STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	)	
Employee Organization,	)	Case No. S-OS-61-S (S-SR-18)
and	)	
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	Administrative Appeal PERB Order No. Ad-156-S
Employer.	)	June 27, 1986

Appearances: Kanter, Williams, Merin & Dickstein by Mark E. Merin for Communications Workers of America, AFL-CIO; Talmadge Jones and Lester L. Jones, Attorneys for State of California, Department of Personnel Administration.

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

DECISION

HESSE, Chairperson: This decision arose out of a request by the Communications Workers of America, AFL-CIO (CWA) that the Public Employment Relations Board (PERB or Board) not conduct an organizational security (or agency fee) election among the members of State of California Bargaining Unit 18, Psychiatric Technicians. The state employer, Department of Personnel Administration (DPA), requested that PERB proceed with the election.

PROCEDURAL HISTORY

DPA and CWA are signatories to a memorandum of understanding (MOU) covering employees in Unit 18 (psychiatric

technicians). The term of the agreement is July 1, 1985, through June 30, 1987, although there is currently pending a decertification vote that would unseat CWA as the exclusive representative. The MOU specifically calls for an agency fee election to be held either 90 days after certification of the results of the decertification election, or, no later than July 1, 1986. The parties agreed that PERB should conduct the election, or if it refused to, for another, mutually acceptable neutral party to conduct the election.

On February 3, 1986, DPA wrote to Chief of Representation Janet Caraway (Caraway) concerning an agency fee election that both CWA and DPA wished PERB to conduct. PERB agreed to conduct the election.

Sometime in February or March 1986, CWA approached DPA about postponing the agency fee election until the decertification results had been certified. After an exchange of correspondence between the two parties, DPA and CWA agreed to proceed with the election and signed a Consent Election Agreement, on April 22, 1986, specifying the terms and procedures of the election. PERB's representative, Caraway, also signed after the phrase "Approved." CWA and PERB signed a fee agreement on April 21, 1986, under which CWA promised to pay PERB for PERB's conducting the election pursuant to the election agreement. CWA tendered a check for six thousand dollars as an initial payment, and PERB then commenced the election preparations.

On April 29, 1986, CWA wrote to Caraway, asking that PERB "cease all preparations for such election and that PERB not hold this election until unfair practice charges relating to the election are resolved or until further agreement between the parties." On that same day, CWA stopped payment on its April 21 check, but CWA offered to pay PERB for any expenses incurred up to April 29.

On May 2, DPA responded to CWA's request by communicating to Caraway that the election should proceed because (1) PERB had a contractual and regulatory duty to conduct the consent election, and (2) the equities demanded that CWA live up to the several signed agreements that called for the agency fee election to be held before July 1. CWA responded on May 6, 1986, raising the same arguments it made in its April 29 letter, and arguing that PERB had no legal duty to hold the election.

On May 8, the Board itself ordered its agents to proceed with the election. Through error, a letter from Caraway, also dated May 8, was sent to DPA and CWA informing the parties that PERB would not proceed with the election. This erroneous letter was not discovered until May 9, when a Board agent called CWA and DPA to inform them of the Board's decision.

On May 13, 1986, CWA filed for an Alternative Writ of Mandate and a Temporary Restraining Order (TRO) in superior court, based on the argument that Caraway's letter was an administrative determination that was subject to appeal. The

superior court issued the Alternative Writ and a TRO on May 15, directing PERB to reinstate Caraway's letter. The Board did so on May 16 and DPA appealed the letter to the Board on the same day. CWA filed a timely response on May 27.

DISCUSSION

The Board, on May 8, 1986, instructed its agents to proceed with the election. That instruction, however, was nullified by the superior court's decision on May 15, directing the Board to treat Caraway's letter as an administrative decision, appealable under PERB regulation. In the interests of resolving this matter expeditiously, the Board has complied with the judge's order, and has duly considered this dispute, de novo, after the parties briefed the issue to the Board. Based on the arguments made before us by the parties, we now overrule Caraway, and order that the agency fee election proceed, for the reasons set forth below.

1. Equitable Reasons to Proceed

PERB is authorized by statute to take action "as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes [of the Act]."[1] PERB's duty extends to insuring that employees are not forced to participate in the activities of a union by payment of fair share fees, except pursuant to participation authorized by an

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[1]Government Code section 3541.3, incorporated into the State Employer-Employee Relations Act (SEERA) at section 3513(g).

MOU.[2] CWA and DPA agreed that fees could be deducted from employee paychecks for the period July 1, 1985-June 30, 1986, without benefit of approval by election of a majority in the unit. In exchange for receiving these funds for a year, CWA agreed that a fee election would be required to authorize deductions after July 1, 1986. Having received the benefit of its bargain, CWA is obligated to follow through with the quid pro quo, i.e., the agency fee election.

A second equitable reason favoring proceeding with the election is that the unit employees have no formal representation in these proceedings, so, mindful of the dictates of the U. S. Supreme Court in Chicago Teachers

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[2]SEERA section 3515 reads, in relevant part:

> 3515. RIGHT TO JOIN OR PARTICIPATE IN ACTIVITIES OF EMPLOYEE ORGANIZATIONS: SELF-REPRESENTATION
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> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to . . . a fair share fee provision, as defined in subdivision (j) of Section 3513, pursuant to a memorandum of understanding.

See also Chicago Teachers Association v. Hudson (1986) ___ US ___.

Association v. Hudson,[3] PERB must protect the employees' statutory and contractual right to decide whether their agency fee obligations should continue. PERB is in the best position to do just that by going forward with the election.

Third, PERB should proceed because CWA does not come to the Board with "clean hands." CWA admits that there is a dispute as to whether it has breached the MOU, and acknowledges that DPA could file suit in superior court against CWA for breach of the consent agreement as well as the MOU.[4] Whether the acts by CWA are ultimately judged by such a court to be a breach, or to be justified by some action on the part of DPA is not for PERB to decide. But, the Board does have the duty to promote the resolution of labor relations problems by negotiation. When such resolution is not possible, PERB encourages the parties to abide by an agreement while seeking redress before the Board.

Here, CWA negotiated an agreement but has failed to carry through its obligations, thereby denigrating the negotiation process. Furthermore, CWA had available to it the option of going forward with the election, and then challenging the ballots if necessary.[5] This would result in the least amount

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[3](1986) ___ U.S. ___ .

[4]We note that on June 20, 1986, DPA filed a complaint against CWA for declaratory relief, interpleader, and accounting, and has alleged that CWA breached the MOU.

[5]The election agreement provides for ballot challenges that are outcome determinative to be resolved by Caraway.

of disruption to the election and negotiation processes. But CWA has chosen to deny its obligations under the MOU and the consent agreement. To permit a party to the negotiations process to abrogate its responsibilities, when the same result could have been achieved by less intrusive means, is manifestly unfair.

CWA alleges that the election should not proceed because (1) DPA's actions have tainted the election atmosphere; and (2) the confusion regarding the identity of the exclusive representative eliminates the possibility of a fair election. As to CWA's concern about the election atmosphere, we note that CWA has already availed itself of the proper forum to resolve such an allegation by filing an unfair practice charge. Because the conduct by DPA at issue preceded the signing of the election agreement, and for the reasons discussed herein, we see no reason to take the unusual step of suspending the election pending the resolution of the charges.

Finally, CWA's concerns about the "confusion" that would result if an election would be held are unfounded. The delay in certification is due to CWA's challenges to that decertification election. The results will not be final for several months at best. It would be patently unfair to the unit members if CWA's delay of the representational election could serve as an excuse to delay the fee election. The fee election ballot clearly states that the agency fee would be paid to CWA, not to the decertifying union. Indeed, the name

of the decertifying union does not appear on the ballot. Should CWA produce any evidence that the employees cannot make an informed choice in the fee election, it can request that the ballots be impounded. But inchoate fears should not justify a request that employees be stripped of their statutory and contractual right to vote on fee deductions.

On the other hand, failure to proceed with the election may well result in confusion on the issue of whether the employer may lawfully continue to deduct fair share fees after July 1, 1986, or whether it has a legal obligation to continue to make the deductions.[6] The most sensible way to eliminate any confusion over the legality of deductions after July 1, 1986, is to proceed with the election.

2. Contractual, Legal, and Statutory Reasons to Proceed[7]

DPA and CWA agreed in their MOU that PERB should conduct an election by July 1, 1986.[8] Thereafter, DPA and CWA entered into a consent election agreement under SEERA section

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[6]The employer's agent, the Controller, can make salary deductions for agency fees only as authorized by statute. SEERA section 3515.7 authorizes those deductions when the parties have entered into an MOU providing for such deductions. That authorization is in doubt past July 1, 1986, and thus the legality is in question for deductions made past that date if no election is held.

[7]Members Craib and Burt would overrule Caraway and authorize the election on equitable grounds because an election "effectuates the purposes of [SEERA]." (Gov. Code sec. 3541.3.) Members Craib and Burt do not agree that an election is compelled by contract, statute or regulation.

[8]The MOU between CWA and DPA sets forth in relevant part:

3515.7(d),[9] and PERB approved the agreement under Regulation 32720.[10] PERB and CWA then entered into a contract on April 21, 1986, in which PERB agreed to conduct the election pursuant to the MOU and the consent election agreement between DPA and CWA. In exchange, CWA would compensate PERB for the expenses of the election.

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10. Agency Shop Fees Election

a. An Agency Shop Fees Election shall be held no later than ninety (90) days after certification of the exclusive representative by the PERB but in no event later than July 1, 1986.

Agency Shop shall be in effect from the date of this Agreement until the election is held at which time it shall terminate unless the majority of those voting elect to continue Agency Shop.

b. The Fair Share Election shall be conducted pursuant to the following:

. . . . . .

(2) An Agency Shop Election shall be conducted by the PERB. However, if the PERB chooses not to conduct such elections, the Agency Shop Election shall be conducted by a State agency or a private firm mutually selected by the State and CWA.

[9]SEERA section 3515.7(d) reads, in relevant part:

> Notwithstanding this subdivision, the state employer and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on a fair share fee provision.

[10]See footnote 12 and accompanying text.

While PERB cannot enforce the MOU between the parties, well established contract law gives PERB the right to proceed under the contract it has with CWA to conduct the election. Although one party to this bilateral contract (CWA) has indicated it no longer wishes PERB to hold the election, such a breach does not strip PERB of its ability to proceed. The breach by CWA allows PERB the right either (1) to refuse to proceed or (2) to hold the election, and pursue damages against CWA if it wishes to. This Board believes that it should proceed because the third party beneficiaries, Unit 18 employees, are best served by the holding of the election, and the purposes of SEERA are best effectuated by holding such an election.

State employees have the right to refuse to join or participate in the activities of an employee organization, except that employees may be required to pay a fair share fee "pursuant to a memorandum of understanding." (SEERA sec. 3515.)[11] In this case, the MOU calls for an agency fee election. To deny the employees the chance to vote in a fee election would not only violate the MOU, but would result in a violation of section 3515 by requiring the employees to participate in union activities, through use of the agency fee, in spite of the lack of authorization for such usage after July 1, 1986.

Therefore, through statutory interpretation, PERB is

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[11]See footnote 2, supra, for text of section 3515.

authorized to take the action necessary to implement the protections of section 3515, specifically, to hold the election as originally agreed to.

PERB regulations may also be relied upon to support a decision that the election proceed. The fee agreement between CWA and PERB specifically states that the election will be held "in accordance with the terms of [the consent agreement] and applicable PERB procedures." (Emphasis added.)

Regulation 32720 mandates, "An election shall be conducted when the Board . . . approves an agreement for a consent election pursuant to . . . Division 3 Chapter 1 [SEERA regulations, including Regulation 40430, which provides for an agency fee election pursuant to an MOU]."[12]

The parties can agree to the mechanics of an election, as was done here, pursuant to Regulation 40430:

> Notwithstanding the provisions of this Article, the employer and the exclusive representative may mutually agree upon alternative procedures regarding a vote on a fair share fee provision pursuant to Government Code section 3515.7(d).

Here, PERB signified its approval of the consent election

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[12]PERB Regulation 32720 reads:

> 32720. Authority to Conduct Elections. An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election, pursuant to the provisions of Division 2, Chapters 1 and 2; Division 3, Chapter 1; or Division 4, Chapter 1 of these regulations. (Emphasis added.)

by approving the contract between CWA and DPA that set out the terms and conditions of the election. No events have transpired since that document was signed that would require the withdrawal of PERB's approval.

Thus, in addition to the equitable reasons in favor of proceeding, PERB has contractual, statutory, and regulatory reasons to proceed with the election.

ORDER

The letter of Janet Caraway of May 8, 1986, is hereby OVERRULED, and the Board ORDERS that the Bargaining Unit 18 agency fee election proceed.

Members Burt, Porter, and Craib joined in this Decision.

Member Morgenstern's dissent begins on page 13.

Morgenstern, Member, dissenting: Contrary to my colleagues, I find that the chief of the Board's representation division acted appropriately in declining to conduct the fair share fee election under the circumstances in this case.

PERB Regulation 32720[1] sets forth the circumstances under which the Board is permitted to conduct an election. It provides, in pertinent part:

> Authority to Conduct Elections. An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election, . . .

Since no order of the Board has issued directing the instant election, the Board's exclusive authority to conduct this election is based on the mutual consent of the parties.

At this juncture, however, one party to that agreement, the Communications Workers of America (CWA), has withdrawn its consent and has voiced an objection to our proceeding with the fee election. The first question in this dispute, therefore, is whether CWA should be permitted to withdraw from the previously agreed-to consent election agreement.

PERB Regulations are silent as to the parties' ability to withdraw from election agreements. The National Labor Relations Board (NLRB) specifically addresses the possibility of such an occurrence in its Casehandling Manual[2] and permits withdrawal

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

[2]NLRB Casehandling Manual, Part II, section 11098.

from consent election agreements but only under prescribed conditions. While PERB may wish to enunciate such a rule to cover future consent election situations, none currently exists and no standards have been enunciated. Thus, we have no basis for precluding CWA's withdrawal.

Given the above and absent any legal requirement that the Board proceed with this election, it is unwise to embroil the Board in what is, at its core, a contractual dispute between the parties. Moreover, if, as the majority posits at page 5, the parties' agreement sets July 1, 1986 as the cut-off date for "fees collected without benefit of election," then the equitable arguments to proceed with the election are irrelevant: the contract would prohibit the alleged inequity. Indeed, holding the election is unlikely to settle anything.

Under these circumstances and absent any statutory or regulatory authority to hold CWA to its agreement, I find a consent agreement that no longer reflects consent an insufficient basis to hold this fee election.