STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 3745, Charging Party, v. CITY OF BELLFLOWER, Respondent.	Case No. LA-CE-1456-M Administrative Appeal PERB Order No. Ad-480-M September 23, 2020
BELLFLOWER CITY EMPLOYEES ASSOCIATION, Joined Party.	

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Hannah Weinstein, and Carlos Coye, Attorneys, for American Federation of State, County, and Municipal Employees, Local 3745; City Employees Associates by Jeffrey W. Natke, General Manager, for Bellflower City Employees Association.

Before Banks, Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Bellflower City Employees Association's (BCEA) administrative appeal of an order by PERB's Office of the General Counsel (OGC) granting a request to stay a representation proceeding before the State Mediation and Conciliation Service (SMCS), pending resolution of a related unfair practice charge. American Federation of State, County, and Municipal Employees, Local 3745

(AFSCME) filed that charge, PERB Case No. LA-CE-1456-M, against the City of Bellflower (City), alleging the City unreasonably applied its local rules when it processed BCEA's petition to represent City employees in three bargaining units that AFSCME currently represents. AFSCME alleged that the City violated or unreasonably applied its local rules. AFSCME's unfair practice charge was styled as a blocking charge and requested a stay of the related election. OGC issued an administrative determination granting AFSCME's request to stay the representation proceedings. BCEA timely appealed.

We have reviewed the administrative determination, the record, and relevant precedent, and we deny BCEA's appeal. We conclude that OGC conducted an adequate investigation, adduced facts that reasonably support the determination, and came to a logical conclusion that the City's alleged unreasonable application of its local rules would so affect the election as to deprive employees of free choice. Accordingly, we affirm OGC' s administrative determination, subject to the below discussion clarifying the applicable standard and addressing issues BCEA raises on appeal.

FACTUAL AND PROCEDURAL BACKGROUND[1]

The City adopted an employer-employee relations resolution (EERR) in accordance with the Meyers-Milias-Brown Act (MMBA).[2] The EERR sets forth

[1] In this procedural posture, the Board assumes the essential facts alleged in the charge are true. (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, p. 9 (*Children of Promise*).)

[2] The MMBA is codified at Government Code section 3500 et seq. Statutory references herein are to the Government Code, except where otherwise specified.

procedures for representation and decertification petitions. In or around February 2020,[3] BCEA filed a single petition to become the recognized employee organization for the employees in three units historically represented by AFSCME. BCEA then provided the City with employee signatures purporting to satisfy the EERR's 30 percent proof of support threshold. The employee signatures were on forms titled "Authorization for Recognition Petition" (Authorization). The Authorizations did not state or otherwise inform the employees that BCEA seeks to decertify AFSCME, despite the express requirement in City Local Rule Section 8.A.4. requiring a decertifying petitioner to furnish proof of support demonstrating that the employees "no longer desire to be represented by the incumbent Recognized Employee Organization."

Additionally, the employee signatures were not grouped by bargaining unit and the representation petition did not describe how many employees are in each of the three previously-established bargaining units. The representation petition also did not include a description of the composition of the unit or units claimed to be appropriate, or a statement or reasons why the unit or units is or are appropriate. The City accepted the petition and informed employees in each of the units that the City would arrange for an election with SMCS.

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

[3] All subsequent dates are in 2020.

On June 16, AFSCME filed Unfair Practice Charge No. LA-CE-1456-M and Request for Injunctive Relief (IR No. 790) against the City.[4] The charge alleged that the City violated its local rules by: (1) accepting a single representation petition for decertifying three separate bargaining units, including accepting a single proof of support submission; (2) accepting the petition even though the proof of support fails to state that BCEA wishes to decertify AFSCME as the exclusive representative; (3) accepting the petition even though it does not state that it seeks to decertify ASFCME as the exclusive representative for the three bargaining units; (4) accepting the petition despite its failure to include a description of the composition of the unit or units claimed to be appropriate, or a statement or reasons describing the appropriateness of the unit or units; and (5) initiating election procedures for a single election for three separate units.[5] The charge also requested that PERB stay any election proceedings until the City complies with the EERR.

AFSCME also filed a motion pursuant to PERB Regulation 32147 requesting that the Board expedite the processing of its charge at all divisions of the agency, which we granted on July 6, 2020.

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[4] AFSCME withdrew its Request for Injunctive Relief after OGC granted the request for stay.

[5] It is worth noting that employee choice in matters of representation is conceptually distinct from unit placement. While employees have the right to choose which employee organization, if any, will represent them, they have no right to choose the bargaining unit in which their classification is placed. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, p.9 [citing HEERA, § 3579; *City of Livermore* (2017) PERB Decision No. 2525-M, p. 14, fn. 6; *County of Riverside* (2012) PERB Decision No 2280-M, p. 9].)

On June 18, OGC informed AFSCME, the City, and BCEA that the stay request would be evaluated pursuant to PERB Regulation 33002.[6] On June 19, the City and BCEA opposed the stay request. On June 22, OGC issued a complaint alleging that the City engaged in various unlawful conduct related to accepting BCEA's representation petition. The same day, OGC issued its administrative determination, granting AFSCME's request to stay the election pending resolution of its unfair practice charge. OGC found the circumstances and factual context surrounding the City's alleged inconsistent or unreasonable application of its local rules indicates that the City's conduct would affect the exercise of free choice in an SMCS-conducted election regarding BCEA's petition. BCEA attempted to file an appeal of the administrative determination, which PERB's Appeals Assistant rejected, as at the time BCEA was not a party to the matter. On July 1, BCEA sought joinder as an interested party under PERB Regulation 32164, and again appealed OGC's administrative determination granting the stay. AFSCME filed a timely opposition to the appeal.[7] The Board granted BCEA's application for joinder on July 30.

DISCUSSION

In an appeal from an administrative determination, the appellant must demonstrate how or why the challenged decision departs from the Board's precedents or regulations. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, p. 4.) In a case concerning a stay of a decertification election, "the inquiry

[6] PERB Regulation 33002 applies to SMCS-conducted elections.

[7] Though the City initially opposed AFSCME's request for stay, it took no position on BCEA's appeal.

on appeal is whether the OGC abused his or her discretion." (*Imagine Schools at Imperial Valley* (2016) PERB Order No. Ad-431, p. 6.) The role of the Board on appeal is not to reweigh facts, but to ensure that the facts support the administrative determination. (*Id*. at p. 7; *Children of Promise*, *supra*, PERB Order No. Ad-428, p. 9.) Where OGC "came to a logically reasoned conclusion in its administrative determination," the Board will affirm the determination. (*Regents of the University of California* (2016) PERB Order No. Ad-435-H, p. 6.)

PERB Regulation 33002, subdivision (a), which governs requests to stay SMCS-conducted elections, and which OGC applied here, states in relevant part:

> "Any party to an SMCS-conducted election may request that the Board stay the election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice."

Though OGC did not directly note the similarity to PERB Regulation 32752, it applied precedent under PERB Regulation 32752. Because PERB Regulation 33002 contains nearly identical language and reflects the same underlying policy considerations as PERB Regulation 32752, OGC appropriately applied the same analysis.

In *Children of Promise*, we articulated the standard we apply in interpreting Regulation 32752 as follows:

> "The question presented is whether the alleged unfair practices by the Academy, if true, are likely to affect the vote of the employees, and thus, the outcome of the election. In other words, would the alleged unlawful conduct described in the blocking charge, if true, 'so affect the election process as to prevent the employees from exercising free choice.' . . . [T]he question is resolved by applying the blocking charge rule to the facts alleged in the

> blocking charge and not by a mechanical or rote application of the rule." (*Children of Promise*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p.18, [internal citations omitted].)

We hold that this standard also applies to a request for stay evaluated under PERB Regulation 33002, irrespective of whether the underlying blocking charge relates to an employer's local rules (as here) or relates to other allegedly unlawful conduct.[8] One of the primary purposes of the MMBA is "to promote the improvement of personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies." (MMBA, § 3500, subd. (a).) In service of this purpose, the MMBA authorizes local agencies to adopt reasonable rules and regulations for the administration of employer-employee relations, including procedures for recognizing employee representatives as the exclusive bargaining agent for units of employees, as well as for decertifying an exclusive representative organization. (MMBA, § 3507; *City of Fremont* (2013) PERB Order No. IR-57-M, p. 18.) Local rules requiring proof of support and processes for representation petitions exist for the purpose of consistently protecting the rights granted by the MMBA, such as employee free choice. To the

[8] We note that the MMBA and some other PERB-enforced statutes allow public entities to promulgate local rules, while others do not. This difference, however, does not lead us to apply a different standard, except to the extent that each request for stay must be evaluated on its particular facts. (See *Children of Promise*, *supra*, PERB Order No. 428-E, adopting administrative determination at p. 18 [noting that the question of whether employer conduct prevents employee free choice is resolved by applying the blocking charge rule to the facts alleged and not by a mechanical or rote application of the rule].)

extent an employer violates its rules and initiates an SMCS-conducted election, the central question is whether that conduct will prevent employees from exercising free choice.

OGC properly framed the inquiry of the administrative determination, viz., whether the unfair practices the City allegedly committed (violating or unreasonably applying its local rules in processing BCEA's petition) would so affect the election process as to prevent the employees from freely selecting an exclusive representative of their choice.[9] To the extent BCEA's appeal challenges OGC's findings, it alleges OGC's conclusions are unsupported by the allegations and based solely on conjecture. For instance, BCEA does not believe it was reasonable for OGC to note the concern that employees may have signed Authorizations only because it appeared

[9] Our dissenting colleague contends OGC abused its discretion by failing to assess whether the conduct "is of such character and seriousness" as to likely affect employee free choice if an election is held. (*Children of Promise*, *supra*, PERB Order No. Ad-428, p. 9, quoting *Regents of the University of California* (1984) PERB Order No. Ad-381-H, p. 6.) But the dissent separates this premise from its context, where conduct "is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (*Ibid*.) If a blocking charge alleges that an employer unlawfully changed an employment term, PERB may analyze whether any bargaining unit employee is likely to learn of the change before voting. Here, in contrast, the blocking charge includes assertions that BCEA's Authorizations misled the signing employees, leaving no room to wonder whether employees may learn of alleged violations. While the dissent nonetheless asks whether employees learned of other alleged violations, it would lead to absurd results to narrow our focus in that manner when the charge directly challenges whether the Authorizations tainted the process, potentially requiring BCEA to collect new Authorizations that do not confuse the core free choice issue: whether one or more of the three bargaining units wishes to replace AFSCME with BCEA. We do not endorse such a misplaced focus and do not believe OGC abused its discretion.

the bargaining units would be combined, thus potentially fostering greater bargaining power.[10]

BCEA fails to challenge other critical OGC findings: that based on the allegations, there is a question as to whether employees were on notice that BCEA sought to become the exclusive representative in place of ASFCME; and that given the ambiguity as to whether BCEA sought to represent employees in the three bargaining units or combine the three units into one larger unit, it is unclear whether employees understood the nature of their authorization. These uncertainties go to the foundational purpose of local rules requiring proof of support and uniform processes for recognition of an exclusive representative. Should AFSCME prove the City violated or unreasonably applied one or more of its local rules prescribing foundational requirements for recognizing or decertifying an exclusive representative, such conduct very likely impairs employee free choice in a resulting election. Indeed, there is no legitimate reason to hold an election when, as here, there are serious questions regarding the basic validity of the underlying petition and its proof of support. Rather, it

[10] As part of its argument, BCEA apparently asks the Board to assess OGC's administrative determination in light of the facts alleged in BCEA's own unfair practice charge against the City, UPC Case No. LA-CE-1458-M. In that charge, BCEA provides a revised petition it allegedly filed at the City's request, which could potentially clarify BCEA's intent, though not necessarily the intent of employees who had previously signed Authorizations. Because the competing allegations in BCEA's charge cannot neutralize or cure the alleged defects in the petition, there remains a strong basis for a stay in this case.

is essential to resolve those questions before proceeding in order to safeguard the rights of all parties.[11]

BCEA's assertion that its petition enjoys overwhelming support is also unavailing. The proper focus of OGC's inquiry is an objective evaluation of the probable effect of the conduct alleged and the possibility of a free election. (*Grenada Elementary School District* (1984) PERB Decision No. 387-E, p. 11 (*Grenada*).) A well-supported petition does not overcome the probable impact on employee free choice if the petition may be invalid because it failed to comply with local rules.

To the extent BCEA argues that the City reasonably interpreted its local rules in processing BCEA's petition, and to the extent BCEA otherwise addresses the underlying merit of AFSCME's unfair practice charge, we do not decide such issues at this stage. In assessing a request for a stay, OGC's task is not to determine the merits of the underlying charge. (See *Grenada*, *supra*, PERB Decision No. 387-E, p. 13.) Though context is relevant, BCEA's arguments on the merits do not overcome the likelihood the allegations, if proven, would affect employee free choice. (See *Children of Promise*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p.15.)

Our dissenting colleague attempts to bend PERB precedent toward a private sector approach that purports to protect employee free choice by checking an incumbent union's supposed opportunity to "benefit" from employer misconduct. We

[11] We are not persuaded by BCEA's argument that any irregularities in the petition or proof-of-support process may be corrected during the election itself. While such corrections may be possible, they are far from certain, and the mere possibility of intervening conduct by the City does not adequately protect the important rights at issue.

find no cause to respond at length to the dissent's private sector citations, as statutory differences and distinct principles relevant to agencies serving the public have frequently led the Board to craft sui generis precedent. Indeed, we have often departed from private sector labor law in our approach to representation matters, which involve interpreting statutory and regulatory language with an eye toward employee free choice, fair collective bargaining, stability, efficiency, avoiding infringement on protected rights, and other goals reflected in California's public sector labor relations law. (See, e.g., *Regents of the University of California*, *supra*, PERB Order No. Ad-453-H, pp. 5-8 [declining to follow private sector accretion principles, in part because employee free choice involves different considerations in the public and private sectors], affirmed, *Regents of the University of California* v*. PERB* (2020) 51 Cal.App.5th 159, 192 [both PERB and NLRB balance employee rights and stability, but they employ different approaches in doing so]; see also *Oak Valley Hospital District* (2018) PERB Decision No. 2583-M, pp. 6-8 [while private sector labor law permits an employer to withdraw recognition when it has an objective basis to doubt a union's majority status, the MMBA does not, a difference that favors stability and by extension favors an incumbent union].) That PERB's blocking charge rule initially mirrored a federal practice does not bind us to hew to more recent federal precedent, particularly where PERB has subsequently developed its own blocking charge case law, rooted in serving "the purposes of the statutes enforced by PERB." (*Children of Promise*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p. 14.)

BCEA has not identified any error of law in OGC's determination, and we find none which impacts the outcome. We conclude that OGC cited to appropriate PERB precedent and properly applied the law to the facts alleged in AFSCME's charge. OGC's conclusions are supported by the record. Therefore, we decline to set aside the administrative determination and instead affirm the decision to grant a stay of the election pending the outcome of AFSCME's unfair practice charge.[12] While we are bound by the MMBA and the City's local rules to treat this representational matter as an unfair practice charge, we have expedited this case at all levels due to the time-sensitive nature of the underlying questions concerning employee free choice.

ORDER

Bellflower City Employees Association's administrative appeal of OGC's June 22, 2020 order in Case No. LA-CE-1456-M staying an election is DENIED.

Members Banks and Krantz joined in this Decision.

Member Shiners' dissent begins on p. 13.

[12] Unlike the dissent, we do not find useful comparison to orders where the Board denied a request for stay of election and instead impounded ballots pending resolution of a representation issue. (See *Long Beach Community College District* (2000) PERB Order No. Ad-301; *Grossmont-Cuyamaca Community College District* (2009) PERB Order No. Ad-378.) In those instances, the Board did not evaluate facts under PERB Regulation 32752 or PERB Regulation 33002, nor does either order meaningfully apply any cognizable standard to its relevant facts. Further, since the instant matter involves an allegedly improper petition under the MMBA, the dissent's proposal to impound ballots would serve only to sow confusion among employees who might be forced to vote twice about representation in various unit configurations. Rather than impound the ballots in a potentially improper election under the circumstances presented here, we believe it is wiser to decide these important questions first and expeditiously.

SHINERS, Member, dissenting: This case presents a novel issue—whether an election should be stayed based solely on allegations that a public agency employer accepted and processed an invalid representation petition. When the Public Employment Relations Board (PERB or Board) processes a representation petition under statutes granting it plenary authority over representation matters, questions as to the validity of the petition are resolved through PERB's administrative process. This case, however, arises under the Meyers-Milias-Brown Act (MMBA), which allows public agency employers to adopt their own local rules regarding representation matters, as the City of Bellflower has done here. We thus must decide, for the first time, whether a charge alleging solely procedural defects in the way an employer has processed a petition under its local rules justifies staying an election. Although I agree with my colleagues that this analysis must be done on a case-by-case basis, I disagree that a stay is warranted in this case because the City's alleged conduct likely would not affect employee free choice in an election. Accordingly, I dissent from the majority's decision to maintain the election stay in this matter.

In reviewing an administrative determination on an election stay request, the Board must determine whether the Office of the General Counsel (OGC) abused its discretion. (*Imagine Schools at Imperial Valley* (2016) PERB Order No. Ad-431, p. 6 (*Imagine Schools*); *Jefferson School District* (1980) PERB Order No. Ad-82, p. 12.) "If the OGC conducts an adequate investigation and reaches a conclusion consistent with the facts developed during the investigation, deference is due and no abuse of

discretion will be found."[13] (*Imagine Schools*, *supra*, PERB Order No. Ad-431, p. 7.) An abuse of discretion will be found, however, if OGC applied the incorrect legal standard. (*Id.* at pp. 11-12; *Children of Promise*, *supra*, PERB Order No. Ad-428, p. 10; see *Holtville Farms, Inc. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 388, 395 ["If the Board applied the incorrect standard to the facts, that is an abuse of discretion, i.e., an error of law."].)

PERB Regulation 33002, subdivision (a)—the applicable regulation here—provides:

> "Any party to an SMCS[14]-conducted election may request that the Board stay the election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice."[15]

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[13] Characterizing OGC's investigation as fact-finding is inaccurate. In determining whether an election stay is warranted, OGC "does not resolve factual disputes" and "assumes that the essential facts alleged in the charge are true." (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, p. 9 (*Children of Promise*).) Because OGC makes no factual findings in deciding whether to stay an election, the Board's inquiry on appeal is whether the determination is supported by the allegations in the charge.

[14] California State Mediation and Conciliation Service.

[15] A charge alleging "unlawful conduct [that] would so affect the election process as to prevent the employees from exercising free choice" is commonly called a "blocking charge" because it serves to "block," or delay, the election. (*City of Fremont* (2013) PERB Order No. Ad-403-M, p. 6, fn. 11; see *Grenada Elementary School District* (1984) PERB Decision No. 387, p. 8 [noting that PERB Regulation 32752, which is nearly identical to PERB Regulation 33002, subdivision (a), codified the "blocking charge rule" developed by the National Labor Relations Board (NLRB)].)

"In considering the stay of an election, the [OGC's] obligation is to determine whether the facts alleged in the unfair practice complaint, if true, would be likely to affect the vote of the employees and, thus, the outcome of the election." (*Pleasant Valley Elementary School District* (1984) PERB Decision No. 380, p. 5.) To support a stay, the conduct alleged in the charge must be "of such character and seriousness" as to likely affect employee free choice if an election is held. (*Children of Promise*, *supra*, PERB Order No. Ad-428, p. 9, quoting *Regents of the University of California* (1984) PERB Decision No. 381-H, p. 6.)

Each stay request is to be investigated and evaluated on its merits rather than being disposed of by rote application of the blocking charge rule. (*Jefferson School District* (1979) PERB Order No. Ad-66, p. 6; see *State of California (Department of Personnel Administration)* (1985) PERB Order No. Ad-151-S, pp. 3-4 (*State of California*) [upholding OGC's decision to dissolve an election stay reached after "a thorough and detailed analysis of the allegations of the complaint, the background information, *and the impact on the employees in the unit of the employer's alleged misconduct*," italics added].) Blocking charge allegations must be evaluated with regard to the factual contexts in which they arise. (*Children of Promise*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p. 16; *State of California*, *supra*, PERB Order No. Ad-151-S, p. 3; *Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 11-12.)

Here, OGC found the unfair practice charge stated a prima facie violation of the MMBA and summarily concluded that this warranted a stay of the election, without any analysis of the relationship between the alleged violations and employee free choice.

Employer conduct that constitutes an unfair practice does not necessarily "have a natural or probable effect on employee free choice." (*Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M, p. 3; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S, p. 3.) For this reason, as described *ante*, our election stay precedent requires OGC to examine whether the alleged misconduct is "of such character and seriousness" as to likely affect employee free choice. That same precedent also requires OGC to consider the factual context of the charge. By not considering either of these criteria and instead focusing solely on whether the charge stated a prima facie unfair practice, OGC failed to make the determination required by PERB Regulation 33002, subdivision (a), viz., whether the City's "alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice." Additionally, by not addressing these aspects of the legal standard, OGC failed to fully consider whether the charge allegations sufficiently justify the infringement on employees' statutory rights caused by an election stay. (See *Templeton v. Dixie Color Printing Co.* (5th Cir. 1971) 444 F.2d 1064, 1069 [noting that "[a]s a consequence [of a blocking charge], the appellees have been deprived during all this time of their statutory right to a representative 'of their own choosing' to bargain collectively for them"].) This legal error constituted an abuse of discretion.

Before analyzing the charge allegations under the proper standard, it is important to recognize the purpose of the two aspects of the standard overlooked by OGC in the administrative determination. It has long been recognized that the blocking

charge rule may be used by an incumbent union to stymie a decertification election. (See, e.g., NLRB Casehandling Manual (Part 2) Representation Proceedings § 11730 (Jan. 2017) ["it should be recognized that the [blocking charge] policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition"]; *NLRB v. Hart Beverage Co.* (8th Cir. 1971) 445 F.2d 415, 420 ["it appears clearly inferable to us that one of the purposes of the Union in filing the unfair practices charge was to abort Respondent's petition for an election, if indeed, that was not its only purpose"]; *NLRB v. Midtown Service Co.* (2d Cir. 1970) 425 F.2d 665, 672 ["If . . . the charges were filed by the union, adherence to the [blocking charge] policy in the present case would permit the union, as the beneficiary of the Employer's misconduct, merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power."].)[16] Although not expressly identified as such in prior Board decisions, in my view the requirement that OGC consider both the "character and seriousness" of the employer's alleged misconduct and the surrounding factual context serves to screen out blocking charges that appear designed to obstruct an election—a safeguard of critical importance given that OGC must assume the factual allegations in the charge are true. (See *Children of Promise*, *supra*, PERB Order No. Ad-428, p. 9 [in determining whether an election stay

[16] As the majority notes, PERB has departed from federal precedent with regard to certain representation matters. This is not one of those matters, however, as PERB unequivocally adopted the NLRB's blocking charge rule without modification. (See *Grenada Elementary School District*, *supra*, PERB Decision No. 387, p. 8 [noting that PERB Regulation 32752 codified the NLRB's "blocking charge rule"].) Accordingly, NLRB interpretative guidance and federal court decisions addressing the potential use of a blocking charge to thwart an election are undoubtedly instructive here.

is warranted, OGC "does not resolve factual disputes" and "assumes that the essential facts alleged in the charge are true"].)

Turning to the first overlooked aspect of the applicable legal standard, the City's alleged conduct in accepting and processing Bellflower City Employees Association's (BCEA) recognition petition was not "of such character and seriousness" that it likely would affect employee free choice. It is well-established "that an election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible." (*Grenada Elementary School District*, *supra*, PERB Decision No. 387, p. 9.) Accordingly, the Board has affirmed election stays based on allegations that the employer negotiated in bad faith. (See, e.g., *Children of Promise*, *supra*, PERB Order No. Ad-428, adopting administrative determination at pp. 18-22; *Grenada Elementary School District*, *supra*, PERB Decision No. 387, pp. 6, 9; *Jefferson School District*, *supra*, PERB Order No. Ad-82, pp. 2-3, 16 [noting the Board sustained a prior stay order due to the employer's unfair bargaining practices preceding a decertification petition].) The Board also affirmed a stay where the employer allegedly sent a misleading communication about the incumbent union to employees while a decertification petition was pending, which could have the effect of undermining the union in the eyes of employees. (*Imagine Schools*, *supra*, PERB Order No. Ad-431, pp. 13-16; but see *Manton Joint Union Elementary School District* (1992) PERB Decision No. 960, adopting proposed decision at pp. 5-6 [election not

stayed but ballots impounded based on allegation that superintendent sent letter to employees expressing support for decertification of incumbent union].)[17]

Conversely, the Board has declined to stay an election and instead impounded ballots when a party has requested a stay pending PERB's resolution of the validity of a petition.[18] For example, in *Long Beach Community College District* (2000) PERB Order No. Ad-301, the Board found that staying an election pending an appeal of OGC's refusal to dismiss a decertification petition would not effectuate the purposes of the applicable statute, and instead ordered the election to proceed with the ballots impounded pending resolution of the appeal. (*Id.* at p. 2.) Similarly, in *Grossmont-Cuyamaca Community College District* (2009) PERB Order No. Ad-378, the Board declined to stay an election pending resolution of an appeal of a dismissal of a decertification petition for lack of support and ordered the election to proceed with the ballots to be impounded until the appeal was resolved. (*Id.* at p. 2.)

Here, American Federation of State, County, and Municipal Employees, Local 3745's (AFSCME) charge alleged that the City improperly accepted and processed

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[17] More often, the effect of alleged employer misconduct that occurs between the filing of a petition and an election is determined via post-election objections. (See, e.g., *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M, pp. 25-26 [resolving objections over employer's alleged grant of preferential access to rival union after it filed decertification petition]; *Oxnard Unified School District* (1999) PERB Decision No. 1341, adopting proposed decision at pp. 17-29 [analyzing and dismissing objections based on allegations that, during the election period, a manager disparaged the incumbent union to multiple employees, and that the employer granted employees a bonus and circulated a flyer touting benefits under the existing collective bargaining agreement].)

[18] Generally, "the vote and impound procedure [] prevent[s] delay and enable[s] elections to be held when interest and momentum are at their peak." (Laurin, *The Vote and Impound Procedure: Not Always a Guardian of Employee Free Choice* (1987) 62 Ind. L.J. 1127, 1129.)

BCEA's petition. Specifically, the charge alleged that BCEA's petition was defective because: (1) BCEA did not file a separate petition for each of the three bargaining units it sought to represent; (2) BCEA did not provide separate proof of support for each bargaining unit it sought to represent; (3) the petition failed to include a proper description of the bargaining units BCEA sought to represent; (4) the petition failed to state that BCEA sought to decertify AFSCME as the exclusive representative of the bargaining units it sought to represent; and (5) BCEA's proof of support documents failed to state that signatory employees wished to decertify AFSCME as their exclusive representative.

AFSCME's charge contains no allegations of the kind that PERB has previously found justified staying an election because they tend to undermine the incumbent union in the eyes of employees, such as bad faith bargaining or misleading communications about the union. Rather, AFSCME's allegations of procedural defects in BCEA's petition are akin to the disputes over the validity of a petition that justified denying a stay but impounding ballots in *Grossmont-Cuyamaca Community College District*, *supra*, PERB Order No. Ad-378 and *Long Beach Community College District*, *supra*, PERB Order No. Ad-301.[19] Moreover, AFSCME's charge does not allege any

[19] The majority manufactures a distinction without a difference, claiming these decisions do not provide a "useful comparison" because they do not involve blocking charges. But no prior Board decision involves a blocking charge based solely on alleged defects in a petition because when a representation matter is subject to PERB's regulations, procedural defects of the type alleged in AFSCME's charge are resolved through PERB's administrative process. (*Grossmont-Cuyamaca Community College District*, *supra*, PERB Order No. Ad-378, p. 2; *Long Beach Community College District*, *supra*, PERB Order No. Ad-301, pp. 1-2.) These decisions demonstrate that the Board has impounded ballots when, as here, the validity of a petition is in dispute.

facts showing that employees in the affected units were aware of the purported procedural defects in BCEA's petition, and thus we cannot infer that those alleged defects likely would affect their ability to vote freely in an election. (See *State of California*, *supra*, PERB Order No. Ad-151-S, pp. 6-7 [employer's filing and later withdrawal of a unit modification petition did not support an election stay in the absence of any allegations that unit employees were aware of or influenced by the employer's conduct].) Consequently, the City's alleged misconduct is not "of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (*Children of Promise*, *supra*, PERB Order No. Ad-428, p. 9.)[20]

As to the second overlooked aspect of the applicable legal standard, the factual context surrounding AFSCME's charge allegations indicates the charge was filed for the primary purpose of thwarting the election. Attached to AFSCME's charge was a copy of BCEA's petition and the accompanying proof of support. According to the

[20] I disagree with the majority's assertion that when the validity of a petition is disputed, the dispute must be resolved before an election can occur "in order to safeguard the rights of all parties." The prompt resolution of questions concerning representation is a primary objective of the MMBA. (See MMBA, §§ 3500, 3502; cf. NLRB Casehandling Manual (Part 2) Representation Proceedings § 11300 (Jan. 2017) [same under National Labor Relations Act].) Impounding ballots allows employees to vote "when interest and momentum are at their peak" (Laurin, *supra*, 62 Ind. L.J. 1127, 1129), thereby allowing employees to fully exercise their right to choose their exclusive representative—a right necessarily impeded by delaying an election for months or years (*Templeton v. Dixie Color Printing Co.*, *supra*, 444 F.2d at p. 1069). At the same time, impounding ballots preserves the incumbent union's right not to be decertified through an invalid election. Impounding ballots therefore properly balances the rights of employees and the competing employee organizations, rather than putting a thumb on the scale in favor of the incumbent union.

petition, the number of employees in the three bargaining units BCEA sought to represent totaled 51. The proof of support was signed by 40 employees. AFSCME does not dispute the validity of the signatures but only challenges the fact that they were not broken out by bargaining unit. It thus is reasonable to infer that a majority of employees currently represented by AFSCME expressed a desire to instead be represented by BCEA.

According to AFSCME's charge, BCEA's petition and proof of support were filed with the City in February 2020. On April 28, 2020, the City sent a letter to employees in the three affected bargaining units notifying them of BCEA's petition and informing them the City would be arranging for a secret ballot election pursuant to its Employer-Employee Relations, Policies and Procedures Resolution. On June 5, 2020, SMCS corresponded with AFSCME, BCEA, and the City about scheduling an election. On June 16, 2020, AFSCME filed the underlying unfair practice charge, a request that the election be stayed, and a request for injunctive relief.

AFSCME's own allegations show that as of February 2020 it knew of the purported defects in BCEA's petition and that a majority of employees in its three bargaining units had signed proof of support for BCEA. The charge does not allege that AFSCME attempted to bring the purported petition defects to the City's attention at any time prior to its unfair practice charge. Instead, AFSCME raised these purported defects for the first time in its charge, filed just days after the parties corresponded with SMCS about scheduling an election based on the petition. This sequence of events demonstrates that AFSCME's primary reason for filing the

underlying charge was to delay or prevent an election it had reason to believe it would lose. Viewed in context, AFSCME's charge allegations do not justify an election stay.

By failing to analyze whether the City's alleged misconduct is "of such character and seriousness" as to likely affect employee free choice, or to consider the factual context surrounding the charge, OGC failed to adequately determine whether the City's "alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice," as required by PERB Regulation 33002, subdivision (a), and thus failed to fully consider whether the charge allegations sufficiently justified the infringement on employees' statutory rights caused by an election stay. This legal error constituted an abuse of discretion. Under the correct legal standard, OGC should have found a stay was not warranted because the City's acceptance and processing of BCEA's petition despite its alleged procedural defects is unlikely to affect employee free choice and AFSCME's charge, viewed in context, is primarily an attempt to thwart the election. Accordingly, I would reverse the administrative determination, dissolve the election stay, direct SMCS to conduct a secret ballot election on BCEA's petition, and impound the ballots pending resolution of AFSCME's underlying unfair practice charge.[21]

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[21] The majority asserts that "impounding ballots would serve only to sow confusion among employees." Impounding ballots is no more confusing to employees than conducting an election and tallying votes subject to the election being set aside based on post-election objections. (See PERB Regs. 32738 [allowing post-tally election objections when PERB conducts the election]; 33009 [allowing post-tally election objections when SMCS conducts the election].) More importantly, impounding ballots allows employees to vote "when interest and momentum are at their peak" (Laurin, *supra*, 62 Ind. L.J. 1127, 1129). By maintaining the stay, my colleagues allow employees' support for BCEA to dissipate while AFSCME's charge is adjudicated, thereby furthering the apparent purpose of the charge.