STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALLIANCE JUDY IVIE BURTON TECHNOLOGY ACADEMY HIGH SCHOOL ET AL., Employers, and UNITED TEACHERS LOS ANGELES, Petitioner.	Case Nos. LA-RR-1281-E LA-RR-1282-E LA-RR-1283-E Request for Judicial Review PERB Decision No. 2719 PERB Order No. JR-30 October 14, 2020

Appearances: Sloan Sakai Yeung & Wong by Jeffrey Sloan and Timothy G. Yeung, Attorneys, for Alliance Judy Ivie Burton Technology Academy High School, Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex; Bush Gottlieb by Erica Deutsch and Dexter F. Rappleye, Attorneys, for United Teachers Los Angeles.

Before Banks, Shiners, Krantz and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request filed pursuant to PERB Regulation 32500 that the Board join Alliance Judy Ivie Burton Technology Academy High School, Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (collectively Charter Schools) in seeking judicial review of the Board's decision in *Alliance Judy Ivie Burton Technology Academy High School, et al.* (2020) PERB Decision No. 2719 (*Alliance*). In the underlying decision, we certified United

Teachers Los Angeles (UTLA) as the exclusive representative of certain certificated employees at the Charter Schools. For the reasons that follow, we deny the request.[1]

In *Alliance*, the Board found that UTLA had demonstrated majority support in presumptively appropriate units and that the Charter Schools had failed to rebut this presumption. Specifically, we found that each of the Charter Schools was a "public school employer" for purposes of the Educational Employment Relations Act (EERA), and that the petitioned-for units were statutorily appropriate under section 3545, subdivision (b)(1), because they included all certificated employees.[2] We further concluded that the Charter Schools had failed to rebut this statutory presumption by showing they belonged to a single employer consisting of all charter schools under the aegis of a non-profit charter management organization (CMO) called Alliance College-Ready Public Schools (Alliance). In reaching this conclusion, we held that the Charter Schools were judicially and equitably estopped from asserting that they were part of a single, integrated enterprise by virtue of prior inconsistent factual representations they and Alliance made in other cases. Additionally, and regardless of principles of estoppel, we held that those inconsistent representations fatally undermined the Charter Schools' ability to use the single-employer construct to rebut the appropriateness of the petitioned-for units. As a third independent basis for our decision, we concluded that the Charter Schools had not demonstrated that a single,

[1] In a separate order issued today, we also deny the Charter Schools' request for reconsideration of *Alliance*.

[2] EERA is codified at Government Code section 3540 et seq.

systemwide unit consisting of all schools was more appropriate than the petitioned for units.

The Charter Schools argue that the Board should join their request for judicial review of the underlying decision because it allegedly concerns a legal question of "special importance" within the meaning of section 3542, subdivision (a) of EERA. We disagree.

DISCUSSION

Under EERA section 3542, subdivision (a):

> "No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, *agrees that the case is one of special importance* and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review."

(Emphasis added.)

Under PERB Regulation 32500, the Board has sole discretion to determine whether a case is one of special importance. The regulation states, in pertinent part: "The Board may join in a request for judicial review or may decline to join, at its discretion." (PERB Reg., § 32500, subd. (c).) [3]

The Board has strictly construed these provisions in order to ensure "that the fundamental rights of employees to form, join and participate in the activities of employee organizations is not abridged. Further, the standard is also employed to

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

prevent employee organizations' rights from being inhibited because if unit determinations by PERB are subject to numerous legal challenges, delays of implementation of the Board's decisions could occur." (*St. HOPE Public Schools* (2019) PERB Order No. JR-29 (*St. HOPE*); *California Virtual Academies* (2016) PERB Order No. JR-27, at pp. 3-4, internal citations omitted.)

Consequently, the Board will join a request for review only if: (1) there is a novel issue presented; (2) the issue primarily involves construction of a statutory provision unique to the statute under consideration; and (3) the issue is likely to arise frequently. (*Burlingame Elementary School District* (2007) PERB Order No. JR-24, p. 3.) All three parts must be satisfied before PERB will join in the request for judicial review, meaning that PERB joins in requests for judicial review only in the narrowest of circumstances. (*California Virtual Academies*, *supra*, PERB Order No. JR-27, p. 4.)

The Charter Schools argue that this case presents a novel question of law with respect to the application of *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*) to charter schools. A principle basis for this argument rests on the fact that the decision drew a dissent. But many of our representation cases elicit dissenting opinions, and we see nothing in this matter (or the dissent) that warrants judicial review at this juncture. (See, e.g., *St. HOPE*, *supra*, PERB Decision No. JR-29 at p. 6 [Member Shiners concurring in denial of judicial review].)

The Charter Schools also seem to argue that the Board did not apply *Peralta* to this case. That is untrue. Rather, the Board concluded that the petitioned-for units were presumptively appropriate under *Peralta* precisely because they sought all certificated employees of the public school employers, i.e., the Charter Schools.

(*Alliance*, *supra*, PERB Decision No. 2719 at p. 25.) The Board declined to interpret *Peralta* and its progeny to mean that "a single unit of all employees of the [asserted] single employer is the only appropriate bargaining unit, regardless of the union's objection and despite the Charter Schools' past representations in other cases." (*Id*. at p. 26.) Thus, far from overruling *Peralta*, the decision applied its holding to the unique facts of this case.[4] In any event, since nearly all representation cases involving certificated employees require the Board to interpret section 3545 and apply *Peralta*, the fact that we did so here is insufficient to warrant judicial review. (*St. HOPE*, *supra*, PERB Decision No. JR-29 at p. 4.)

The Charter Schools further argue that the Board's conclusion that the Charter Schools' prior inconsistent factual representations fatally undermined their own case somehow "abrogate[d] PERB's jurisdiction over unit determination issues in direct contravention of EERA section 3545." (Gov. Code, § 3545 ["In each case where the appropriateness of the unit is an issue, the board shall decide the question . . ."].) This argument is undeveloped but appears tethered to a footnote in the dissent in the underlying decision, which makes a similar assertion. (See *Alliance*, *supra*, PERB Decision No. 2719 at p. 55, fn. 43.) However, insofar as section 3545 requires the Board to make unit determinations based on the parties' "established practices,"

[4] The dissent believes *Peralta* prevents the Board from certifying the otherwise presumptively appropriate charter school units in this case. It therefore takes issue with our application of *Peralta* to charter school cases presenting more than one appropriate unit. But the dissent's belief is not supported by the Board's interpretation of *Peralta* or EERA. Rather, it seeks to create new law requiring single-employer units in cases involving charter school networks such as Alliance. For the reasons set forth in the underlying decision, this would contravene the purposes of EERA and make a millstone of *Peralta* for the benefit of these employers.

among other criteria, there is no reason to believe that the Charter Schools' historical conduct is statutorily irrelevant, especially since it centers on their very status as public school employers under EERA.

While the Charter Schools and dissent believe these issues are destined to arise frequently, given the number of unorganized Alliance-affiliated schools, we believe the facts of this case are unusual and unlikely to recur. Indeed, few if any public employers will repeat the sort of legal gamesmanship we encountered here.[5] For all these reasons, we cannot conclude that the Charter Schools satisfied the three-part test and we therefore decline to grant the request.

ORDER

The request filed by Alliance Judy Ivie Burton Technology Academy High, Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex that the Public Employment Relations Board join in a request for judicial review of *Alliance Judy Ivie Burton Technology Academy High, et al.* (2020) PERB Decision No. 2719 is hereby DENIED.

Members Krantz and Paulson joined in this Decision.

Member Shiners' dissent begins on page 7.

[5] Because there are some number of CMO-affiliated charter schools in California, the dissent claims the issues in this case will likely arise with the requisite frequency to warrant immediate judicial review. However, throughout the Board's history, no other litigants asserted contradictory facts in multiple cases concerning their status as public school employers. Thus, it was the Charter Schools' unprecedented conduct that brought us to this result. We do not believe such conduct is likely to become frequent.

SHINERS, Member, dissenting: I dissent from the majority's refusal to join in the request for judicial review of *Alliance Judy Ivie Burton Technology Academy High, et al.* (2020) PERB Decision No. 2719 (*Alliance*) filed by Alliance Judy Ivie Burton Technology Academy High, Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (collectively Charter Schools). In my view, the underlying decision is a case of special importance that warrants judicial review.

The Educational Employment Relations Act permits judicial review of a unit determination decision "when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review." (EERA, § 3542, subd. (a).) "The Board may join in a request for judicial review or may decline to join, at its discretion." (PERB Reg. 32500, subd. (c).) Currently, the Board's discretion to join in a request for judicial review is constrained by precedent requiring the requesting party to establish that: (1) the case presents a novel issue; (2) the issue primarily involves construction of a statutory provision unique to the statute under consideration; and (3) the issue is likely to arise frequently.[6] (*Burlingame Elementary School District* (2007) PERB Order No. JR-24, p. 3.) I agree with the Charter Schools that all three factors are met here.

[6] In adopting this standard, the Board appears to have transformed three factors that weighed in favor of judicial review in one particular case into a three-part test that must be met in every case. (See *Los Angeles Unified School District* (1985) PERB Order No. JR-13, p. 3 [noting that in a prior decision addressing the meaning of "same employee organization" in EERA section 3545, subdivision (b)(2), the presence of the three factors convinced the Board the case was one of special importance]; compare *Palomar Community College District* (1992) PERB Order No. JR-14, p. 4

First, this case presents a novel issue—whether the presumption adopted by the Board in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*) should apply differently in the charter school context.[7] In the underlying decision in this case, the Board majority found "the *Peralta* presumption has less weight in the charter school context than in traditional public school districts." (*Alliance*, *supra*, PERB Decision No. 2719, p. 31, fn. 28.) Yet in three prior decisions where the Board applied the *Peralta* presumption to charter school unit determinations, it made no mention of giving the presumption "less weight"—or

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[concluding the petitioning district failed to meet the "standard" set out in *Los Angeles Unified School District*, *supra*, PERB Order No. JR-13.) The Board has never explained why these three factors—and no others—appropriately define what constitutes "special importance" in every case, particularly when earlier precedent considered additional factors. (E.g., *Fairfield-Suisun Unified School District, et al.* (1980) PERB Order No. JR-8, pp. 2-3 [finding a case of special importance where an issue of statutory interpretation was "significant and novel," likely to arise frequently, and there was no alternative method for the requesting party to obtain judicial review]; *San Francisco Unified School District* (1977) EERB Order No. JR-3, p. 1 [declining to find a case of special importance where the requesting party has an unfair practice remedy available]; *Grossmont Union High School District* (1977) EERB Order No. JR-2, pp. 1-2 [finding a case of special importance where the issue was novel; arose frequently; and the requesting party, having lost its exclusive representative status, could not draw an unfair practice charge to obtain judicial review].) Given that PERB has granted only one judicial review request in the 28 years since the current standard was adopted, I believe the Board should reevaluate whether the standard properly serves the objective of determining which cases are of "special importance." Nonetheless, because the three factors are met here, I join my colleagues in applying the current standard in this case.

[7] In *Peralta*, *supra*, PERB Decision No. 77, the Board harmonized subdivisions (a) and (b)(1) of EERA section 3545 by creating a rebuttable presumption that all of a public school employer's classroom teachers should be placed in a single bargaining unit unless the resulting unit would be inappropriate under the criteria in subdivision (a). (*Id*. at p. 10.) Prior to the underlying decision in this case, PERB had applied this presumption even-handedly to all parties subject to EERA, including charter schools.

otherwise modifying the presumption—in the charter school context. (*St. HOPE Public Schools* (2018) PERB Order No. Ad-472, pp. 4-5; *California Virtual Academies* (2016) PERB Decision No. 2484, p. 79; *Orcutt Union Elementary School District* (2011) PERB Decision No. 2183, pp. 7-8.) The underlying decision in this case is the first time the Board has found that the *Peralta* presumption applies differently to charter schools, making this a novel issue.[8]

Second, the novel issue is primarily one of statutory construction. In one of the rare instances where the Board joined in a request for judicial review, the underlying decision addressed the interplay between Education Code section 45103, subdivision (b)(4), which excludes part-time playground positions from the classified service, and EERA section 3540.1, subdivision (e), which defines "exclusive representative" as an employee organization that represents a bargaining unit of "certificated or classified employees." (*Castaic Union School District* (2011) PERB Order No. JR-25, p. 4; see *Castaic Union School District* (2010) PERB Order No. Ad-384, pp. 3-5, overruled by *Center Unified School District* (2014) PERB Decision No. 2379.) Thus, judicial review is not limited to cases that turn on the meaning of particular statutory language but

[8] The majority mischaracterizes my application of *Peralta* to the facts of this case as an attempt to "create new law requiring single employer units in cases involving charter school networks such as Alliance." That is not so. There may be a future case where a charter school network does not constitute a single employer and thus a network-wide unit would not be appropriate under *Peralta*. But that is not this case.

also encompasses cases where the Board must define the relationship between statutory provisions.[9]

By giving the *Peralta* presumption "less weight" in charter school cases, the underlying decision in this case allows PERB to certify a petitioned-for unit at a charter school as long as the unit is an appropriate unit under the statutory criteria in EERA section 3545, subdivision (a). This has the practical effect of writing EERA section 3545, subdivision (b)(1) out of the statute in charter school cases. Because this case centers on the proper relationship between subdivisions (a) and (b)(1) of EERA section 3545 in the charter school context, it raises primarily an issue of statutory construction.[10]

Third, how the *Peralta* presumption applies to charter schools affiliated with a charter management organization (CMO) is an issue likely to arise frequently. During

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[9] To the extent *California Virtual Academies* (2016) PERB Order No. JR-27 suggests the statutory construction factor is met only where the meaning of particular statutory language is at issue (*id.* at p. 7), I disagree with such a limitation as contrary to court and Board precedent. (See, e.g., *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (2002) 100 Cal.App.4th 973, 985 [determining the proper interplay between statutory provisions is "an issue of statutory construction"]; *Castaic Union School District*, *supra*, PERB Order No. JR-25, p. 4 [joining in request for judicial review of decision determining interplay between provisions of EERA and the Education Code].)

[10] The majority's claim that it merely "declined to interpret *Peralta* and its progeny" in a particular way understates what it actually did—reinterpreted EERA section 3545 to allow PERB to ignore subdivision (b)(1) in charter school cases. Though my colleagues obviously dislike the *Peralta* presumption (see *Alliance*, *supra*, PERB Decision No. 2719, p. 31, fn. 28), they cannot under the guise of interpretation rewrite EERA section 3545 to suit their notion of what the statute should say (*Regents of the University of California v. Public Employment Relations Bd.* (1985) 168 Cal.App.3d 937, 944-945).

the 2016-2017 school year, 24% of California's 1,258 charter schools were affiliated with a CMO. (National Alliance for Public Charter Schools, National Charter School Management Overview 2016-17, p. 6.)[11] In that same school year, 47 CMOs operated in California, each affiliated with at least three charter schools. (*Id.* at pp. 7-14.) Thus, it is likely PERB will continue to have to decide the appropriate certificated unit configuration for charter schools affiliated with a CMO. Moreover, as the underlying decision certified bargaining units at only three of the 25 schools affiliated with the Alliance College-Ready Public Schools CMO, PERB will have to determine appropriate units for other schools in the Alliance network as United Teachers Los Angeles (UTLA) continues to organize them.[12]

In sum, each of the three factors for joining in the request for judicial review is met here. Accordingly, I would join in the Charter Schools' request for judicial review.

[11] Available at https://www.publiccharters.org/sites/default/files/documents/2019-06/napcs_management_report_web_06172019.pdf.

[12] Instead of addressing the likelihood that PERB will have to apply *Peralta* in future cases involving CMO-affiliated charter schools, the majority focuses on the Charter Schools' litigation conduct in the underlying cases, claiming such "unprecedented conduct" is unlikely to recur. But even if "the facts of this case are unusual and unlikely to recur" as to other CMO-affiliated charter schools, they will continue to apply to petitions to represent certificated employees at the remaining 22 Alliance network charter schools, including the two petitions filed by UTLA in 2019 that were placed in abeyance pending the outcome of this case. (See *Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6 [PERB may take official notice of its own records and files].)