STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PROFESSIONAL & SCIENTIFIC EMPLOYEE ORGANIZATION, Charging Party, v. SANTA CLARA VALLEY WATER DISTRICT, Respondent.	Case No. SF-CE-950-M PERB Decision No. 2531-M June 23, 2017

Appearances: Clisham & Sortor by David P. Clisham, Attorney, for Professional & Scientific Employee Organization; Brian C. Hopper, Sr. Assistant District Counsel, for Santa Clara Valley Water District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Professional & Scientific Employee Organization (PSEO) to a proposed decision by a PERB administrative law judge (ALJ), dismissing the complaint and PSEO's unfair practice charge against the Santa Clara Valley Water District (District). The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by failing to follow its local rules when considering and denying a unit modification petition, through which PSEO sought to establish a separate bargaining unit consisting of certain classifications of professional employees.

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

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

PSEO's statement of exceptions and supporting brief raise several arguments, most of which were addressed in one form or another by the proposed decision. The centerpiece of PSEO's position is that the ALJ erred by not ordering the District to sever its present miscellaneous unit, which effectively denies professional employees within that unit their right to be represented separately from nonprofessional employees, pursuant to MMBA section 3507.3. The District argues that PSEO's exceptions are without merit, that the ALJ's findings of fact and conclusions of law are supported by the record and applicable law, and that the Board should adopt the proposed decision.

The Board has reviewed the entire record, the proposed decision, and the parties' exceptions, responses and supporting briefs in light of applicable law. Based on this review, we find that the ALJ's findings of fact are generally supported by the record as a whole and his conclusions of law are well-reasoned and in accordance with applicable law. We hereby affirm the result of the proposed decision, subject to the following discussion of issues raised by PSEO's exceptions.

PROCEDURAL HISTORY

PSEO filed its unfair practice charge on April 11, 2012 and the District filed a position statement on April 25, 2012. Following an investigation, on October 23, 2012, PERB's Office of the General Counsel issued a complaint, alleging that the District had acted inconsistently with its local rules by denying PSEO's unit modification petition seeking to create a separate bargaining unit composed exclusively of professional employees. This conduct was alleged to violate section 3507.3[3] and section 3509, subdivision (b), of the MMBA and PERB Regulation 32603, subdivision (g).

[3] Section 3507.3 provides:

On November 13, 2012, the District filed its answer to the complaint, denying the material allegations and asserting various affirmative defenses.

On January 3, 2013, an informal settlement conference was held, but the matter was not resolved.

On March 9, 2015, the District filed a pre-hearing motion to dismiss on the basis that PSEO's petition was procedurally flawed and therefore properly denied for noncompliance with the District's local rules. PSEO filed its opposition to the motion on March 25, 2015, and the following day, the ALJ notified the parties by letter of his ruling to deny the District's motion without prejudice.

On April 7, 2015, the ALJ conducted a formal hearing in Oakland at which both parties were represented by counsel and had the opportunity to introduce evidence and examine and cross-examine witnesses.

On June 17, 2015, the parties filed post-hearing briefs and the matter was submitted for decision.

> Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the California State Mediation and Conciliation Service for mediation or for recommendation for resolving the dispute.
>
> "Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

On July 13, 2015, the ALJ issued a proposed decision, which addressed two theories of liability: that the District had acted inconsistently with its local rules by denying PSEO's petition for unit modification; and, that it had also violated its local rules and/or MMBA section 3507.3 by not, on its own motion, establishing a separate unit comprising all professional employees currently residing in the miscellaneous unit. Rejecting both theories as either unsupported by the evidence and/or not a cognizable violation of the MMBA, the ALJ dismissed the complaint and PSEO's unfair practice charge.

On August 18, 2015, PSEO filed with the Board a statement of exceptions and supporting brief, and on September 10, 2015, the District filed its response to PSEO's exceptions and a supporting brief.

FACTUAL BACKGROUND

The Employees Association (Association), which is an affiliate of the American Federation of State, County and Municipal Employees, Local 101 (AFSCME) is the exclusive representative of the District's miscellaneous[4] unit, which includes both professional and nonprofessional classifications. The Association is not a party to this case.

PSEO, the charging party in this case, is an employee organization within the meaning of the MMBA and the District's local rules, in that it consists of self-described professional and scientific employees within the District's miscellaneous unit, and "has as one of its primary purposes representing those employees in their relations with [the District]." (MMBA, § 3501,

[4] PSEO's statement of exceptions and supporting brief quibble with the ALJ's characterization of this unit as a "miscellaneous" rather than "mixed" unit, i.e., one comprising both professional and nonprofessional employees. However, there is no dispute that the unit in question contains both professional and nonprofessional classifications, and PSEO's exceptions and supporting brief fail to explain the significance of this distinction, other than to assert that professional employees have an absolute right to separate representation, even in the absence of a valid petition and identification of an appropriate unit, a contention which we reject for reasons discussed below.

subd. (a)(1).) PSEO disclaims any interest in becoming the exclusive representative of its members.

Pursuant to the District's local rules and MMBA section 3507.3, on November 30, 2010, PSEO filed a unit modification petition with the District in an effort to sever from the miscellaneous unit employees in ten ostensibly professional classifications. Although PSEO's petition was signed by at least 50 percent of the employees in the proposed professional bargaining unit, the petition disclaimed any interest in becoming the exclusive representative of employees in the proposed unit. Rather, PSEO sought only to sever from the miscellaneous unit those positions identified in the petition and to include them in a newly-created professional unit, which would continue to be represented exclusively by the Association.

On December 16, 2010, the District's Labor Relations Officer Michael Baratz (Baratz) denied PSEO's petition on the basis that two of the ten classifications identified in PSEO's petition were not professional employee classifications and thus, the proposed unit was not appropriate. PSEO objected and the matter was referred to the State Mediation and Conciliation Service (SMCS) for mediation on March 4, 2011. On the same date, PSEO sent a letter to the District's deputy administrative officer, arguing that the petition be expanded to remove all professionals from the miscellaneous unit and that they be inserted into a newly-created professional unit to be represented by the Association.

On March 16, 2011, the Association submitted written opposition to the petition, which asserted that the proposed unit was inappropriate because it would not include all of the District's professional employees in the Association's unit. The Association noted that PSEO had sought to amend the petition to include all professionals, but, the Association argued, such an amendment improperly sought to cure a petition after the window period had closed. The

Association also asserted that the petition failed to conform to the District's local rules because PSEO, as the petitioning organization, did not seek to represent the proposed unit. According to the Association, by proposing to retain the Association as the exclusive representative of a unit *proposed by PSEO*, PSEO was improperly attempting to force the Association to represent a particular unit that the Association and its members were not seeking to create or represent. The Association also asserted that granting PSEO's petition would likely embroil the District in an internal union dispute, but, in any event, not one appropriate for the District's unit-modification procedure, which expressly requires that the organization petitioning for modification seek to become the majority representative of the petitioned-for unit.[5]

On April 21, 2011, at the parties' request, SMCS Mediator Joseph Rios (Rios) conducted a card check and apparently confirmed that the 29 petitioning employees who signed PSEO's original petition constituted sufficient proof of majority support for the unit of ten classifications proposed by PSEO's petition.[6] However, Rios made no determination as to the appropriateness of the proposed unit.

Pursuant to the District's recently-adopted local rule governing representation proceedings, on June 29, 2011, Baratz convened a hearing on the petition at which he received

[5] The Association's opposition to PSEO's petition and to representing a separate unit of professional employees in the absence of a properly filed petition and representation election is also set forth in a July 7, 2011 letter by Andrew Baker, counsel for the Association, which served as the Association's closing brief in proceedings before the District (Respondent's Exhibit D), and in the testimony of AFSCME Council 57 Staff Representative John Tucker, who was called as witness for the District at the PERB hearing.

[6] As noted in the proposed decision, because Rios excluded one classification from the proposed unit, it appears that his determination of majority support was made on a classification-by-classification basis, rather than on the proposed unit as a whole. However, neither party has argued that the manner of determining majority support has affected the result in this case, and we therefore disregard the error, if any, as non-prejudicial. (*Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

evidence and heard argument from PSEO and the Association, both of which were represented by counsel. After completing the hearing, Baratz recommended to the District's governing board that the petition be denied. Baratz gave three reasons for denying the petition: (1) PSEO had failed to show that the proposed professional unit was separate and distinct from employees in the existing miscellaneous bargaining unit; (2) the proposed unit lacked a community of interest; and (3) the proposed unit was not the broadest appropriate unit of professionals.

On November 15, 2011, the District's governing board voted unanimously to deny the petition based on Baratz's recommendation.

On April 11, 2012, PSEO filed its charge, which resulted in PERB's Office of the General Counsel issuing a complaint on October 23, 2012.

On July 7, 2014, in an apparent attempt to settle the dispute, the District met with representatives of PSEO and the Association. At this meeting, the District identified 34 classifications in the existing miscellaneous unit which, in the District's opinion, would constitute an appropriate unit of professional employees. Significantly, however, the District did not commit to establishing such a unit on its own motion and informed PSEO that it would need to amend and re-file its petition, if it wished to pursue the matter. For its part, the Association repeatedly informed the District that it would not agree to severance of the professionals into a separate unit, unless required to do so as the result of representation election following a proper showing of proof of support for PSEO.

On July 28, 2014, PSEO submitted a letter to the District asserting its understanding that, based on the "agreement" reached at the July 7 meeting, the District would proceed immediately to establish a separate professional unit consisting of the 34 classifications previously identified by the District. PSEO's letter included no proof of support.

The District responded the following day by stating that PSEO's letter had mischaracterized the District's position, that the District had provided PSEO with information as to which classifications the District considered professional in the event PSEO wished to amend and re-file its petition, but that the District itself had no intention of creating a separate unit of professionals on its own motion. Although PSEO then began efforts to circulate a petition to establish a new unit of professional employees, which the Association publicly opposed, the record includes no evidence that PSEO ever submitted an amended petition or any other proof of support to the District.

THE PROPOSED DECISION

After a formal hearing and briefing, the ALJ issued a proposed decision in which he determined that PSEO had abandoned or changed its original theory of liability that the District's denial of PSEO's unit modification petition violated the express terms of the District's local rules governing representation proceedings. According to the proposed decision, the issue framed by PSEO's briefing before the ALJ was whether the District had violated its local rules by failing or refusing to modify the existing unit containing professional and nonprofessional employees, *on the District's own motion*, once it was made aware of the desire of some professional employees, as expressed in PSEO's petition, to be represented separately. The ALJ rejected both theories, reasoning that, because PSEO did not seek to represent the proposed unit exclusively, its unit modification petition did not comply with the District's local rules. Absent a valid unit modification petition, the ALJ concluded that no grounds existed either to question the appropriateness of the miscellaneous unit, or to establish a separate unit comprising some or all of the professional classifications currently residing in the miscellaneous unit.

THE PARTIES' POSITIONS

PSEO argues that a petition for unit modification may be presented in the form of a petition for recognition but that it is unnecessary and unreasonable for the District to require proof of support, unless a question of representation is presented, i.e., a change of bargaining representative. In this case, because there is no such question or dispute, PSEO argues that it should not be required to comply with that portion of the District's local rules requiring that the petitioning organization seek to become the exclusive representative of the petitioned-for unit. For the same reasons, PSEO argues there is no reason for the District to require a representation election in this case. Without any question or dispute concerning representation, there is nothing for employees to vote on, because employees do not decide the composition of bargaining units; rather, employers make such decisions subject to a determination that the unit is "appropriate."

Additionally, PSEO argues that the present miscellaneous unit is not "appropriate," because it contains professional employees who have been denied the statutory right to be represented in a separate bargaining unit from nonprofessional employees. Even assuming that PSEO's proposed unit did not include all professional classifications, PSEO argues that, once the District was on notice of the desire of some professional employees to form a separate unit, it had an obligation under MMBA section 3507.3, either to grant PSEO's petition or, on its own motion, to establish a more appropriate, separate unit comprising all professional classifications currently residing in the miscellaneous unit.

PSEO also argues that the proposed decision has not set forth a legally cognizable reason for dismissing the complaint, because the consent of an incumbent union is not among the requirements of MMBA section 3507.3 for establishing an appropriate unit of professional employees separate from nonprofessional employees. It cites PERB Reg. 61450, which

expressly contemplates that a public employer may, either by agreement, or without an agreement, file a petition for unit modification in accordance with this section to "divide [an] existing unit into two or more appropriate units" or to "delete classifications or positions which by virtue of change in circumstances are no longer appropriate to the established unit because said classification(s) or position(s) are not covered by MMBA or otherwise prohibited by statute or local rule from inclusion in the unit." (§ 61450, subds. (a)(2), (b)(1).)

The District argues that PSEO's exceptions are without merit, that the ALJ's findings of fact and conclusions of law are supported by the record and applicable law, and that the Board should adopt the proposed decision. Specifically, the District contends that: (1) PSEO's petition failed to comply with the local rules which require that the petitioner intend to represent the proposed unit exclusively; (2) four of the classifications in the proposed unit fail to meet the definition of professional employees; and (3) the District correctly concluded that the proposed unit lacked a sufficient community of interest. The District also disputes PSEO's contention that it has any obligation to establish a separate professional unit comprising all professional classifications currently in the miscellaneous unit, simply because employees in some classifications desire separate representation.

DISCUSSION

For several reasons, we affirm the dismissal of the complaint and PSEO's unfair practice charge. First and foremost, PSEO has not overcome the presumption of correctness afforded a legislative act to show that the District acted unreasonably in applying or enforcing any aspect of its local rules.

The MMBA grants public agencies the right to "adopt reasonable rules and regulations" for the administration of employer-employee relations, including for determining what

constitutes "an appropriate unit" of employees for collective bargaining purposes. (MMBA, § 3507, subd. (a)(4).) PERB and judicial authority requires that, when evaluating the reasonableness of a public agency's unit determination made pursuant to a local rule, the party challenging the unit determination bears the burden of demonstrating that the decision was not reasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.) Thus, if reasonable minds could differ over the appropriateness of a determination, PERB should not substitute its judgment for that of the local agency. (*Id*. at pp. 338-339; see also *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13; *City of Glendale* (2007) PERB Order No. Ad-361-M, p. 4; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830.)

Here, PSEO's petition indisputably failed to comply with Resolution 70-35, section (9)(A)(11) of the District's local rules governing unit modification and severance. This provision requires that an employee organization petitioning for "formal" recognition include, along with its statement of why the proposed unit is appropriate, a "request that recommends that the Board of Directors recognize the employee organization as the majority representative of the employees in the [proposed] unit claimed to be appropriate for the purpose of meeting and conferring in good faith on all matters within the scope of representation."[7] However,

[7] Resolution 70-35, section (9)(B), also includes provisions for "informal" recognition, which would require the District to consult in good faith with an employee organization not enjoying majority support within an appropriate unit. However, this section of the District's local rules is inapplicable here because the petitioning employees identified by PSEO were already exclusively represented by the Association, and the local rules expressly state that, "No employee shall be represented by more than one recognized employee organization for the purposes of this Resolution," i.e., employees cannot be simultaneously represented by more than one employee organization enjoying either formal or informal recognition.

PSEO disclaimed any interest in seeking majority status to represent the petitioned-for unit of professional employees *exclusively* in their employment relations with the District.

PSEO has provided no authority, and we have located none, to suggest that requiring an employee organization seeking to modify an existing unit which it does not represent to also seek to become the majority representative of the proposed unit is contrary to the MMBA or PERB decisional law.[8] Because there is no allegation or evidence of facial inconsistency between the District's local rules and either the MMBA or PERB decisional law, the issue before the ALJ and the Board is whether the District *enforced* its local rules in an unreasonable manner. (*County of Monterey* (2004) PERB Decision No. 1663-M, p. 2.) However, under the deferential standard required by the statute and decisional law, PSEO has not shown that the District acted unreasonably in enforcing its requirement that an employee organization seek to become the majority representative of the petitioned-for unit. Section 3507.3 prohibits public agencies from denying professional employees the right to representation separate from

[8] *County of Riverside* (2012) PERB Decision No. 2280-M is distinguishable. In that case and in an earlier case involving the same parties and substantially the same issues, the Board held that the employer had unreasonably enforced its local rules by requiring proof of majority support for a petition to accrete unrepresented employees into an existing unit represented by the petitioning organization. In the *Riverside* cases, however, the employer's local rules were silent on the issue, and under the circumstances, even PERB Regulations, if applied to "fill in the gap," would not require a showing of majority support. (*Id*. at pp. 7-8; *County of Riverside* (2011) PERB Decision No. 2163, pp. 2-5.) The Board reasoned that, to imply a majority support requirement where the local rules included none would allow the employer to amend its local rules without meeting and consulting, as required by MMBA section 3507.

By contrast, in the present case, the District's local rules *expressly require* a petitioning employee organization to seek exclusive representative status of the proposed unit, which necessarily implies a showing of majority support among the employees in the petitioned-for unit. (See also MMBA, § 3507.1, subd. (b).) In these circumstances, requiring majority support for exclusive representation of a petitioned-for unit is not patently unreasonable, and whether that requirement is one that PERB would choose to include in its own Regulations is not at issue. (*Organization of Deputy Sheriffs v. County of San Mateo, supra,* 48 Cal.App.3d 331, 338-339; *City of Glendale, supra,* PERB Order No. Ad-361-M, p.4.)

nonprofessional employees. It does not, either expressly or by implication, prohibit professional employees from being represented in a unit along with nonprofessionals in the absence of a valid unit modification petition, because, absent such petition, there is no basis to question the appropriateness of the existing miscellaneous unit.

PSEO argues that MMBA section 3507.3 is analogous in purpose to section 9(b) of the National Labor Relations Act (NLRA),[9] which prohibits the National Labor Relations Board (NLRB) from establishing a unit including both professional and nonprofessional employees, "unless a majority of such professional employees vote for inclusion in such unit." (29 U.S.C., § 159.) According to PSEO, if anything, MMBA section 3507.3 is even more protective than federal law of the right of professional employees to separate representation, because, unlike the NLRA, it does not even require an employee vote, unless a rival employee organization seeks to replace an incumbent organization. We disagree.

When interpreting the California labor relations statutes, PERB may take guidance, as appropriate, from administrative and judicial authorities interpreting analogous provisions of federal labor law. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.) However, where the statutory language is dissimilar, or where the California and federal statutes serve dissimilar purposes, PERB is not constrained by federal precedent. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15, citing *Mount Diablo Unified School District, et al.* (1977) EERB[10] Decision No. 44, pp. 8-9.) Unlike PSEO, we read the NLRA as establishing an *opt-in* procedure, which presumes separate representation, unless a majority of professional employees vote otherwise, while, under California law, a public

[9] The NLRA is codified at 29 U.S.C. section 151 et seq.

[10] Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB),

agency's establishment of a unit containing professional and nonprofessional employees is presumptively appropriate, until professional employees have given notice of their desire to *opt-out* by filing a valid unit modification, severance or other representation petition. (*Organization of Deputy Sheriffs v. County of San Mateo, supra,* 48 Cal.App.3d 331, 338-339; *Alameda County Assistant Public Defenders Assn. v. County of Alameda, supra,* 33 Cal.App.3d 825, 830.) Accordingly, PERB and controlling judicial authority have held that the right to separate representation is not absolute, but must be harmonized with other provisions of the statute. (*Organization of Deputy Sheriffs v. County of San Mateo, supra,* at p. 340; *County of Yolo* (2013) PERB Decision No. 2316-M, p. 15; *Modesto Irrigation District* (2005) PERB Decision No. 1768-M, pp. 6-7.) Because the right of professional employees to separate representation only arises as the result of a properly-filed representation petition, which may include a requirement that the petitioning employee organization seek to become the exclusive representative of the proposed unit, it was not unreasonable for the District to deny PSEO's petition to establish a separate unit of professional employees.

Nor has PSEO demonstrated that the District acted unreasonably in declining to sever some or all professional employees from the miscellaneous unit on its own motion. PSEO is correct that unit determinations are made by public agencies and are not subject to a vote by affected employees. (MMBA, § 3507.1; *County of Riverside, supra*, PERB Decision No. 2280-M, p. 7, fn. 6.) However, a public agency is not obligated to process a unit modification, severance or decertification petition that has previously been rejected for failure to comply with the agency's local rules, nor to solicit a new, properly-filed petition from an employee organization, after deficiencies have been identified. (*County of Orange* (2010) PERB Decision No. 2138-M, p. 15.) To the contrary, the MMBA and our precedents generally

prohibit public agencies from assisting employee organizations in perfecting petitions affecting representation matters. (§ 3506.5, subd. (d); *City of Fremont* (2013) PERB Order No. IR-57-M, pp. 19-21.) Thus, the failure of PSEO's petition to comply with the requirements of the District's local rules is fatal to either theory of liability advanced by PSEO.

Second, even assuming a properly-filed petition, PSEO has not shown that the District's reasons for denying PSEO's petition were unreasonable interpretations of the "appropriate unit" criteria set forth in the District's local rules. Relying on the recommendation of the District's Labor Relations Officer, Baratz, the District's governing board gave three reasons for denying the petition: (1) PSEO had failed to show that the proposed professional unit was separate and distinct from employees in the existing miscellaneous bargaining unit; (2) the proposed unit lacked a community of interest, as it encompassed various classifications with no apparent commonality, other than their professional designation, while ignoring other professional classifications within the miscellaneous unit; and (3) the proposed unit was not the broadest appropriate unit of professionals.[11] However, as explained in the District's decision denying PSEO's petition: "While professional employees undeniably have the right to be represented separately from non-professional employees, the nature of the unit must be

[11] PSEO's reliance on PERB's Regulations governing representation matters is misplaced. As pointed out by the ALJ, the Board must enforce and apply rules adopted by public agencies concerning unit determinations, representation, recognition, and elections. (MMBA, § 3509, subd. (c).) PERB only has authority to assert jurisdiction and to conduct representation proceedings under PERB's own Regulations where the public agency has no functionally equivalent local rules under which the petitioner can accomplish what it seeks without undue burden. (*County of Orange, supra,* PERB Decision No. 2138-M, pp. 9-13; *City of Inglewood* (2011) PERB Order No. Ad-390-M, adopting dismissal letter at pp. 2-3.) Because PSEO could achieve separate representation for professional employees with a properly-filed petition for unit modification or decertification and a representation election for exclusive representation in its own name, rather than for continued representation by another employee organization who opposes severance, it appears that the District's local rules provide the functional equivalent of PERB's Regulations governing severance. Consequently, there are no grounds for resort to PERB's Regulations rather than the District's local rules.

appropriate and reflect a community of interest separate and distinct from the other employees in the existing bargaining unit." (Joint Exhibit 6.)

PSEO argues that, as of the July 7, 2014 meeting, when the District provided a comprehensive list of professional classifications in the miscellaneous unit, any dispute over what constitutes an appropriate unit of professional employees was resolved. In doing so, PSEO effectively concedes the District's argument that the unit initially proposed by PSEO was not appropriate. However, PSEO never filed an amended petition demonstrating proof of support in the more inclusive unit suggested by the District's list of professional classifications or seeking to represent such a unit, both of which are required by the District's local rules. Nothing in PSEO's statement of exceptions or supporting brief challenges the validity of the District's stated reasons for rejecting the unit initially proposed by PSEO in the only petition filed with the District to date. Nor has PSEO explained how the more comprehensive list of professional employees identified by the District is an unreasonable application of the appropriate unit or community of interest criteria relied on by the District. Indeed, it now concedes the appropriateness of that determination. Under the circumstances, reasonable minds could not even differ over the appropriateness of the District's unit determination; rather, in the absence of *any* contrary evidence or argument, reasonable minds must defer to the District's determination that the only unit ever proposed by PSEO was not appropriate. (*Organization of Deputy Sheriffs v. County of San Mateo, supra,* 48 Cal.App.3d 331, 338-339; *County of Riverside, supra,* PERB Decision No. 2119-M, p. 13; *City of Glendale, supra,* PERB Order No. Ad-361-M, p.4.) PERB would exceed its authority if we were to substitute our own judgment here for that of the District (*Alameda County Assistant Public Defenders Assn. v.*

County of Alameda, supra, 33 Cal.App.3d 825, 830; *County of Amador* (2013) PERB Decision No. 2318-M, pp. 8-9), and we therefore decline to do so.

Third, notwithstanding other provisions of the governing statute, in other contexts, PERB has held that it has no authority to order an incumbent representative to accrete or otherwise accept representation of a group of employees whom it does not wish to represent. The principle stems from *Long Beach Community College District* (1989) PERB Decision No. 765, an early PERB decision involving unit placement of so-called "residual employees," meaning groups of unrepresented employees, who were excluded from bargaining units established by voluntary recognitions or consent election agreements, but who likely would have been included in such units, had PERB made the initial unit determination. (*Id*. at p. 2.) Even though such employees may, from a logical and community of interest analysis, be best placed in an existing unit with other represented employees in similar classifications, for policy reasons, the Board has declined to do so against the wishes of the incumbent representative.

Thus, in *Long Beach*, approximately 300 full-time faculty members resided in a unit that had been established more than a decade earlier in accordance with existing regulations and case precedent, but was hostile to including some 700 part-time faculty members, a majority of whom sought representation. A plurality of the Board consisting of Members Craib and Camilli observed that unrepresented residual employees may file a petition for recognition in a separate unit "because there is no mechanism for being added to the existing unit if the exclusive representative of that unit chooses not to file a unit modification petition" to accrete or otherwise accept the residual employees in its unit. (*Id*. at p. 3.) In adopting a proposed decision that found a separate unit of certificated part-time instructors would be appropriate, the *Long Beach* Board explained that there is no legal authority nor sound policy

basis "for forcing upon an existing unit an additional group of employees [whom] the unit does not want." (*Id*. at pp. 5-7, esp. fn. 6.) In subsequent precedential decisions, the Board has adopted the reasoning of the Craib/Camilli plurality opinion in *Long Beach,* and the principle that it would not effectuate the purposes of the PERB-administered statutes to force expansion of a unit upon an unwilling representative is settled Board law. (*Stanislaus County Office of Education* (1993) PERB Decision No. 1022, adopting proposed decision at p. 22; *Santa Ana Unified School District* (2010) PERB Order No. Ad-383, p. 3.)

The facts in the present case are somewhat different than in *Long Beach* and other residual employee cases, in that the professional employees at issue are not unrepresented, but are already represented by the Association. However, similar policy considerations apply. While the District may propose to modify an existing unit pursuant to a properly adopted local rule (MMBA, § 3507.1, subd. (b)), in the absence of such a proposal, policy reasons suggest that only the exclusive representative or a rival employee organization seeking to become the exclusive representative has standing to propose an alternative unit configuration. (*Riverside Unified School District (Petrich)* (1985) PERB Order No. Ad-148a, pp. 3-4.) Because here, there has been no valid petition by PSEO under the District's local rules, nor a majority of votes cast in a properly-conducted representation election to establish a separate unit and separate majority representative, we will not attempt to force the Association to represent some or all of the professional employees currently in the miscellaneous unit in a separate professional unit.

For all of the above reasons, we affirm the dismissal of the complaint and underlying unfair practice charge.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-950-M are hereby DISMISSED with prejudice.

Chair Gregersen and Member Winslow joined in this Decision.