STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

THOMAS BARNES, Charging Party, v. SAN FRANCISCO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. SF-CE-884 Interlocutory Appeal PERB Order No. Ad-153 May 1, 1986

Appearance: Ronald A. Glick for San Francisco Community College District.

Before Hesse, Chairperson; Morgenstern, Burt, Porter and Craib, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on an interlocutory appeal filed by the San Francisco Community College District (District) and certified to the Board by an administrative law judge (ALJ) pursuant to PERB Regulation 32200.[1] The District

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

Regulation 32200 states:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service

excepts to the ALJ's proposed interlocutory order denying the District's motion to dismiss an unfair practice charge filed by Thomas Barnes (Charging Party), alleging discrimination and retaliation for union activities in violation of the Educational Employment Relations Act (EERA or Act) section 3543.5(a).[2]

Barnes initially filed his charge on March 16, 1984, alleging unlawful discrimination. The regional attorney issued

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> pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:
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> (a) The issue involved is one of law;
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> (b) The issue involved is controlling in the case;
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> (c) An immediate appeal will materially advance the resolution of the case.

[2]The EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise noted.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

a complaint on the charge on July 11, 1984 and, on September 10, 1984, Barnes amended his charge to further allege a retaliatory discharge in violation of EERA section 3543.5(a).

On August 2, 1984, the District answered the complaint, denied that it had committed an unfair practice, and moved to dismiss the complaint on the grounds that PERB lacked jurisdiction because classified employees of the District had been legislatively excluded from coverage by EERA.

On October 30, 1984, the ALJ held a hearing on the jurisdictional question only. On December 28, 1984, the ALJ issued his decision ruling that PERB has jurisdiction over the complaint. Accordingly, he denied the District's motion to dismiss. On January 11, 1985, the District requested that the question of PERB's jurisdiction be submitted to the Board as an interlocutory appeal and, on January 17, 1985, the ALJ certified the appeal to the Board, reserving jurisdiction to reconvene the hearing on the merits of the complaint pending the Board's decision.

For the reasons that follow, we affirm the ALJ's finding that the PERB has jurisdiction over this unfair practice complaint and affirm his denial of the motion to dismiss.

FACTS

The facts of this case, as found by the ALJ and in the record, are as follows:

Thomas Barnes was a custodian working at San Francisco Community College. He became a steward for Local 390/400 of

the Service Employees International Union (SEIU or Union) in July 1982. The charge alleges that Barnes was given unreasonable work assignments in retaliation for his union activities. The charge further alleges that Barnes was called into a disciplinary meeting on October 5, 1983 and, when he tried to call the Union to get representation in the meeting, he was given a two-day suspension. Barnes and an SEIU field representative testified that he was suspended by Charles Collins, the director of custodial and grounds personnel for the District. The District's representative made an offer of proof to the effect that Collins called his supervisor, Mr. Iwomoto, to explain what had happened and that Iwomoto contacted Hilary Hsu, the District superintendent, who then authorized the suspension. Barnes asserts that, on November 9, 1983, he was again suspended for four days by Robert Sayles, the supervisor directly under Collins, when he said he had to go to a doctor the following day. On April 3, 1984, Barnes received a notice from the District that a termination hearing would be held.[3] Barnes was terminated, and the San Francisco Civil Service Commission (Commission) reviewed the action. The Commission upheld the termination

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[3]Although the record does not indicate the precise nature of the hearing held, we note that section 8.341 of the San Francisco City and County Charter (Charter) provides that a hearing conducted by a neutral hearing officer under contract with the City is required prior to final termination.

from the District, but rescinded his ineligible status as to employment elsewhere with the City and County of San Francisco (City).[4] Barnes received the final notice of termination on July 24, 1984.

DISCUSSION

The gravamen of the District's jurisdictional objection in this case is that Charging Party Thomas Barnes, like all classified employees who work at San Francisco Community College, is not a District employee, but a City employee. This fundamental point, argues the District, leads to the following legal conclusions: first, by filing against the District Barnes has not named a proper respondent to his charge, inasmuch as the District is not his employer; and, second, by filing with PERB, Barnes has filed with the wrong forum because labor relations between a city or county and its employees fall not under the EERA but under the Meyers-Milias-Brown Act, (MMBA)[5] which PERB does not administer.

In support of its claim that Barnes' true employer is the City, the District relies on Education Code sections 88000 and

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[4]The City and County of San Francisco operate under a single Charter, as further discussed below. Among other things, the Charter establishes a merit or civil service system of employment which includes a civil service commission as one of its components. In this Decision, we have referred to the City and County as the "City" solely for purposes of convenience.

[5]The Meyers-Milias-Brown Act is codified at Government Code section 3500 et seq.

88137. According to the District, these sections exempt the classified employees at San Francisco Community College from the coverage of both the Education Code and the EERA, and thereby demonstrate that the terms of employment for such employees are determined solely by the civil service provisions of the Charter. Since Barnes' wages, hours, and other working conditions are fixed according to the City Charter's civil service system, says the District, the City is clearly his employer.

In assessing the District's defense, we find initially that the record fails to substantiate the District's claim that it is a mere department of the City and therefore cannot be a "public school employer" as defined in EERA section 3540.1(k). Indeed, our own records, of which we take administrative notice, indicate that the District has several times defended against charges before this agency concerning its employer-employee relations with the certificated employees at the College. See San Francisco Community College District (1979) PERB Decision No. 105; San Francisco Community College District (1980) PERB Decision No. 146; and San Francisco Community College District (1982) PERB Decision No. 278.

Moreover, provisions of the Charter do not support the contention that the District is a mere department of the City. Charter section 5.104 states, in pertinent part:

> Notwithstanding the provisions of Section 5.100 or of any other provisions of this

> charter, . . . the community college district of the city and county shall be under the control and management of a board of education . . . .

The clear intent of this language is that, "notwithstanding" any other Charter provision, the District be under the "control and management" of its board of education, rather than the City board of supervisors.

Section 5.104 also provides that the superintendent shall be the executive officer "of the governing board" of the District. This contrasts with similar language in Charter section 5.102, mistakenly relied on by the District, where the superintendent of the city unified school district is established as a department head "of the" City. Other Charter provisions relied on by the District are equally unpersuasive.[6]

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[6]In addition, the District cites nonexistent language from Charter section 8.321 to support its position.

We note that the Dissenters refer to a February 7, 1984 agreement between the District and a SEIU local, apparently in support of its position that the District is a mere "department" of the City. As the Dissent itself later states:

> . . . in jurisdictional matters, parties cannot, by their action of recognition, create jurisdiction where none exists under the statutes. (Dissenting Opinion at p. 32).

Thus, the parties' description of their relationship in that February 7 agreement is legally irrelevant. Moreover, it is contradicted in the District's March 13, 1986 letter to PERB, wherein the District describes itself as the employer under the EERA and encloses a copy of Governing Board

Neither does the District deny that the San Francisco Community College District is a public school system. EERA section 3540 sets forth the fundamental purpose of the Act. It states that the purpose of EERA is to:

> . . . promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California . . . .

To further this end, the statutory scheme grants certain rights, including the right to join and participate in employee organizations, to employees of public school systems in California. Section 3543.5(a) of the Act protects these rights by making it an unfair practice for public school employers to discriminate or retaliate against employees because of their exercise of rights guaranteed by EERA. Section 3540.1 of the Government Code defines a "public school employee" as:

> any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor . . . , management employees, and confidential employees.

A "public school employer" is defined in the same section as:

> the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

Resolution No. 860218-S4 in which it voluntarily recognizes United Public Employees Local 790, SEIU, AFL/CIO, as the exclusive representative of a wall-to-wall unit of classified employees. (See p. 18, infra.)

Although the EERA does not specifically state that its provisions cover community college districts, various references in its sections make it clear that the Legislature intended that result. See, e.g., section 3540, paragraph 2. Indeed, the Board has issued orders involving community colleges since early in its history without challenge to its jurisdiction.

It is clear, then, that the District functions under the law as an independent entity, and that it operates a public school system. Nevertheless, the District argues that EERA does not apply to the employment relations of its classified employees. The Education Code provisions relied on by the District, however, do not support its argument.

The District claims that the Legislature, through Education Code sections 88000 and 88137, exempted any community college district in the State lying wholly within a city and county from the requirements of the EERA regarding classified employees. The District is the only community college district in California that is so situated.

Title 3 of the Education Code, sections 71000 through 88263, deals with California's community colleges; Chapter 1 contains provisions applying to all employees and Chapter 4, sections 88000 through 88263, deals exclusively with classified employees in community colleges. The District relies on section 88000, which makes Chapter 1 and various articles

within Chapter 4 applicable to "all classified employees of a community college district" unless otherwise limited. The second paragraph of section 88000 states:

> These provisions shall not apply to employees of a community college district lying wholly within a city and county which provides in its charter for a merit system of employment for employees employed in positions not requiring certification qualifications.

Education Code section 88137, which is entitled: "Provisions for inclusion of district employees in merit system of city and county" reads:

> In every community college district coterminous with the boundaries of a city and county, employees not employed in positions requiring certification qualifications shall be employed, if the city and county has a charter providing for a merit system of employment, pursuant to the provisions of such charter providing for such system and shall, in all respects, be subject to, and have all rights granted by, such provisions; provided, however, that the governing board of the district shall have the right to fix the duties of all of its non-certificated employees.

The District asserts that section 88000 "absolutely" exempts the civil service/merit system employees of the District from all provisions of the Education Code. It then argues that, since section 88000 exempts these employees from Chapter 1 and various Chapter 4 requirements and section 88137 says they shall "in all respects" be employed pursuant to the Charter merit system, the District and its classified employees are subject solely to the Charter.

This position is not supported by the text of the sections. In our view, all section 88000 purports to do is exempt the District from the requirements of certain sections of the Education Code. EERA, however, is part of the Government Code. Neither Chapter 1 nor Chapter 4 pertains to collective bargaining. Neither section 88000 nor section 88137 refers to EERA or the jurisdiction of PERB and, clearly, neither specifically exempts the District from the requirements of EERA. Nor does the language of EERA, itself, specifically exempt the District from its coverage. Since it is obvious from the language of section 88000 that the Legislature knew how to exempt the District from whatever statutory provisions it wanted to, and yet did not include an exemption from EERA in either the Education Code sections or in EERA, we find the District's first argument to be without merit.

The District relies on the language of section 88137 primarily to support its second, related argument. It contends that the classified employees are subject solely to the Charter, which in turn makes the City's civil service system the sole regulatory scheme for its classified employees and, thus, the City the true employer of Barnes. It bolsters this argument by citing sections of the Charter allegedly showing that all control over the terms and conditions of employment of its classified employees is vested in the board of supervisors of the City and in the Commission.

Again, such a broad reading of section 88137 is not warranted; indeed, the final provision of the section leads to a contrary conclusion. It says that the governing board of the District shall have the right to fix the duties of its employees. As we read the section, therefore, it does not establish the District's classified personnel as employees of the City; rather, it expressly refers to those workers as employees of the District, and affirms the District's authority, as the employer, to direct the employees in their work.[7]

Section 88137, then, merely requires that, to the extent the Charter specifies employment conditions, the District must act in conformity with those provisions in regard to its classified personnel.

We note that many California public school districts operate pursuant to a merit system, under which employment conditions are determined, at least in part, by an independent "personnel" or "civil service" commission.[8] Many such districts have appeared before this agency in their roles as

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[7]Although the District maintains it has never, in fact, "fixed the duties" of these employees, it offered no evidence to support this. Moreover, the record shows that the District, at the very least, assigned and directed Barnes in his work, evaluated his performance and disciplined him.

[8]See Education Code sections 88050 through 88139, which provide for this system of personnel management for classified employees.

public school employers; yet none have argued, nor could they, that because of the local personnel commission, they are not the employers of their school personnel. We see the case at hand as being much the same. Thus, Education Code section 88137 establishes the City's civil service commission as the personnel commission which will serve the District and its classified employees. It does not follow from this that the District is thereby stripped of its status as the employer of those employees.

The District also quotes Charter section 3.661 to support its assertion that the Commission has sole responsibility for hiring, firing and supervising the classified work force, thus, making the City the employer. Section 3.661 reads, in pertinent part:

> The commission shall adopt rules to carry out the civil service provisions of this charter and, except as otherwise provided in this charter, such rules shall govern applications; examinations; eligibility; duration of eligible lists; certification of eligibles; appointments; promotions; transfers; resignations; lay-offs or reduction in force; . . . (Emphasis added.)

Significantly, the District omits from its quotation the "except as otherwise provided" language. As indicated above, Charter section 5.104 does provide otherwise by putting the District under the control and management of its board of education.

In any event, the list of terms and conditions of

employment addressed by the Charter does not appear to exhaust the subjects the Board has found to be within the scope of representation under EERA. The record indicates that the District retains at least some residual authority; it can fix the duties of its employees and, more importantly, it can discipline them.

That an employee may have more than one employer controlling his or her terms of employment is a well-established concept in labor law. In the private sector, the National Labor Relations Board (NLRB) has long used the term "joint employer" to denote a situation in which more than one employer determines the terms and conditions of employment for a unit of employees. See, The Greyhound Corp. and Floors, Inc. (1965) 153 NLRB 1488, 1495; Manpower, Inc. and Armour Grocery Products Co. (1967) 164 NLRB 287; and Thriftown, Inc. d/b/a Value Village (1966) 161 NLRB 603. In Turlock School Districts (1977) EERB Order No. Ad-18,[9] PERB applied the NLRB standard for joint employers in resolving whether two school districts were joint employers.

Other state public employment labor boards have also endorsed and applied the NLRB's joint employer doctrine. Thus, in County of Ulster, et al. (1970) 3 NY PERB 3527, the Public Employment Relations Board of the State of New York held that

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[9]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

the County of Ulster and the constitutionally-established Sheriff's Department were joint employers of the Sheriff's Department deputies, citing, inter alia, Greyhound and Manpower, supra.

The California Supreme Court has itself endorsed the notion that California's public employees may have more than one employer. Thus, in Los Angeles Civil Service Commission v. Superior Court (1978) 23 Cal.3d 55, the Court considered a case in which, by county charter, the civil service commission had sole authority to determine layoff procedures for county employees. The court ruled that, notwithstanding the fact that most other working conditions were controlled by the county itself, the civil service commission functioned as the employer for purposes of the subject of layoffs and, therefore, the commission had the obligation as employer under the MMBA to meet and confer on layoff procedures with the union representing the county workers.

In the underlying determination, the ALJ observed that just such a division of authority appears to exist between the District and the City. He stated:

> The San Francisco City and County Board of Supervisors, by their control over the annual budget and annual salary-setting ordinance, act as "employer" in this obviously important area of labor-management relations. The City and County, through the civil service commission, also acts as "employer" in other important ways. At the same time, though, it is clear from the discussion above that the Legislature

> intended the District board of trustees to continue to act as the employer of classified employees in other ways. Further, it is the intent of the charter that the District governing board exercise "control and management" of the school district. It must be concluded that the District has the right and obligation to do so, and in so doing to act as employer in all ways authorized by statute.[10]

We agree, and conclude that the District and the City each possess employer authority. While the City and/or Commission appears to control fundamental matters of wages and hours, it remains clear from Education Code section 88137 and Charter section 5.104 that the operation and management of the school system, including the power to fix and assign duties of classified employees, is reserved solely to the governing board of the District. Further, both logical inference and the brief record of this case indicate that the District's governing board also has the related authority to evaluate the job performance of its employees, to correct their work, and to reassign and discipline those employees as necessary. Most relevantly of all, it is clear from the facts that the allegedly unreasonable work assignment and the two suspensions imposed on Thomas Barnes were decided on and implemented by

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[10]In the underlying proceeding, neither party favored the application of the term "joint employer" to the relationship between the District and the City. While the District maintained that the City was the sole employer, Charging Party used the term "dual employers" to characterize the relationship, and the ALJ adopted that term. We find no basis in the record for the creation of such new terminology and here disavow it.

District officials; the record does not show that the City played any role. The record is less clear regarding his termination but, although the Commission played a role, there is nothing to indicate that it or the City was the prime mover. Having demonstrated that the District was the party taking adverse action against Barnes, the District has the burden of demonstrating that it is not the proper respondent in this action. It has failed to do so.

Finally, it appears that such a joint employer relationship can function quite smoothly under the laws governing the conduct of labor relations in San Francisco. We note with interest the employment relationship existing in San Francisco's other public school district. Nothing in the record indicates that the San Francisco Unified School District is embued by law with greater independent authority than the Community College District. Yet, the Unified School District has negotiated and signed a memorandum of understanding[11] with SEIU as the exclusive representative of the Unified School District's classified personnel which operates in conjunction

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[11]That agreement provides initially that:

> This agreement is intended to establish a mutually satisfactory arrangement between the District and the Union regarding only those certain conditions of employment within the discretion of the District . . . . This agreement is limited to those areas of jurisdiction over which

with the memorandum of understanding covering the same employees that SEIU negotiated with the City.

Peter Wilensky, field representative for SEIU, testified that his organization has been working toward a memorandum of understanding with the Community College District which would be similar in scope to SEIU's contract with the Unified School District. Indeed, the District and SEIU have already signed an agreement establishing approved methods of union access and, on February 18, 1986, the District Governing Board adopted Resolution No. 860218-S4, voluntarily recognizing a SEIU local as the exclusive representative of a wall-to-wall unit of its classified employees pursuant to EERA.[12]

Upon the foregoing review, we conclude that, while the City

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the School District has the authority to act.

Thereafter, the argument sets forth provisions on employer discrimination, evaluation procedures, union security, union access, in-service training, subcontracting of work, voluntary reduced workweek, work assignment procedures, grievance procedure and other matters. Express references in the agreement to the memorandum of understanding which SEIU negotiated with the City reflects that the two agreements are appropriately harmonized. See, for example, the grievance procedure provision.

[12]We take note of this Resolution, as well as the agreement between SEIU and the San Francisco Unified School District, not because we find either has any "binding" effect or precedential value in the analysis of the instant case, but rather because both show that the "tremendous confusion" over bargaining that the Dissent anticipates will result from PERB's taking jurisdiction over the parties in the instant case apparently has not yet occurred in the Unified School District negotiations and is not greatly feared by the parties who would be bargaining over the Community College classified employees' concerns.

acts as the employer of the District's classified personnel for some purposes, as reflected in the existing memorandum of understanding between the City and SEIU, the District itself has exclusive control over certain other matters which are central to the employment relationship and is therefore properly designated as the employer of its classified personnel to that extent.

Since the record before us is limited, we do not here attempt to map out the exact parameters of the employer authority which resides in the District and in the City, respectively.

Our holding furthers the purpose of EERA section 3543.5(a), to protect public school employees from reprisals, discrimination or coercion because of their exercise of rights guaranteed by the EERA. By providing a forum in which Barnes can seek redress for the alleged unfair practices against him, we are furthering the purposes of the EERA in conformity with the intent of the Legislature. Doing so does not interfere with the protections given employees under the City's merit system; instead, it complements them.[13]

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[13]See Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, where the Supreme Court found that the authority of the State Personnel Board to enforce the merit system as provided for in the California constitution did not preclude or conflict with the authority granted PERB under the State Employer-Employee Relations Act. It found that the two boards served different, but not inconsistent, purposes and upheld PERB's jurisdiction.

ORDER

For the above reasons, we find that the Public Employment Relations Board has jurisdiction over the unfair practice complaint in Case No. SF-CE-884. We therefore AFFIRM the administrative law judge's denial of the motion to dismiss and REMAND the complaint to the administrative law judge for a hearing on the merits of the complaint.

Members Morgenstern and Craib joined in this Decision.

Chairperson Hesse's Dissent begins on page 21.

Member Porter's Dissent begins on page 35.

Hesse, Chairperson, dissenting: The issue of PERB's jurisdiction over certain classified employees of the City and County of San Francisco (San Francisco) is a novel one. Although this Board has ruled on cases that dealt with various other community college districts,[1] and although it has occasionally ruled on cases involving a district with a merit system,[2] the Board has never addressed the issue of whether the classified employees of the San Francisco Community College District (SFCCD) are under our jurisdiction.[3]

San Francisco's political structure is unlike any other in California, due to the identical boundaries of the city and county. Further setting San Francisco apart from other cities and counties is the fact that this combined city and county was established by charter. California courts have long acknowledged that a municipal government established by charter has certain rights of self-governance granted under the California Constitution that are not available to general law municipalities.[4] San Francisco is unique in that it is the

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[1]See, e.g., Mt. San Antonio Community College District (1982) PERB Decision No. 224.

[2]See, e.g., Sonoma County Board of Education v. PERB (1980) 102 Cal.App.3d 689.

[3]This is in contrast to the certificated unit, which has had a collective bargaining relationship since at least 1978. Statutorily, the certificated unit is not covered by the Education Code provisions at issue here, since, obviously, certificated employees are not governed under merit systems.

[4]Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296.

only chartered, combined city/county government in California.

As part of its charter, San Francisco established a civil service commission to oversee its merit system and to administer its employment policies and practices.[5] In addition, San Francisco is under the jurisdiction of the Myers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. San Francisco, as the employer, negotiates memoranda of understanding (MOU) with various unions under the auspices of that act.[6]

In this unique setting, Service Employees International Union, Local 390/400 (SEIU) was recognized by San Francisco pursuant to the MMBA as the exclusive representative of certain employees, including custodians (TR, pg. 11). As the exclusive representative, the union has negotiated a MOU with San Francisco. When Mr. Barnes (Charging Party or Barnes) was hired by San Francisco as a custodian, he was hired under the auspices of the Civil Service Commission, and he became subject to the memorandum of understanding negotiated by SEIU under the MMBA.[7]

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[5]Also as part of the charter, the San Francisco Unified School District and the SFCCD were created.

[6]Due to a charter provision enacted in 1976, the city cannot negotiate wages per se. Those are established by the Civil Service Commission. But see footnote 9, infra.

[7]Charging Party's own pleadings to this Board note that custodians in general are classified by the City and County of San Francisco, and can be assigned to any one of several locations within the city and county. In other words, after

That Barnes is an employee of the city and county rather than the community college district is apparent from a number of factors. He can be transferred to any other department within the city and county, subject only to the chartered merit system rules. Discipline that is imposed upon the custodians is done so pursuant to civil service rules. Indeed, Barnes, after his "termination" by the SFCCD, continued to be an employee of the City and County of San Francisco. (Union's brief to the hearing officer regarding jurisdiction at pg. 7.)

Charging Party concedes that he is an employee of the City and County of San Francisco. As noted before, such an employment relationship brings him under the protection of the MMBA. He further argues, however, that he is also an employee of the SFCCD and, as such, also comes under the jurisdiction of PERB through its administration of EERA.

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being hired, a custodian can be assigned to work at city hall, the county hospital or even the SFCCD. Transfers from one department to another are strictly civil service matters. If a custodian is assigned to the SFCCD, in its position as a department of the City and County of San Francisco, the SFCCD has the right to assign the custodian to any particular campus. This is akin to a custodian being assigned to San Francisco General Hospital, and the hospital itself assigning the custodian to work in a particular building in that facility.

Although Barnes is the only named charging party in this proceeding, we note that his legal counsel also represents SEIU and appears to argue as well on behalf of SEIU's alleged rights to negotiate under EERA. All parties assume, as does the majority opinion, that bringing Barnes within PERB's jurisdiction would likewise extend PERB's jurisdiction to his representative, thereby according all the EERA-created statutory rights to SEIU. Indeed, we know of no precedent nor legal basis that would limit the jurisdiction of EERA, once granted, solely to the issue in the present case.

Thus, he argues, he has a "dual employer." The ALJ appropriately recognized that neither PERB nor the National Labor Relations Board (NLRB) have used this term, but rather, generally use the term "joint employer." The ALJ specifically found that Charging Party did not intend "dual employer" to be synonymous with "joint employer." No doubt this conclusion was reached because the relationship between SFCCD and San Francisco does not meet the NLRB standard for joint employers.

The majority opinion, however, adopts the position that San Francisco and SFCCD are joint employers. The majority opinion cites cases decided under the National Labor Relations Act (NLRA), in which the NLRB was asked to find a "joint employer" relationship between two employers that are both subject to the same act. Here, however, two statutes are involved, EERA and MMBA, and thus finding of a joint employer relationship will impose two complete statutory schemes on one group of employees.

Furthermore, even assuming SFCCD and San Francisco were subject only to one act, the majority opinion ignores the NLRB's test for finding a joint employer relationship. Under the NLRA, a joint employer relationship will be found when a secondary employer "is in a position to influence the labor relations" of the primary employer.[8] Under Barnes' own argument, the primary employer is the City and County of San

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[8]Thriftown, Inc. (1966) 161 NLRB 603; David Gold and Harvey Tesler (1965) 155 NLRB 295.

Francisco. Whether SFCCD would become a joint employer under NLRB standards would depend on the influence it has over the labor relations of San Francisco. According to this record, aside from making the work assignments of the custodians, SFCCD apparently has no influence over San Francisco's labor relations. Although it can initiate discipline, it does so only according to the MOU and the rules of the civil service commission. There is no evidence that SFCCD has any authority independent of those rules and regulations of the city and county to hire, fire or discipline employees. Certainly it has no authority to negotiate working conditions - that is permitted only to the city and county under the MMBA. Wages and benefits are not bargained at all, currently even by San Francisco under the MMBA. They are set by the Civil Service Commission.[9] Therefore, it cannot be concluded that SFCCD has any meaningful influence over the employee relations of the City and County of San Francisco.

The majority opinion also relies upon Greyhound Corporation Inc. (1965) 153 NLRB 1488. In that case the NLRB confronted

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[9]Certain subjects of bargaining are not negotiable due to the charter provisions. (See San Francisco Fire Fighters, Local 798 v. Board of Supervisors of the City and County of San Francisco (1979) 96 Cal.App.3d 538.) A recent case decided by the California Supreme Court indicates that, despite that decision, subjects may be negotiable within the framework of the merit system, but that the statute that governs the negotiability is the MMBA. (See People ex rel. Seal Beach Police Officers Association v. City of Seal Beach (1984) 36 Cal.3d 591.)

the issue of whether the employees of an independent contractor (Floors, Inc.) were also employees of the corporation to which the independent contractor provided services (Greyhound, Inc.). In finding that a joint employer relationship existed, the NLRB noted that the Floors' employees had originally been employees of Greyhound and were transferred to the Floors' payroll at a later date. Furthermore, the secondary employer (Greyhound) exercised control over all aspects of work assignment and evaluation. More importantly, Greyhound dictated to Floors the straight-time and overtime wages to be paid to the Floors' employees, setting a cap on the allowance of overtime. Finally, Greyhound specified the number of employees to be assigned for each shift.

We find no such evidence of dual control over the custodians in this case. The "secondary employer" (SFCCD) has no influence on wages or benefits. Mere assignment of tasks is not, in and of itself, enough to make SFCCD an employer of classified employees in this situation. Perhaps if other factors were present, we might conclude differently. But no evidence was presented that leads to any conclusion but that Barnes is subject only to MMBA and civil service laws, not EERA.

Further, we foresee tremendous confusion should PERB assert jurisdiction over these classified employees. For example, if SFCCD is the "employer" under EERA, it will presumptively have an obligation to comply with all of EERA's provisions, including the duty to bargain. The majority opinion attempts

to deal with the issue of SFCCD's bargaining duty by citing the MOU between San Francisco Unified School District (SFUSD) and SEIU, the representative of SFUSD's classified employees, despite the charter constraints. We do not believe that the actions of the unified school district are binding upon SFCCD.[10]

The positions of both Charging Party and SFCCD demonstrate that there is very little authority vested in SFCCD to negotiate over any of the subjects within scope. In fact, Charging Party takes the position that the negotiation obligation would extend only to those subject areas in which SFCCD has discretion and which are not already encompassed by the existing MOU. Cited examples include transfers within the district and video display safety conditions. We find no precedent whatsoever for the proposition that an employer is subject to part of EERA but not all of it, nor that an employer can be held accountable under both MMBA and EERA. This, however, is the unavoidable result of the majority opinion. If SFCCD can be held liable under EERA section 3543.5(a), then it should have the concomitant right and obligation to bargain over all subjects of representation - an obligation it cannot, in fact, fulfill.

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[10]Furthermore, we note that the jurisdictional problem has never arisen before, probably because the same union represents all custodians who are employees of San Francisco, no matter where they are assigned to work.

The sole statutory support advanced by the majority opinion for the position that SFCCD is also Barnes' employer depends on a construction of a single word used in a very limited context in the Education Code. Section 88137 grants SFCCD the right to fix the duties of "its" employees. The majority opinion asserts that use of the word "its" denotes a legislative recognition of the employer-employee relationship between SFCCD and classified employees who perform services for the district. That word, combined with a legislative failure to specifically exempt SFCCD from the provisions of EERA, constitutes sufficient legal authority, according to the majority opinion, to extend PERB's jurisdiction to those classified employees. A careful reading of those statutes, however, leads to the inevitable conclusion that SFCCD is not the employer of Barnes.

In looking at the Education Code, we note that classified employees of SFCCD have a unique status under the law. The first paragraph of section 88000 provides that a multitude of Education Code provisions apply to both merit and non-merit school districts. When those provisions are examined, virtually <u>every</u> statute governing employment of classified employees, except those pertaining to the merit system, is included. According to the second paragraph of section 88000, however, these same provisions do <u>not</u> apply to non-certificated employees of SFCCD.

The question becomes, then, "What provisions are not covered under the first paragraph, and thus would apply to SFCCD?" Of those articles not specifically excluded, the only article of any substance is Article 3, governing merit districts. Within that article, however, is section 88137, which states that as long as San Francisco's charter provides for a merit system, classified employees of the district "shall, in all respects, be subject to, and have all rights granted by, such [charter] provisions." (Section 88137, emphasis added.) The only exception is that the district has the right to fix duties.

As a result of the combined reading of sections 88000 and 88137, the only statutory power granted to SFCCD with regard to "its" classified employees is the right to assign duties. The employees themselves enjoy none of the Education Code benefits and protections given to all other classified school employees in California. Rather, they must look to San Francisco's charter and civil service rules. Accordingly, PERB may not grant the District any other authority over those employees, absent such grant of authority in the San Francisco charter. The fact that the district may initiate discipline[11] of an

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[11]Even on this issue, the record is not clear that Barnes' supervisors are employed by SFCCD, any more than is Barnes himself. The District's post-hearing brief asserts that the supervisors are also under the civil service system, and are within a county-wide unit of supervisors and managers and are, themselves, subject to an MOU negotiated with San Francisco. The Charter offers some support for this assertion,

employee assigned to work in the district does not alter the essential relationship between the employee and the county, particularly when the discipline is imposed pursuant to civil service rules and the employee has the right pursuant to the MOU to a binding arbitration hearing before a neutral arbitrator. If the arbitrator's decision is adverse to the employee, that decision is binding with respect to the Civil Service Commission, which then may determine whether the employee continues to be eligible for city/county employment. In this case, the arbitrator found there was cause to terminate Barnes' employment with SFCCD. The Civil Service Commission then ruled that Barnes is still eligible for employment in the city and county and he is now working for the Department of Health.

The majority opinion also finds no legislative intent to exclude SFCCD from the provisions of EERA, focusing on the definition of "public school employer" and finding that SFCCD meets that definition. The focus, however, should be on Barnes - not the District. EERA defines "public school employee" as "any person employed by any public school employer . . ."

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and there is no explicit evidence to the contrary. For example, the letter informing Barnes that SFCCD was "bringing charges" was signed by a "senior departmental personnel officer," Mori Noguchi. (Charging Party Exhibit 7) If Barnes' supervisors, who initiated the discipline, are employed by San Francisco, and if the only role of the District in initiating his discipline was to bring the charges through these supervisors, then it can hardly be said the District, in the sense of the governing board, initiated the discipline.

(Government Code section 3540.1(j) emphasis added.) The facts in the record demonstrate that Barnes is not employed by the district, but rather is an employee of San Francisco, and thus not a public school employee within the meaning of EERA.

For example, Charging Party Exhibit 4 is an agreement dated February 7, 1984, between SFCCD and United Public Employees, Local 390/400,. In that agreement, SEIU

> agrees that all its represented employees located at San Francisco Community College District work sites and locations are employed by the City and County of San Francisco, not the Community College District. (Emphasis added.)

This agreement, signed by representatives of both SFCCD and Local 390/400, states that all employees represented by Local 390/400 have all rights, privileges and obligations of civil service employees; that the District is, for all purposes involving civil service employees, a department of the City and County; that SFCCD's Chancellor is a Department Head and Appointing Authority within the statutory scheme established by the City and County; and that these employees are covered under the MOU between the City and County and SEIU Locals 250, 390/400, and 535. (Charging Party Exhibit 1).

On the other hand, there is no evidence that the school district governing board had any involvement whatsoever with Barnes. There was no evidence the board took any formal action to either hire him or fire him, or was even involved in the

decision. Rather, authorization for Barnes' suspensions came from the Chancellor, who as indicated in the agreement discussed above (Charging Party Exhibit 4), was considered a department head and appointing authority within the statutory scheme established by the City and County of San Francisco. (Tr. 71)

Therefore, while SFCCD may technically meet the definition of "public school employer," Barnes, and other similarly situated county employees, do not meet the definition of "public school employees" and are therefore not within PERB's jurisdiction.

Nor are we persuaded to adopt a different conclusion by the letter from the SFCCD to this agency dated March 13, 1986, "recognizing" United Public Employees, SEIU, Local 790 under EERA. No evidence or testimony in this case has properly been admitted such that we may take judicial notice. Furthermore, in jurisdictional matters, parties cannot, by their action of recognition, create jurisdiction where none exists under the statutes.

In its holding, the majority opinion fails to consider the various statutory schemes as a whole, nor does it come to terms with the consequences that will inevitably flow from its decision. As was stated by the court in Cory v. Poway Unified School District (1983) 147 Cal.App.3d 1158, 1168:

> In applying the relevant statutes to these facts, we are mindful of our duty to achieve a result that is reasonable and comports with the apparent purpose and intent of the Legislature. [Citations.] Where uncertainty exists, consideration should be given to the consequences flowing from a particular interpretation. The apparent purpose of the legislation will not be sacrificed to a literal construction. [Citations.] A practical construction is preferred to one that is technical and is required when the latter would lead to mischief or absurdity. [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]

In the present case, the purposes of the MMBA and EERA are virtually identical, in that both statutory enactments seek "to promote the improvement of personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of public [school] employees to join organizations of their own choice and be represented by such organizations in their [professional and] employment relationships" with their employers. (Gov. Code secs. 3500 and 3540.) Further, EERA provides,

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements. (Gov. Code sec. 3540.)

The intent of these provisions is to create a uniform method by which public employees may exercise their statutory rights. A refusal by PERB to exercise jurisdiction under EERA does not leave Barnes without a remedy. He can bring an action under MMBA, Government Code section 3506,[12] and he can bring a grievance action under the MOU, which likewise prohibits discrimination for union activities, and culminates in binding arbitration. (Charging Party Exh. 1.)

In short, a harmonious reading of the Education Code, the MMBA and EERA, and the charter and civil service rules of San Francisco, compels the conclusion that the Legislature put SFCCD in a status apart from other school districts, and recognized the unique geopolitical characteristics of San Francisco. In so doing, the Legislature intended to accord San Francisco the ability to have one unified and cohesive labor relations structure under its civil service system. That purpose is not furthered by injecting an entirely new statutory scheme into what appears to be a stable relationship.

I reject the majority's decision as it ignores the reality of San Francisco's unique status as a chartered city and

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[12]Government Code section 3506 states:

> Discrimination Prohibited.
>
> Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against public employees because of their exercise of their rights under section 3502.

county. The plethora of questions raised by the majority's decision may haunt this Board for years to come.

Porter, Member, dissenting: I join Chairperson Hesse's dissent and write separately, simply to further emphasize certain points.

The issue involved in this case concerns PERB's jurisdiction over the controversy in question and, ultimately, its jurisdiction over the labor relations between San Francisco Community College District (SFCCD) and the San Francisco City and County (City and County) classified employees who are assigned to work there. Jurisdiction is a broad concept, and resolution of this case cannot be reduced to the two simple primary premises of the majority opinion, i.e., (1) use of the phrase "fix the duties of its employees" in Education Code section 88137 denotes a measure of authority and control by SFCCD over the classified employees sufficient to make those employees "public school employees," and (2) legislative failure to specifically exempt SFCCD from EERA indicates a legislative intent that such employees come under the Board's authority.

Jurisdiction has been described by the California Supreme Court in the leading case of Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, in which the Court stated:

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation]. . . . But in its ordinary usage, the phrase "lack of jurisdiction" is not limited to these fundamental situations . . . . [I]t may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

(Id. at 288.) The Court later quoted a previous decision in which it had said,

> The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject matter or question presented. In this sense, the commission undoubtedly had jurisdiction in this case, and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed. [Citations omitted.]

Id. at 290, citing Spreckels S. Co. v. Industrial Accident Commission 186 Cal. 256, 260 [199 Pac. 8, 9]. Thus, the Board must first find that there is jurisdiction over the parties and the subject matter and, finding that, must also determine that the relief sought is within PERB's jurisdiction to grant.

Turning to the question of jurisdiction in this case, then, the necessary parties involved in this matter include the

Charging Party, SFCCD and, in addition, the City and County. The City and County is a necessary party, in that it is undisputedly the employer of Charging Party, a fact conceded by Charging Party himself. Charging Party was suspended and terminated pursuant to the civil service rules and procedures of the City and County; both the termination hearing and its binding effect were pursuant to the civil service rules and the charter of the City and County; Charging Party's right to have the termination decision based solely on merit was created by charter, and his right not to be discriminated against for participation in union activities was granted by both the MOU negotiated between the City and County and SEIU under the Meyers-Milias-Brown Act (MMBA) and by the MMBA itself; the City and County granted his request to transfer to a different department of the City and County and changed his job classification in the process; and the City and County's Civil Service Commission ruled him ineligible for reemployment in SFCCD. Given these factors, it is clear the City and County must be a participant in these proceedings. Nevertheless, PERB has no jurisdiction over the City and County, as it is a local agency under the MMBA, and not a school district.

Additionally, as discussed in the Chairperson's dissent, Barnes does not meet EERA's definition of "public school employee" since he is "employed by" the City and County. Absent a more sufficient showing of Barnes' employment by SFCCD, PERB has no jurisdiction over the very person bringing

this action. It requires no further discussion to reach the conclusion that, lacking jurisdiction over two of the three necessary parties, jurisdiction over the third party is irrelevant.

PERB unquestionably has general subject matter jurisdiction over claims that a public school employer discriminated against a public school employee because of the employee's exercise of rights protected under EERA. Since Barnes is not a public school employee, he does not have any protected rights under EERA. Consequently, he is attempting to vindicate rights protected under MMBA and the charter of the City and County. Thus, PERB has no subject matter jurisdiction.

Finally, as to jurisdiction to accord relief, the customary remedy for a claim of discriminatory suspension/termination is a cease and desist order, along with reinstatement and back pay. As discussed above, however, there has been a final, binding civil service hearing and decision, and the Civil Service Commission has ruled Charging Party ineligible for future employment in SFCCD. Lacking that eligibility, SFCCD is not empowered to reinstate Barnes. Similarly, he is paid by the City and County, even when assigned to SFCCD. SFCCD could not pay him back pay, and clearly PERB could not order the City and County to do so. The cease and desist remedy, even if directed solely at SFCCD, would have little meaning in this case, given Charging Party's ineligibility for future employment in SFCCD. Thus, the Board is without jurisdiction

to render any kind of meaningful remedy, and hence is without jurisdiction. (Corona Unified Hospital District v. Superior Court (1964) 61 Cal.2d 846, 852; Fortenberry v. Superior Court (1940) 16 Cal.2d 405, 407-08.)

Assuming arguendo the majority opinion is correct in its conclusion that PERB has jurisdiction, the question that should then be confronted is whether it would further the purposes of EERA to assert that jurisdiction in this case. As stated in Government Code section 3540, the purpose of the Act is "to promote the improvement of personnel management and employer-employee relations within the public school systems . . . ," but nothing contained in EERA

> shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements. (Emphasis added.)

In this case, the record shows that SFCCD is a department of the City and County (Charging Party Exh. 4) and, as such, is subject to the City and County Charter, the Employment Relations Ordinance, the MOU negotiated by the City and County and SEIU, and the Civil Service Commission Rules. These four documents provide a very thorough method of administering employer-employee relations, and give to Barnes and similarly situated employees all of the rights and protections afforded

to other public school employees under EERA. Indeed, Barnes has more protection than classified employees of other school districts, in that his termination from the district was determined by a binding hearing officer decision (cf. United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District (1984) 162 Cal.App.3d 823 [209 Cal.Rptr. 16]; he had the right to argue, and did, in fact, argue that the recommendation for termination was based on discrimination or retaliation for his involvement in protected union activites[1]; and following an adverse decision, Barnes nevertheless continued to be employed by the City and County, albeit in a different department, but one to which he had previously sought and obtained a transfer.

If this were a case of an employee lacking protection in the absence of PERB's assertion of jurisdiction, asserting jurisdiction would be understandable. However, such is not the case here, where the employee already enjoys all of the rights and protections afforded employees generally under EERA. Therefore, no purpose is served by PERB asserting jurisdiction. Indeed, assertion of jurisdiction would contradict the purpose of the MMBA, the City and County's Employee Relations Ordinance

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[1]I would take official notice of Hearing Officer Alonzo Field's binding decision in which Barnes raised retaliation as a defense. This decision is part of the official record of the Civil Service Commission and, therefore, may appropriately be the subject of official notice. See, Agostini v. Strycula (1965) 231 Cal.App.2d 804, 806.

and EERA itself, to the extent the purpose of those enactments is to provide a uniform basis for employees to exercise their rights to representation. As a result of the majority opinion, City and County employees will not have a uniform basis, since those employees who happen to be assigned to SFCCD at any given time will enjoy an entirely new and additional layer of employment relations provisions. Obviously, assertion of jurisdiction is clearly unwarranted, given the facts in this case.

The majority opinion cites Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 as authority for its conclusion that providing Barnes with a forum, through PERB, for redress of alleged unfair practices does not interfere with the protections given employees under the City's merit system. However, the question faced by the Court was the constitutionality of SEERA on its face. The Court merely held that the potential overlap in jurisdiction between PERB and the State Personnel Board provided no basis for finding the applicable provisions of SEERA unconstitutional on their face. Id. at 200. This case, however, presents numerous distinctions that render Pacific Legal Foundation of dubious relevance. For example, the City and County has an Employee Relations Ordinance that incorporates the MMBA and makes those terms specifically enforceable by the Civil Service Commission. The MMBA is likewise applicable in that Barnes is an employee of the City

and County. The MOU negotiated under the MMBA[2] prohibits discrimination on the basis of an employee's participation in protected activity, and provides for binding arbitration. Thus, Barnes already has at least three forums for redress of the alleged unfair practice asserted in this case. Adding a fourth forum, with the added potential for conflicting resolutions, can hardly be said not to interfere, especially considering the stated purposes of uniformity. Additionally, this case does not present a question in the abstract but, rather, involves an actual situation in which Barnes has already litigated the issue of discrimination for protected activity and has received an unfavorable ruling, binding on himself, the SFCCD and the Civil Service Commission. The Civil Service Commission has acted on the decision, ruling Barnes ineligible for future employment in SFCCD. Assertion of jurisdiction can do nothing but conflict with the binding nature of those decisions.

In conclusion, I would dismiss this action, on the ground that PERB lacks jurisdiction or, alternatively, should refrain from exercising it.

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[2]Barnes himself served as a member of the negotiating team that negotiated that MOU, and was a signatory to the agreement.