



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Employer,

and

UNIVERSITY PROFESSIONAL AND
TECHNICAL EMPLOYEES, CWA LOCAL 9119,

Exclusive Representative.

Case No. SF-UM-779-H

Request for Judicial Review
PERB Order No. Ad-453-H

PERB Order No. JR-28-H

February 27, 2018

Appearance: Renne Sloan Holtzman Sakai by Timothy G. Yeung, Attorney, for Regents of the University of California.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by Regents of the University of California (University) pursuant to Higher Education Employer-Employee Relations Act (HEERA)¹ section 3564 and PERB Regulation 32500² for the Board to join in a request for judicial review of the Board's decision in *Regents of the University of California* (2017) PERB Order No. Ad-453-H (*Regents*). In *Regents*, the Board denied the University's appeal from an administrative determination by PERB's Office of the General Counsel regarding a unit modification petition filed by the

¹ HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32500, subdivision (a), authorizes any party to a decision in a representation matter by the Board itself to seek judicial review within 20 days following the date of service of the Board's decision. Subdivision (c) of the Regulation provides that the Board itself "may join in a request for judicial review or may decline to join, at its discretion."

University Professional and Technical Employees, CWA Local 9119 (UPTE). The effect of our *Regents* decision was two-fold. We found that unrepresented employees in the newly-created classifications Systems Administrator 1, 2 and 3 share a community of interest with employees in the University's Technical (TX) Unit, which is exclusively-represented by UPTE. We also concluded that UPTE's petition to accrete the Systems Administrator positions to the TX Unit without proof of majority support was authorized by PERB Regulation 32781 and decisional law, because the petitioned-for classifications would increase the size of the TX Unit by less than ten percent.

At issue in the present request for judicial review is the University's continuing disagreement with our application of PERB Regulation 32781, subdivision (e)(1), which expressly requires proof of majority support for a unit modification only when the petition "requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more."³ The University argues that the ten percent rule is inconsistent with private-sector authority, that this case presents several novel issues of statutory interpretation warranting judicial review, that these issues are likely to arise frequently; and that judicial review is necessary to preserve HEERA's fundamental principle of employee choice. UPTE has filed no response to the University's petition for judicial review.

For the reasons set forth below, which are themselves largely a repetition of points made in our previous *Regents* decision, we deny the University's request for judicial review.

³ Although the University's request for judicial review focuses only on the propriety of the ten percent rule, as applied in *Regents*, it expressly reserves the right to re-litigate the community of interest as well, if judicial review is granted.

DISCUSSION

HEERA section 3564, subdivision (a), makes PERB unit determinations immune from judicial review except when, in response to a petition for judicial review from an employer or employee organization, the Board agrees that the case is one of “special importance” and joins in the request for review; or when the issue is raised as a defense to an unfair practice complaint. (HEERA, § 3564, subd. (a).) The Board’s considerable discretion in the determination of appropriate units is demonstrated by the very limited circumstances under which judicial review of its unit decisions may be obtained. (PERB Reg. 32500, subd. (c); *San Diego Unified School District* (1981) PERB Order No. JR-10, p. 4.)

The Board has applied a strict standard in reviewing requests for judicial review and evaluating whether cases are “of special importance” because the fundamental rights of employees to form, join and participate in the activities of employee organizations (HEERA, § 3565) could be jeopardized if PERB’s unit determinations were routinely subject to legal challenges. (*The Regents of the University of California* (1999) PERB Order No. JR-19-H, p. 3; see also *California Virtual Academies* (2016) PERB Order No. JR-27, pp. 3-4; *Burlingame Elementary School District* (2007) PERB Order No. JR-24 (*Burlingame*), p. 3.) On the few occasions when the Board has joined in a request for judicial review, it has determined that the case has “special importance” because all of the following are present: (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. (*Burlingame, supra*, at p. 3; *Castaic Union School District* (2010) PERB Order No. JR-25 (*Castaic*); *Fairfield-Suisun Unified School District, et al.* (1980) PERB Order No. JR-8.)

The purportedly novel issue that is the basis for the University's request is its disagreement with the Board's interpretation of the ten percent rule governing unit modification petitions, as set forth in PERB Regulation 32781. However, as we noted in *Regents*, "this is not a matter of first impression" for PERB. (*Id.* at p. 5.) In *Regents of the University of California* (2010) PERB Decision No. 2107-H, a case involving the same parties, the Board considered and rejected the same arguments raised by the University's administrative appeal in this case. Following the analysis of the 2010 *Regents* decision, we concluded in this case that the ten percent rule was added to Regulation 32781 in 2006 "to eliminate ambiguity and add clarity regarding when majority proof of support is required for a petition that seeks to add unrepresented positions to a unit." (*Regents, supra*, PERB Order No. Ad-453-H, p. 5, citing *Regents, supra*, PERB Decision No. 2107-H, p. 20, citing Cal. Reg. Notice Register 2005, No. 51-Z, p. 1773.) Thus, as decided by the Board in the 2010 *Regents* decision, and as affirmed by the current Board in the present case, the ten percent rule of Regulation 32781 is clear and unambiguous and, even if it were not, the rulemaking history of the Regulation resolves any doubt that the ten percent threshold was inserted specifically to eliminate the Board's discretion to order proof of majority support when a unit modification would increase the size of an existing unit by less than ten percent. (*Regents, supra*, PERB Order No. Ad-453-H, p. 21.)

Nonetheless, relying on *Castaic, supra*, PERB Order No. JR-25, the University's request for judicial review argues that this case presents "several" novel issues because the propriety of PERB's ten percent rule in unit modifications has never been the subject of an appellate court decision. However, "[t]he Board has not agreed that the mere fact that a court has not ruled on an issue meets the 'special importance' test, stating that 'such would be an

abdication of our responsibility to interpret the statute which we enforce and would tend to render this Board simply another administrative hurdle to be cleared on the way to unit certification.” (*Regents, supra*, PERB Order No. JR-19-H, pp. 3-4, citing *Livermore Valley Joint Unified School District* (1981) PERB Order No. JR-9, p. 5.)

Castaic, supra, PERB Order No. JR-25, provides no persuasive authority for the University’s position. In *Castaic*, a case arising under the Educational Employment Relations Act (EERA),⁴ the Board considered whether individuals in part-time playground positions who hold no other classified position within the same school district, and who are thus excluded from the classified service by Education Code section 45103, have representational rights under EERA. The Board determined that this was “a novel issue that has not been addressed by any court.” (*Castaic, supra*, at p. 4.) In support of this conclusion, the *Castaic* Board cited a prior *Regents* decision, holding that the status of student academic employees under HEERA was not a novel issue because it had been addressed by the California Supreme Court and a California court of appeal. It would be a logical fallacy, however, to conclude that the converse is necessarily true, i.e., that an issue is necessarily “novel,” simply because no appellate court has addressed it, and regardless of how many times the Board has addressed the issue in detail.

The University’s request also fails the second prong of the test for special importance. Neither the Regulation nor the ten percent rule at issue in this case is unique to HEERA; in fact, as indicated by the authorities we cited in *Regents*, it applies as well to cases arising under other PERB-administered statutes. (PERB Regs. 32781 [EERA and Ralph C. Dills Act⁵],

⁴ EERA is codified at section 3540 et seq.

⁵ The Dills Act is codified at section 3512 et seq.

61450 [Meyers-Milias-Brown Act⁶], 81450 [Trial Court Employment Protection Act⁷], 91450 [Trial Court Interpreter Employment and Labor Relations Act⁸]; see also *Regents, supra*, PERB Order No. Ad-453-H, p. 6, citing *Orcutt Union Elementary School District* (2011) PERB Decision No. 2183, adopting proposed decision at pp. 15-16.) The University’s request for judicial review merely recycles the arguments it presented in opposition to the unit modification petition and in its appeal to the Board from the administrative determination granting the unit modification, but its continuing disagreement with the Board’s decision does not demonstrate that the case is one of “special importance.” (*California Virtual Academies, supra*, PERB Order No. JR-27, p. 6; *Burlingame, supra*, PERB Order No. JR-24, pp. 4-5.)

Accordingly, we deny the University’s request for judicial review.

ORDER

The request by Regents of the University of California for judicial review is hereby DENIED.

⁶ The MMBA is codified at section 3500 et seq.

⁷ The Trial Court Act is codified at section 71600 et seq.

⁸ The Court Interpreter Act is codified at section 71800 et seq.