, SEIU argues that the Court's requirement that employee organizations seeking to file a decertification petition must provide adequate proof of support dated within thirty (30) days of the petition is unlawful.

The ALJ rejected SEIU's argument regarding the alleged vagueness of "first anniversary date" in section (j)(2). Relying on the rule of statutory construction that mischief or absurdity is to be avoided, the ALJ determined that the only logical application of "first anniversary date" in section (j)(2) would be to the first anniversary of the date on which the MOU was extended. We agree with the ALJ and also note that both the ERR and Article 62(a) clearly establish that MOUs are extended for a maximum period of one year and it would be reasonable to calculate the petition window period from the expiration date or first anniversary date which are, in this instance, coterminous. We conclude therefore that SEIU's contention lacks merit.

While the ALJ did not address SEIU's contention that section (j)(2) requires that a decertification petition be filed before the MOU is automatically extended, SEIU did not

explain how such an anomaly was necessitated by the language of section (j)(2), and we do not find that to be the case. Accordingly, we conclude that this contention also lacks merit.

We do not reach the issue of the requirement under the ERR that a decertification petition be accompanied by adequate proof of support dated within thirty (30) days. SEIU's decertification petition was not denied on the basis that its proof of support was insufficient; it was rejected solely on the ground that the petition itself was untimely filed. Thus, SEIU's contention concerning the 30-day rule need not be further addressed.

SEIU's Fourth Exception: Whether PERB's regulation should "fill the gap" in the County's ERR.

In its final exception, SEIU contends that the ALJ failed to address whether PERB's regulations should "fill the gap" in the County's ERR. As the ALJ stated:

> The inquiry does not concern whether PERB would find a different local rule or different application of a local rule more reasonable, or whether the existing local rule or its application is unreasonable measured against an arbitrary standard. Instead, the inquiry is whether a disputed local rule or its application is consistent with and effectuates the purposes of the express provisions of the Trial Court Act.

(Proposed Dec., p. 9.) Since the ALJ concluded that ERR section (j) was not unreasonable nor was it unreasonably applied to SEIU, he had no occasion to determine whether PERB's regulations should "fill the gap" in the County's ERR. We conclude with the ALJ that ERR section (j) is not unreasonable. Likewise, we conclude with the ALJ that the ERR was not unreasonably applied to SEIU. (*County of Monterey* (2004) PERB Decision No. 1663-M.) PERB's regulations do not supplant a lawful local rule for determining the window period for a decertification petition. (*County of Riverside* (2011) PERB Decision No. 2163-M [PERB regulations apply only when the agency has no local rule governing a particular representation matter].)

CONCLUSIONS OF LAW

Based upon the entire record in the case, we conclude that the Court did not violate the Trial Court Act when it rejected as untimely the decertification petition filed by SEIU on September 17, 2013.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-43-C are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. SAN BERNARDINO COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-43-C PROPOSED DECISION (03/05/2014)

Appearances: Weinberg, Roger & Rosenfeld, by Jacob J. White, Attorney, for Service Employees International Union, Local 721; Atkinson, Andelson, Loya, Ruud & Romo, by Nate J. Kowalski and Jay Trinnaman, Attorneys, for San Bernardino County Superior Court.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a trial court's local rule regarding a decertification petition window period as being contrary to the Trial Court Employment Protection and Governance Act[1] (Trial Court Act). The trial court denies any violation of the Trial Court Act or PERB Regulation.[2]

On September 30, 2013, the Service Employees International Union, Local 721 (Local 721) filed an unfair practice charge (charge) against the San Bernardino County Superior Court (Court) that its local rule violated the Trial Court Act. On November 4, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint that on September 17, 2013, the Court denied Local 721's petition to decertify the exclusive representative, the San Bernardino Public Employees Association (SBPEA or

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated all statutory references are to the Government Code.

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

Association), of the Support Services Unit based upon its decertification petition window period local rule which was contrary to the Trial Court Act and therefore violating Trial Court Act sections 71631, 71633, 71635.1, 71636, and 71639.1(c), and PERB Regulation 32603(a), (b) and (f).

On November 15, 2013, the Court answered the complaint denying the allegations and asserting affirmative defenses. On December 4, 2013, an informal settlement conference was held, but the dispute was not resolved. A formal hearing was scheduled for March 11, 2014.

On January 22, 2014, the Court filed a motion for summary judgment which included a declaration from the Court's Director of Human Resources Kimberlie Turner (Turner) and attached exhibits A through G[3] in support of its motion. Local 721 filed a cross-motion for summary judgment and opposition to the Court's motion for summary judgment on February 10, 2014.[4] On February 20, 2014, the Court filed its reply in support of its motion for summary judgment. On February 28, 2014, Local 721 filed its surreply[5] pursuant to leave granted by the Administrative Law Judge. As neither party objected to the exhibits/declaration cited by the other party, those exhibits will be considered for purposes of ruling on the motion/cross-motion. Additionally, as neither side requested to present additional

[3] These exhibits included the Memorandum of Understanding (MOU) between SBPEA and the Court from 2009-2010; the MOU between SBPEA and the Court from 2011-2012; the MOU between SBPEA and the Court from 2012-2015; the Court's Employee Relations Rules (ERR's); Local 721's August 29, 2013 request for the Court's ERR's; Local 721's September 9, 2013 decertification petition; and, the Court's September 17, 2013 response to the decertification petition.

[4] Local 721 cited in support of its cross-motion/opposition: Local 721's September 9, 2013 decertification petition; the Court's September 17, 2013 response to the decertification petition; the declaration of Turner; the Court's ERR's; and the MOU between SBPEA and the Court from 2011-2012.

[5] Local 721 entitled this surreply as "Charging Party SEIU Local 721's Reply Memorandum in Support of its Motion for Summary Judgment." This was erroneously titled, as the Court never sent an opposition to Local 721's motion for summary judgment, so it will be treated as a surreply to the Court's motion for summary judgment.

evidence/witness(es) and Local 721 did not request to cross-examine declarant Turner, the matter shall be deemed submitted on the record as of February 28, 2014, based on the exhibits/declaration, the motion/cross-motion for summary judgment, and the responsive arguments.

FINDINGS OF FACT

The Court is a "trial court" within the meaning of Trial Court Act section 71601(k) and PERB Regulation 32033(a). The Association is the "exclusive representative" of the Support Services Unit within the meaning of PERB Regulation 32033(b). Local 721 is an "employee organization" within the meaning of Trial Court Act section 71601(b).

Local Rules

Pursuant to Trial Court Act sections 71636 and 71636.3, on January 18, 2001, the Court adopted local rules or ERR's, within the meaning of PERB Regulation 32033(c), for the administration of employer-employee relations. These local rules provide in pertinent part:

> Representation Proceedings.
>
> Representation proceedings will be administered by the Personnel Officer of the Court.
>
> [¶ . . . ¶]
>
> (j) TIMING OF PETITIONS: A petition for certification, decertification, or modification of an authorized employee representation unit may only be filed during:
>
> (1) A period beginning not earlier than two hundred forty (240) days and ending not later than two hundred ten (210) days before the expiration date of any Memorandum of Understanding covering the affected unit(s).
>
> (2) In the event any Memorandum of Understanding covering the affected unit(s) is continued for one (1) year by the terms of said Memorandum, a Petition for certification, decertification, or modification of an authorized employee representation unit may only be filed during a period beginning not earlier than two hundred forty (240) days and

> ending not later than two hundred ten (210) days before the first anniversary date of the agreement;
>
> (3) In the event any Memorandum of Understanding covering the affected unit(s), or the continuation of said Memorandum has expired, a Petition for certification, decertification, or modification of an authorized employee representation unit may only be filed in the thirty (30) day period which begins eleven (11) months after the most recent filing period referenced in this section.

(Emphasis added.)

MOU's and MOU Extensions between the Court and the Association

On August 19, 2009, the Association and the Court executed an MOU (2009-2010 MOU) for the Support Services Unit which had an expiration date of September 30, 2009. This MOU had a provision that stated that if a successor MOU could not be negotiated by the expiration date, the MOU would be extended for one year or until a successor MOU was adopted, whichever occurred sooner. As a successor MOU was not negotiated by September 30, 2010, the MOU was automatically extended for one year until September 30, 2011 (2010 MOU Extension). As September 30, 2011 was the "first anniversary date of the agreement"[6] or extension, the window period for filing a decertification petition during the extension period as set forth in the ERR section (j)(2) was between February 3, 2011 and March 5, 2011.

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[6] Local 721 complains that the "first anniversary date of the agreement" is facially invalid as it is not defined in the local rules and is vague as it could apply to the first anniversary date of the MOU. The only logical application of this term would be to apply the "date of the agreement" to the day that the MOU was extended, especially since it would have referred to the term "Memorandum of Understanding" or "Memorandum" instead of "agreement" in ERR section (j)(2), if it was to apply to the MOU itself. Additionally, if it would apply to the MOU instead of the extension, it would not make any sense as it would apply to a time period that had long since passed. A statutory (or regulatory) construction which creates mischief and absurdity is to be avoided. (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1392.)

On December 1, 2011, the Association and the Court executed another MOU (2011-2012 MOU) that expired on November 30, 2012. The MOU also had a provision which stated that if a successor MOU could not be negotiated by the expiration date, the MOU would be extended for one year or until a successor MOU was adopted, whichever occurred sooner.[7] As a successor MOU was not negotiated by November 30, 2012, the MOU was extended for a period up to one year (2012 MOU Extension). As November 30, 2012 was the expiration date of the 2011-2012 MOU, the window period for filing a decertification petition during the MOU period as set forth in the ERR section (j)(1) was between April 4, 2012 and May 4, 2012. As November 30, 2013 was the first anniversary date of the extension, the window period for filing a decertification petition during the extension period as set forth in the ERR section (j)(2) was between April 4, 2013 and May 4, 2013 for the 2012 MOU Extension.

On August 30, 2013, the Association and the Court ratified a successor MOU with a retroactive date of December 1, 2012 and continuing until June 30, 2015 (2012-2015 MOU). According to the ERR section (j)(1), the window period for filing a decertification petition during the MOU period would be between November 2 and December 2, 2014.

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[7] Specifically, MOU Article 62 provided in pertinent part:

> (a) The term of this Memorandum of Understanding shall commence at 12:01 a.m. December 1, 2011 and this Memorandum of Understanding shall expire and otherwise be fully terminated at 12:00 a.m. (midnight) of November 30, 2012. If a successor Memorandum of Understanding has not been reached by 12:00 a.m. (midnight) of November 30, 2012, the terms and conditions of this Memorandum of Understanding shall be extended one (1) year or until a successor Memorandum of Understanding is adopted, <u>whichever occurs sooner</u>.

(Emphasis added.)

Petition for Decertification

On September 9, 2013,[8] Martin Manteca (Manteca), Organizing Director for Local 721, wrote the Court Executive Officer Stephen Nash (Nash) and submitted a decertification petition which stated in pertinent part:

> SEIU Local 721 desires to become the exclusive recognized employee organization, for the purposes of employee representation, of the following authorized employee representation unit: Support Services Unit. This Unit is currently represented by [SBPEA]. However, SEIU Local 721 has proof that more than forty percent (40%) of the employees in this Unit wish to decertify SBPEA and be represented by SEIU Local 721.

On September 17, 2013, Nash responded to the petition by stating:

> As you may know, pursuant to the terms of the subject contract with SBPEA, the contract was extended to 12:00 midnight on November 30, 2013. Accordingly, under section (j)(2), a decertification petition must be filed "during a period beginning not earlier than two hundred forty (240) days and ending not later than two hundred ten (210) days before the first anniversary date of the agreement." November 30, 2013, would be the first anniversary date of the one (1) year extension and therefore we calculate that a decertification petition should have been filed between April 5, 2013 and May 4, 2013.
>
> Because the petition on behalf of SEIU Local 721 was not filed timely under the Employee Relations Rules, the Court is unable to act upon it.

ISSUE

Is ERR section (j)(1) and (2), which governs the window periods for decertification petitions during the MOU period and the MOU extension period, and the MOU extension language "whichever occurs sooner," contrary to the Trial Court Act as applied to Local 721's September 9, 2013 petition for decertification?

[8] The petition was received by the Court Executive Officer on September 13, 2013.

CONCLUSIONS OF LAW

Pertinent Trial Court Act Sections and PERB Regulations:

The pertinent Trial Court Act sections concerning a trial court's reasonable rules related to a petition for decertification provide:

> 71630(a) It is also the purpose of this article to promote the improvement of personnel management and employer-employee relations within the trial courts in the state by providing a uniform basis for recognizing the right of trial court employees to join organizations of their own choice and be represented by those organizations in their employment relationships with trial courts.
>
> [¶ . . . ¶]
>
> 71631 Except as otherwise provided by the Legislature, trial court employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.
>
> [¶ . . . ¶]
>
> 71636(a) A trial court may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this article. These rules and regulations may include provisions for:
>
> [¶ . . . ¶]
>
> (3) Recognition of employee organizations.
>
> [¶ . . . ¶]
>
> (9)(c) No trial court shall unreasonably withhold recognition of employee organizations.
>
> [¶ . . . ¶]
>
> (e) Trial court employees and employee organizations shall be able to challenge a rule or regulation of a trial court as a violation of this chapter.
>
> 71636.3 (a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a

trial court in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.

[¶ . . .¶]

71639.1(b) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this article and shall include the authority as set forth in subdivisions (c) and (d). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a trial court has no rule.

(c) A complaint alleging any violation of this article or of any rules and regulations adopted by a trial court pursuant to Section 71636 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this article, shall be a matter within the exclusive jurisdiction of the board, . . . The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this article and Section 71639.3. . . .

(d) The board shall enforce and apply rules adopted by a trial court concerning unit determinations, representation, recognition, and elections.

71639.3 Trial courts and trial court employees are not covered by Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or any subsequent changes to these sections except as provided in this article. However, where the language of this article is the same or substantially the same as that contained in Chapter 10[9] (commencing with Section 3500) of Division 4 of Title 1, it shall be interpreted and applied in accordance with the judicial interpretations of the same language.

(Emphasis added.)

The pertinent PERB Regulations regarding a violation of the Trial Court Act or a local rule related to a petition for decertification provide:

32606 It shall be an unfair practice for a trial court to do any of the following:

[¶ . . . ¶]

[9] Chapter 10 is the Meyers-Milias-Brown Act (MMBA), Government Code section 3500, et seq.

(f) Adopt or enforce a local rule that is not in conformance with the Trial Court Act.

Unreasonable Regulation

When the language in the sections of the Trial Court Act and the MMBA are similar, including cases regarding the determination of whether a local rule is reasonable, PERB has applied past judicial precedent regarding the MMBA. (*Tehama County Superior Court* (2008) PERB Decision No. 1957-C, pp. 5 and 6.) Trial Court Act sections 71630, 71631, 71636, 71636.3 and 71639.1 are similar to MMBA sections 3500, 3502, 3507, 3507.1 and 3509 and therefore MMBA precedent shall be applied to this Trial Court Act case.

A local government agency may not adopt rules and regulations which "would frustrate the declared policies and purposes of the [MMBA] . . . [T]he power reserved to local agencies . . . was intended to permit supplementary regulations which are 'consistent with, and effectuate the declared purposes of, the statute as a whole.'" (*Huntington Beach Police Officers Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502 [*Huntington Beach*].) The inquiry does not concern whether PERB would find a different local rule or different application of a local rule more reasonable, or whether the existing local rule or its application is unreasonable measured against an arbitrary standard. Instead, the inquiry is whether a disputed local rule or its application is consistent with and effectuates the purposes of the express provisions of the Trial Court Act. (*International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley* (1983) 34 Cal.3d 191; *Huntington Beach*; *City of San Rafael* (2004) PERB Decision No. 1698-M; *County of Monterey* (2004) PERB Decision No. 1663-M.) When a local agency's rule or its application is challenged as unreasonable, the burden of proof is on the challenging party. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338; PERB Regulation 32178.)

It is not disputed that Local 721's decertification filing did not occur during any of the window periods set forth in ERR section (j)(1) and (2). Instead, Local 721 contends that ERR section (j) is contrary to the Trial Court Act because the 2011-2012 MOU was a contract of indefinite duration and therefore may not serve to bar a decertification petition (*State of California, Department of Personnel Administration* (1989) PERB Order No. Ad-191-S; *County of Sacramento* (2004) PERB Decision No. 1581-M) or, in the alternative, that the MOU extension language "whichever occurs sooner" alters the window period which interferes with a challenging organization's ability to mount a decertification drive (*Hayward Unified School District* (1980) PERB Order No. Ad-96). Local 721 argues that because of the defective extension set forth in the 2011-2012 MOU, the PERB Regulations must be applied to "fill the gap." (*County of Orange* (2010) PERB Decision No. 2138-M; *County of Amador* (2013) PERB Decision No. 2318-M.)

In support of its argument, Local 721 cites *Crompton Company* (1982) 260 NLRB 417, *Frye & Smith, Ltd.* (1965) 151 NLRB 49, and *White Provision Company* (1956) 116 NLRB 1552, where incumbent unions and the employer agreed to extension of a Collective Bargaining Agreement (CBA) and if the parties came to a successor CBA, it would supercede the CBA extension. The effect of such an extension agreement would be that the extension would continue the contract bar and prohibit a challenging employee organization from filing a decertification petition and, therefore, interfere with employee choice. In those cases cited by Local 721, the extension eliminated part of the window period where an employee organization could petition to decertify the incumbent union. However, in this case, the Court's local rules provide for a window period within the MOU extension period where the extension provided in the cases relied upon by Local 721 did not.

In the instant case, the MOU extension language "whichever occurs sooner" did not eliminate the established window period in ERR (j)(2) during which employees could depend on a time-certain opportunity to exercise a basic, but limited right (*San Francisco Unified School District* (1984) PERB Decision No. 476, pp. 6 and 7), especially since the 2012-2015 MOU was not ratified until August 30, 2013, which was after the April 4, 2013 through May 4, 2013 window had expired.[10] Therefore, in this situation, the Court's local rules do not violate an employees' right to choose an employee organization which they want to represent them before the employer. As the right to employees' choice was not eliminated and Local 721 did not file during the window period set forth in ERR section (j)(2), the allegation that ERR section (j) violated the Trial Court Act is hereby dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-43-C, *Service Employees International Union, Local 721 v. San Bernardino County Superior Court*, are hereby DISMISSED.

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:

[10] Even if the MOU extension window period had not passed when the Court and the Association ratified a successor MOU, the remedy for eliminating the set window period (April 4, 2013 through May 4, 2013) would be to reinstate the window period set forth in the local rules, and not to "fill the gap" with a PERB regulation as the local rules provided the window period in question to be applied.

Public Employment Relations Board
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Sacramento, CA 95811-4124
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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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)