STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CENTRAL BASIN MUNICIPAL WATER DISTRICT, Employer, and AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 1902, Petitioner.	Case No. LA-RR-1296-M Administrative Appeal PERB Order No. Ad-486-M March 24, 2021

Appearances: Baker, Keener & Nahra by Derrick S. Lowe, Attorney, for Central Basin Municipal Water District; Rothner, Segall & Greenstone by Eli Naduris-Weissman, Attorney, for American Federation of State, County & Municipal Employees, Local 1902.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This representation case is before the Public Employment Relations Board (PERB or Board) on appeal by Central Basin Municipal Water District from an administrative determination by PERB's Office of the General Counsel (OGC). American Federation of State, County, and Municipal Employees, Local 1902 (AFSCME) seeks to become the exclusive representative of the District's non-managerial employees, and AFSCME therefore filed with PERB a petition for

recognition (Petition) pursuant to PERB Regulation 61215 and Government Code section 3507.1, subdivision (c) of the Meyers-Milias-Brown Act (MMBA).[1]

In the administrative determination, OGC determined that: (1) AFSCME submitted proof of support from a majority of employees in the proposed bargaining unit; (2) no other employee organization demonstrated at least 30 percent proof of support; (3) the District did not dispute that the proposed unit was appropriate; and (4) the District had not granted recognition. Accordingly, OGC certified AFSCME as the proposed unit's exclusive representative under PERB Regulation 61275.

On appeal, the District asserts that OGC abused its discretion in determining AFSCME proved that it enjoyed majority support. The District primarily argues that OGC issued the administrative determination prematurely, thereby depriving it of an opportunity to "fully submit all of the evidence in support of its position." The District asks us to consider five employee declarations it submitted to PERB for the first time with its appeal. Based on these declarations, the District urges us to reverse the certification and direct OGC to conduct an evidentiary hearing to determine the validity of the proof of support AFSCME filed with its Petition.

Having reviewed the entire record in this case and considered the parties' arguments, we deny the District's appeal and affirm the administrative determination.

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[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

BACKGROUND

On July 2, 2020,[2] AFSCME filed its Petition seeking recognition as the exclusive representative of a proposed unit of all District non-managerial employees.[3] Together with its Petition, AFSCME submitted proof of support in the form of signed authorization cards.

On July 6 and July 21, OGC sent letters to the District asking whether the District had adopted local rules covering a petition for recognition. OGC also left voicemail messages for the District's then Board President Robert Apodaca and then Director of Administration and Board Services Cecilia Pulido, as well as in the District's general voicemail message box. OGC received no responses to these inquiries.

On July 29, 2020, OGC forwarded its prior letters to the District's then Director of Human Resources, Naja Braddock, who subsequently notified OGC that the District had a new Board President, Leticia Vasquez, as of approximately July 23. Braddock also stated that Pulido had forwarded OGC's July 6 letter to Vasquez. On August 4, OGC spoke with Vasquez and District Board member Martha Camancho-Rodriguez. Neither was able to report whether the District had applicable local rules.

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[2] All dates refer to 2020, unless otherwise specified.

[3] The proposed unit is described as "all non-managerial employees of the Central Basin Municipal Water District, including the Conservation Manager, Deputy Board Secretary/Senior Procurement Analyst, Senior Accountant, Recycled Water Development Specialist, Assistant Engineer, Administrative Clerk, Management Analyst, Public Affairs Specialist, Public Safety Officers, [and] Accounting Specialist." The proposed unit excludes managerial employees.

By letter dated August 6, OGC notified the parties that PERB would process the Petition because the District had failed to provide information indicating whether it had applicable local rules. OGC's August 6 letter directed that the District must: (1) within 10 days provide employees with the Notice of Representation Petition (Notice) and a copy of the Petition; (2) file with PERB a written statement describing when and how it provided employees with the Notice and Petition; (3) within 20 days file with PERB a list of all individuals employed in the proposed unit as of the last date of the payroll period immediately preceding the Petition; and (4) file a Notice of Appearance form identifying a designated representative for service.

Having not heard from the District as of August 19, OGC e-mailed the parties and attempted to obtain the responses the District was required to provide. OGC also called the general phone number for the District and learned that the District had a newly appointed General Manager, Alejandro Rojas. On August 20, OGC e-mailed Rojas, notifying him that the District needed to comply with the requirements set forth in OGC's August 6 letter.

On August 27, the District provided its non-managerial employees with the Notice and sent OGC a list of these employees. On September 1, the District sent OGC an amended list of employees in the proposed unit and provided these employees with a copy of the Petition.

At no time did PERB receive a competing petition from any other union seeking to represent any of the employees in the proposed unit.

On September 25, pursuant to PERB Regulation 61240, subdivision (c), OGC sent the parties a letter indicating that the proof of support submitted with the Petition

demonstrated that a majority of unit employees had authorized AFSCME to be their exclusive representative. OGC explained that it made this determination by comparing the signed authorization cards AFSCME submitted in July with the list of employees the District had provided. Because AFSCME submitted evidence of majority support and no valid competing petition had been filed, OGC informed the District that, unless it had a good faith doubt that the unit was appropriate, it must recognize AFSCME as the unit's exclusive representative. OGC directed the District to respond within 15 days.

OGC received no timely response to the September 25 letter. Instead, on October 13, Rojas orally informed OGC that the District did not oppose the proposed unit and wished to recognize AFSCME as exclusive representative. Rojas followed up later that day with an e-mail message to the parties and OGC, stating in relevant part:

> "The District does not object to the appropriateness of the unit described in the petition and will place an item on the agenda for the October 26, 2020 Board meeting to recognize AFSCME, Local 1902 as the exclusive representative for the unit of employees described in the petition. As General Manager, I will recommend to the Board members that it recognize AFSCME, Local 1920 as exclusive representative."

On October 19, the District abruptly reversed course. Rojas sent an e-mail to the parties and OGC, stating that a "proper vote" was not taken to decide if employees wanted to be represented by AFSCME. Rojas's October 19 e-mail also stated that a majority of employees did not want to be represented by AFSCME and would not join AFSCME. OGC informed Rojas that, per the September 25 letter, AFSCME had

demonstrated majority support, and that, in any event, the deadline for the District to object had elapsed.

The District's Board of Directors met on October 26, considered whether to recognize AFSCME as the exclusive representative of the proposed unit, and declined to do so.

On November 2, OGC issued an Order to Show Cause (OSC), placing the burden on the District to demonstrate any reason "why AFSCME should not be certified as exclusive representative of the claimed unit." The OSC further directed as follows:

> "Factual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein. Legal argument and supporting materials must be filed with [OGC] no later than **November 20, 2020**."

(Emphasis in original.) The OSC concluded: "Upon receipt of the District's argument and factual assertions, or the expiration of the time allowed for same," OGC would contact the parties regarding "further case processing steps."

On November 12, Rojas filed with PERB a letter titled "Response to Order to Show Cause" (Response) together with two e-mail attachments and a proof of service. In the Response, Rojas wrote that on November 9 he had met with five employees in the proposed unit "to confirm whether a proper authorization vote had been taken." Rojas alleged that AFSCME lacked majority support because only five employees returned authorization cards out of eleven eligible employees, two employees did not

return original copies of their authorization cards, and employee Lucia Cid-Sanchez requested to be removed from AFSCME on October 15, 2020. The District's Response did not include any declarations and thereby failed to meet the OSC's requirement that the District support all allegations and authenticate all exhibits with sworn declarations from witnesses with personal knowledge.

A week later, on November 19, OGC issued its administrative determination concluding that, pursuant to PERB Regulation 61275, it must certify AFSCME as the exclusive representative of the proposed unit. OGC found, inter alia, that: (1) the District did not challenge unit appropriateness; (2) the District had waived its opportunity to challenge AFSCME's proof of support by failing to comply with PERB Regulation 61020, subdivision (f), which required any party seeking to challenge proof of support to file evidence via sworn declarations within 20 days after the petitioning party had filed its representation petition and proof of support; and (3) even if the District had timely challenged AFSCME's proof of support, it had not provided sworn declarations supporting its contentions. Because AFSCME demonstrated majority support within the proposed unit and the District did not dispute unit appropriateness, OGC certified AFSCME as the unit's exclusive representative.

OGC electronically served the administrative determination on November 19, at 3:36 p.m. Rojas responded to OGC's e-mail shortly thereafter, at 5:07 p.m., as follows:

> "I apologize that I didn't let you know sooner (because I assumed we had until November 20, 2020 to submit our documents) but we are collecting our sworn declarations and we're going to submit before the 20th as an amendment to our initial response.

> "We will file an appeal and the employees would also like to submit a decertification too."

The District did not supplement its November 12 Response with sworn declarations before November 20, nor did it otherwise amend its Response. Rather, when the District filed the instant appeal on December 11, it provided PERB for the first time with five employee declarations, all of which were executed on December 4.

DISCUSSION

Under the MMBA, a union seeking to exclusively represent an employee group constituting an appropriate unit may petition for an election. (§ 3507.1, subd. (a).) The union alternatively may require the employer to abide by the results of a "card check" in which a neutral third party determines if the union has collected sufficient proof of support from employees to demonstrate a majority within the unit, though this option is unavailable if another union already exclusively represents the unit or can demonstrate at least 30 percent support in the unit. (*Id.*, subd. (c).) The statutory card check provision established an expedited method for certifying an exclusive representative for purposes of meeting and conferring over wages, hours and terms and conditions of employment. (*Morongo Basin Transit Authority* (2015) PERB Order No. Ad-430-M, p. 11 (*Morongo*).)

The MMBA grants local public agencies the authority to adopt reasonable rules concerning recognition of unions and specified other topics, "after consultation in good faith with representatives of a recognized employee organization or organizations." (§ 3507, subd. (a).) However, if an agency has not adopted a reasonable local rule on a particular representation issue, PERB Regulations fill the gap. (§ 3509, subd. (a); *Morongo*, *supra*, PERB Order No. Ad-430-M, p. 8; *County of Siskiyou/Siskiyou County*

Superior Court (2010) PERB Decision No. 2113-M, p. 17.) Here, OGC correctly determined that PERB Regulations govern, as neither party indicated that the District adopted reasonable local rules on any relevant topic.

PERB Regulation 61275, which effectuates the MMBA's card check procedure for employers that have not adopted a reasonable card check rule, provides as follows:

> "If the Board determines (1) an employee organization requesting recognition has demonstrated at least majority proof of the employees in an appropriate unit, (2) no other employee organization has demonstrated proof of support of at least 30 percent of the employees, and (3) the public agency has not granted recognition, the Board shall certify the petitioner as the exclusive representative."

In reviewing a Board agent's proof-of-support determination, we apply an abuse-of-discretion standard. (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 13 (*Children of Promise I*).) The District argues that OGC abused its discretion by issuing its administrative determination on November 19, rather than waiting until November 20, when the District allegedly intended "to complete its evidentiary submissions." The District further contends that the declarations attached to its appeal warrant reversal of the administrative determination and a direction to OGC to hold an evidentiary hearing.

As explained below, the District waived its position at several earlier junctures and now raises untenable procedural arguments as to why we should consider declarations it submitted for the first time with its appeal. In the alternative, even were it appropriate to consider these declarations, they would not show that OGC abused its discretion in its proof of support determination.

I. The District Repeatedly Waived its Position, and the Declarations Submitted with Its Appeal Are Procedurally Improper.

When AFSCME filed its Petition—and at all relevant times thereafter—PERB Regulations covering proof of support were dispersed, with largely similar language appearing in disparate provisions applicable to the various labor relations acts we enforce. Regulation 61020 was among those dispersed regulations and applied to MMBA petitions for recognition in the absence of a reasonable local rule. Effective February 15, 2021, well after all events giving rise to this dispute, PERB consolidated all proof of support regulations into revised Regulation 32700. Thus, while Regulation 32700 now governs proof of support under the MMBA, we analyze this case under former Regulation 61020.

PERB Regulation 61020, subdivision (f) established a 20-day deadline for the District to provide evidence challenging AFSCME's proof of support, and the regulation prohibited OGC from considering a tardy challenge, absent good cause. The Board strictly construes this requirement. (*Morongo*, *supra*, PERB Order No. Ad-430-M, p. 9.) The 20-day deadline elapsed at close of business on July 22, and the District never sought or obtained a good cause finding for any delay beyond that point, much less for delaying all the way until December 11, when it ultimately filed its first evidence regarding proof of support. The District's failure to challenge AFSCME's proof of support by July 22 constitutes the first of several times it waived the position it now asserts.

By letter dated September 25, OGC notified the parties that AFSCME had demonstrated majority support and therefore, since no valid competing petition had been filed, PERB would grant the Petition unless the District responded within 15 days

and asserted a good faith doubt that the unit was appropriate. The District failed to assert any such doubt, either within the 15-day period or at any time, thereby waiving any challenge to unit appropriateness. (*Regents of the University of California* (1998) PERB Decision No. 1261-H, pp. 35-36 [employer that does not dispute the appropriateness of a proposed unit, after having been provided an opportunity to do so, waives any argument that the unit is inappropriate].)[4]

On October 13, Rojas orally told OGC that the District had no objection to the unit and wished to recognize AFSCME. And in an e-mail later that day, Rojas wrote that the District did not object to the appropriateness of the unit, and that he would recommend that the District's Board formally recognize AFSCME at its October 26 meeting.

As noted above, Rojas espoused a contrary position just six days later, claiming that a "proper vote" had not occurred. This argument was procedurally untenable given the District's several waivers, and it was substantively wrong as well, since the MMBA permitted AFSCME to choose whether it wished to petition for an election or to use the MMBA's card check option. Because OGC had already determined that AFSCME demonstrated majority support, and the District had not challenged unit appropriateness, the District was obligated to recognize AFSCME as the exclusive

[4] The District claims on appeal that the administrative decision erred when it found that the District did not dispute unit appropriateness. However, the District's argument on appeal relates solely to its claim that AFSCME lacked proof of support; the District does not challenge the composition of the unit. We therefore cannot construe the appeal as challenging unit appropriateness, and, in any event, the District has waived any such challenge.

representative of the proposed unit; and when the District failed to do so, OGC was required to certify AFSCME. (§ 3507.1, subd. (c); PERB Reg. 61275.)

As a final step before certifying AFSCME, OGC issued the OSC, which explicitly required the District to support all allegations and authenticate all exhibits with sworn declarations from witnesses with personal knowledge. The District did not submit any sworn declarations by the November 20 deadline. Rather, on November 12 the District made several unverified assertions regarding proof of support issues, including suggestions that it knew whether each unit employee had signed an authorization card and, if so, in what manner the employee signed and returned the card.[5] The District then claimed: "As of November 10, 2020 there are no current District employees who wish to be represented by a union and their current decision not to join AFSCME would most certainly lead to the immediate disbandment of the unit."[6]

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[5] Rojas claimed to have discovered "new evidence" when "meeting with all current District employees" on November 9 "to confirm whether a proper authorization vote had been taken," although Rojas raised similar concerns about "a proper vote" in an October 19 e-mail to OGC and AFSCME. While it appears possible that Rojas unlawfully asked employees about their protected activities, no such allegation is before us and we make no such finding.

[6] To the extent the District suggests that decertification is an appropriate procedure for employees who have changed their mind, that is mainly correct. However, a decertification petition cannot be filed in at least the first year after recognition or certification (§ 3507, subd. (b)), and no decertification election is possible if unfair practices prevent a fair election from proceeding. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, pp. 5-6.) Because employer unfair practices can make it impossible to hold a decertification election, a clear lesson emerges: an employer concerned about employees' ability to decertify a union will maximize that ability by refraining from unfair practices.

When OGC issued the administrative determination on November 19, a week after the District's Response, the District objected. According to the District, OGC "mistakenly interpreted" its November 12 Response as its "last submission" and then prematurely issued the administrative determination on November 19. In support of its position, the District asks us to consider Rojas's e-mail to the Board agent on November 19 at 5:07 p.m., approximately 90 minutes after OGC served him with the administrative determination. As noted above, Rojas's e-mail stated, in pertinent part, that "we are collecting our sworn declarations and we're going to submit before the 20th as an amendment to our initial response."

The District ignores that the OSC had stated that OGC would contact the parties about next steps either "[u]pon receipt of the District's argument and factual assertions, or the expiration of the time allowed for same." While OGC left unsaid whether it meant the earlier or later of these two eventualities, it is difficult to construe the above phrasing to mean the later of the two dates, since the District had no right to file a response at any point past the deadline. OGC reasonably construed its letter to mean the earlier of the two and reasonably believed that it had received "the District's argument" when it received the November 12 letter titled "Response to Order to Show Cause," which was signed by Rojas and included a proof of service. Moreover, in his November 19 e-mail, Rojas admits that he did not warn OGC that the District's Response would come in two parts. Such an unusual approach would, moreover, have meant that the District's argument contained no references to its declarations.

In any event, the District never followed through and submitted the declarations on November 20, as Rojas promised in his November 19 e-mail, thereby waiving its

position yet again. Indeed, not only did the District not submit its declarations until December 11, concurrently with the instant appeal, but the declarations are dated December 4, further undermining the District's argument. The likely inference is that the District did not realize its mistake until it received the administrative determination on November 19 and at that point began trying to obtain declarations. The District's November 19 claim that it would file declarations the next day, as well as its current claim that the administrative determination somehow precluded it from doing so, thus have all the markings of bad faith litigation tactics, though no such allegation is before us and we do not make any such finding. Indeed, irrespective of whether the District engaged in bad faith conduct, it remains the case that declarations submitted on December 11 did not satisfy the November 20 deadline.

Where good cause is shown, we may reopen the record and consider new evidence on appeal. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 17 [good cause to reopen the record generally requires showing that evidence was not previously available, could not have been discovered earlier with reasonable diligence, was submitted within a reasonable time of its discovery, and is relevant to the issues in a manner that may materially impact the decision].) The present circumstances do not satisfy these conditions, and we decline to reopen the record.

For the foregoing reasons, the District's appeal asserts a position it has repeatedly waived, and the five declarations the District attached to its appeal are not properly before us.

II. Even if the District Had Not Waived Its Position and Had Properly Introduced the Five Employee Declarations into the Record, these Declarations would Not Warrant Reversing the Administrative Determination.

The five employee declarations the District filed with its appeal fall into two categories. In one declaration, Lucia Cid-Sanchez purports to revoke her authorization for AFSCME to represent her as of December 4, the date of her declaration. In the four other declarations, non-managerial employees state: "Contrary to any representation of AFSCME, I have never agreed to allow AFSCME to represent me or act on my behalf in any matter and do not do so at this time." If these five declarations were credited, the District argues, AFSCME could not show support from six unit employees, as is required to show majority support in a 10-employee or 11-employee bargaining unit.[7]

Even had the District filed the declarations by November 20, they would not constitute cause to hold an evidentiary hearing. First, the District had already waived any challenge to AFSCME's proof of support, and the District has never sought or obtained relief from that waiver. Moreover, neither the single purported revocation nor anything found in the other four declarations raises material issues of fact that would necessitate an evidentiary hearing. We explain.

[7] The Petition states there are 10 employees in the proposed unit and lists 10 titles for inclusion. The District's appeal also states there are 10 employees in the proposed unit. The District's November 12 Response, in contrast, claims that there are 11 members in the proposed unit. The September 1 employee list provided by the District, which would provide the true number of eligible employees on July 2, is not in evidence. In any event, whether there were 10 or 11 employees in the proposed unit during the payroll period immediately preceding the Petition filing, AFSCME would need at least six employees to show majority support.

In determining whether a petitioner has achieved a majority (or a lower level of support, as applicable in other contexts), OGC assesses proof of support based on an employee list as the date the petition was filed and, correspondingly, employee support or lack thereof as of the same date. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, p. 21 and adopted administrative determination at p. 5; *Children of Promise I*, *supra*, PERB Order No. Ad-402, p. 14.) For that reason, even assuming solely for the sake of argument that revocations were permitted in the present circumstances (see *Morongo*, *supra*, PERB Order No. 430-M, p. 14), the potential revocation from Cid-Sanchez would still be irrelevant as a matter of law since it postdated July 2.[8]

The signatories of the remaining four declarations, far from alleging that they signed cards because of fraud or coercion (see *Morongo*, *supra*, PERB Order No. 430-M, p. 10), do not claim that they ever signed authorization cards. There is therefore no basis to consider their declarations as potentially revoking authorizations or subtracting from AFSCME's proof of support. (*Id*. at p. 13.) Rather, at best, these declarations would show that four employees did not authorize AFSCME to represent them, facts which, even if true, would not call into question OGC's determination that AFSCME submitted valid proof of support from six employees.[9]

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[8] The District's November 12 Response claimed that Cid-Sanchez purported to revoke her authorization on October 15 and included an unverified e-mail to that effect. Curiously, that e-mail is not attached to Cid-Sanchez's December 4 declaration. In any event, the purported revocation would not be effective whether it was tendered October 15 or December 4.

[9] Although the District's unverified November 12 Response suggested that two authorization cards AFSCME submitted were not originals and therefore did not

ORDER

The Central Basin Municipal Water District's appeal of the Office of the General Counsel's administrative determination certifying American Federation of State, County, and Municipal Employees, Local 1902 (AFSCME) as the exclusive representative of a proposed unit of non-managerial District employees is DENIED. AFSCME is certified as the exclusive representative of all employees in the unit of District employees set forth below:

> "Title of Unit: Non-managerial employees
>
> "Shall INCLUDE: All non-managerial employees of the Central Basin Municipal Water District, including the Conservation Manager, Deputy Board Secretary/Senior Procurement Analyst, Senior Accountant, Recycled Water Development Specialist, Assistant Engineer, Administrative Clerk, Management Analyst, Public Affairs Specialist, Public Safety Officers, and Accounting Specialist.
>
> "Shall EXCLUDE: Managerial employees."

Chair Banks and Member Paulson joined in this Decision.

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comply with PERB Regulation 61020, the late-filed declarations do not support that contention. Therefore, in addition to the several waivers noted above, the District has further waived this issue by failing to submit competent evidence at any time.