STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF CARSON, Employer, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 809, AFL-CIO, Petitioner.	Case No. LA-BR-2-M Administrative Appeal PERB Order No. Ad-327-M June 20, 2003

Appearances: Richards, Watson & Gershon by Amy Greyson, Attorney, for City of Carson; Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for American Federation of State, County and Municipal Employees, Local 809, AFL-CIO.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City of Carson (City) of a Board agent's administrative determination (attached). The American Federation of State, County and Municipal Employees, Local 809, AFL-CIO (AFSCME) filed a petition for Board review under PERB Regulation 60000[1] alleging that the City failed to follow its Employer-Employee Relations Resolution No. 85-107 (EERR) promulgated pursuant to the Meyers-Milias-Brown Act (MMBA)[2] in granting a unit modification petition. Under the unit modification petition, Professional Association (Association) proposed to transfer the Public Information Specialist

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

[2]MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

(PIS) classification from AFSCME's middle-management unit to the Association's professional employees' unit. AFSCME alleged that the petition was: (1) untimely; (2) did not follow the format required by the EERR; and (3) did not contain appropriate factual justification for the proposed modification. In the administrative determination, the Board agent found that: (1) the Board has jurisdiction over this dispute; (2) the applicable "open period" for petitioning for a unit modification under Article II, Section 10 of the EERR is that of the incumbent employee organization, and not of the petitioning organization; and, (3) the unit petition was not filed within the "open period" under Article II, Section 8 of the EERR because it was filed during the term of the memorandum of understanding (MOU) between the City and AFSCME, the incumbent organization. The Board agent thus concluded that the City's decision that the unit modification petition was timely filed was inconsistent with its own rules and ordered that the PIS be returned to AFSCME's middle-management unit.

We agree with the Board agent and thereby adopt the administrative determination as a decision of the Board itself. The Board addresses the issues raised in the City's appeal below.

DISCUSSION

Both the City and AFSCME acknowledge that this dispute involves whether, under the City's EERR, the Association may petition to transfer the PIS from AFSCME's bargaining unit to the Association's bargaining unit during the Association's open period. As a threshold issue, the City argues that the Board lacks jurisdiction over this dispute. Contrary to the City's contention, we conclude that the Board has jurisdiction over this dispute for the reasons that follow.

On March 1, 2001, the Association filed a petition to transfer two classifications, including the PIS, from the AFSCME bargaining unit to the Association's professional

employees' unit. This occurred during the open period in the Association/City MOU, but not during the open period in the AFSCME/City MOU.[3] By memorandum dated March 6, 2001, the City's Director of Human Resources, Ramona Lopez (Lopez), found the petition to be timely filed. By memorandum dated September 24, 2001, Lopez granted the petition for transfer of the PIS classification. AFSCME appealed the Lopez decision to the City Manager, Jerry Groomes (Groomes), who affirmed Lopez's decision. AFSCME then appealed the Groomes decision to the City Council, who on February 19, 2002, accepted the staff recommendation to affirm the decision to transfer the PIS to the Association's bargaining unit.

The Board finds that in the March 6 memo, by its own language, Lopez interpreted Article II Sections 8 and 10 of the EERR to find the petition timely filed. The Board agent found this interpretation of the City's rules to be in error. The City claimed that the Board agent improperly ruled on the propriety of the proposed unit modification under MMBA section 3507. 3.[4] However, we find that the Board agent properly determined that the City's decision did not comply with its own rules for unit determinations promulgated under MMBA

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[3]The MOU between the City and the Association was in effect from July 1, 1999 through June 30, 2001, and the MOU between the City and AFSCME, from July 1, 1999 through June 30, 2002.

[4]MMBA section 3507.3 provides, in pertinent part:

> Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

section 3507.[5] (MMBA section 3509(c).[6]) Under MMBA section 3509(a),[7] this issue is properly before the Board.[8]

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[5]Section 3507 provides, in pertinent part:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).
> (Emphasis added.)
>
> Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

[6]Section 3509(c) provides:

> The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

[7]Section 3509(a) provides:

> The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c).

[8]PERB Regulation 60000, which provides the mechanism for AFSCME to challenge the City's application of its local rules under MMBA sections 3509(a) and (c), states in pertinent part:

> (a) Any party to a determination by a public agency concerning unit determination, representation, recognition or elections may file a petition requesting the Board review the determination. Such a petition may only be filed within 30 days following exhaustion of administrative remedies available under the applicable local rules. A challenge to the validity of a local rule may not be filed under this section and may only be filed as an unfair practice charge pursuant to Section 32602 of these regulations.
> (Emphasis added.)

The Board next decides whether the City properly applied EERR Article II in determining that the Association timely filed its petition for unit modification. We agree with the Board agent that the City erred in its interpretation of EERR Article II.

The EERR, in Article II, section 10 provides that:

> Procedure for Modification of Established Appropriate Units. Requests by Exclusively Recognized Employee Organizations for modifications of established appropriate units represented by the Exclusively Recognized Employee Organizations may be considered by the Employee Relations Officer only during the open period specified in Section 6[9] of this Article II. (Emphasis added.)

EERR, Article II, section 8 provides, in pertinent part:

> A Decertification Petition may not be filed within one year after a valid election or during the term of, or the negotiations leading to, a valid Memorandum of Understanding except during an 'open period': the 30-day period commencing one hundred fifty (150) days and ending one hundred twenty (120) days prior to the termination date of a Memorandum of Understanding. A valid Memorandum of Understanding shall not serve as bar to the filing of a Decertification Petition for more than a three-year period. (Emphasis added.)

Both parties acknowledge that Article II does not specify which MOU open period applies in this situation. The City applied the Association's open period in order to find that the Association's petition was timely.

In applying the open period in the Association's MOU, the City states that its interpretation of its local rules is reasonable and thus the Board should defer to the City's interpretation. The City states that the Board agent improperly interpreted MMBA and

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[9]Both parties agree that the reference to EERR Article II, Section 6 is incorrect, and instead should refer to Article II, Section 8, which identifies the open period for decertification petitions. Article II, Section 6 refers to the 15-day period for a competing employee organization to file a challenge to an election petition once the City has posted a notice of election.

inappropriately applied National Labor Relations Board (NLRB), Educational Employment Relations Act (EERA), Higher Education Employment Relations Act (HEERA), and the Ralph C. Dills Act (Dills Act) precedent to this matter.[10] In so doing, the City heavily relies upon Service Employees Internat. Union v. City of Santa Barbara (1981) 125 Cal. App. 3d 459 [178 Cal.Rptr. 89] (SEIU).

AFSCME argues that Article II, Section 8, as applied to decertification petitions, prohibits such petitions within one year after a valid election, or during the term of a valid MOU, the purpose of which is to protect the incumbent organization and thus the stability of employer/employee relations. AFSCME further asserts that this protective function extends to unit modification petitions. AFSCME argues that MMBA section 3507 allows public agencies to establish rules restricting such petitions in addition to, but not conflicting with, the rules in Section 3507, which, AFSCME asserts, is what the City did in Article II, Sections 8 and 10 of the EERR. AFSCME thus contends that SEIU is irrelevant, since in that case, the court disagreed with the union's position that the NLRB's 3-year contract bar should supercede a local rule identical to MMBA section 3507, requiring a 12-month bar for decertification petitions.

We agree with AFSCME that the instant matter is clearly distinguishable from SEIU. The court in SEIU noted the express contract bar periods found in EERA, HEERA, and the Public Utilities Code as compared to the absence of such a bar in MMBA and concluded that the union's proposed imposition of a 3-year contract bar comprised an "unwarranted invasion of legislative prerogative," not an intrusion upon the City of Santa Barbara's legal authority.

[10]EERA is codified at Government Code section 3540 et seq. HEERA is codified at Government Code section 3560 et seq. The Act is codified at Government Code section 3512 et seq.

(Emphasis added.) In this case, the EERR Article II, Section 8 imposes an express contract bar for unit modifications separate and distinct from the 12-month election bar provided in Section 3507. Therefore, we agree with the Board agent and AFSCME that the holding in SEIU does not control in this case.

The City further argues that the Board should interpret the local rules in accordance with the purposes of MMBA and thus uphold its interpretation of the EERR if it is reasonable. However, we concur with the Board agent's well-reasoned conclusion that "the City has de facto extended the principles of the contract bar doctrine to unit modification petitions by including open period requirements" in Article II, Sections 8 and 10 of the EERR. Thus, it is appropriate to construe those provisions in accordance with NLRB case precedent, EERA section 3544.7(b)(1),[11] and PERB's unit modification regulations applicable to cases under EERA, HEERA and the Dills Act.[12] As a result, it is appropriate for the Board to rely upon

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[11]EERA section 3544.7(b)(1) provides:

> (b) No election shall be held and the petition shall be dismissed whenever either of the following exist:
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> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

[12]PERB Regulation 32781 provides, in pertinent part:

> Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

precedent from the NLRB and pertinent statutes under the Board's jurisdiction to interpret the provisions of Article II, Sections 8 and 10 of the EERR.[13]

Under Board and NLRB precedent, the objectives of the contract bar doctrine are: (1) to simplify rules in order to avoid litigation and quickly resolve disputes in representation proceedings; and, (2) to balance the statutory policies of stability in labor relations with employees' freedom to choose their bargaining representatives.[14] We disagree that the City's interpretation of Article II of the EERR was "reasonable" or meets those objectives. Indeed, to paraphrase the Board agent's assessment, to permit one exclusive representative to "raid" another bargaining unit by filing a unit modification petition during the petitioner's open period would severely diminish the time needed to stabilize the incumbent representative's bargaining relationship with the employer, a purpose the contract bar doctrine seeks to avoid.

> (b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification:
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> (4) To delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, not covered by EERA, HEERA or Ralph C. Dills Act, or otherwise prohibited by statute from inclusion in the unit, provided that:
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> (C) The petition is filed during the 'window period' of a lawful written agreement or memorandum of understanding as defined in these regulations in Section 33020 for EERA, Section 40130 for Ralph C. Dills Act or Section 51026 for HEERA.

[13]See State of California (1983) PERB Decision No. 348-S.

[14]See State of California (Department of Personnel Administration) (1983) PERB Decision No. 327-S; Pittsburg Unified School District (1978) PERB Order No. Ad-49; Bassett Unified School District (1979) PERB Order No. Ad-63; Appalachian Shale Products Co. (1958) 121 NLRB 1160, at p. 1161 [42 LRRM 1506].

On the other hand, the Board agent's determination that the AFSCME/City MOU provided the applicable open period under the City's EERR promotes those objectives. Since the Association's petition was filed outside of that open period, the Board finds that the City erred in its determination that the petition was timely.

In light of the above, the Board summarily affirms the Board agent's administrative determination.

ORDER

The Board affirms the administrative determination in Case No. LA-BR-2-M in its entirety and thereby orders the City of Carson to return the Public Information Specialist to the American Federation of State, County and Municipal Employees, Local 809, AFL-CIO's middle-management bargaining unit.

Members Baker and Neima joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF CARSON, Employer, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 809, AFL-CIO, Petitioner.	REPRESENTATION CASE NO. LA-BR-2-M ADMINISTRATIVE DETERMINATION March 19, 2003

BACKGROUND

On March 20, 2002, the American Federation of State, County and Municipal Employees, Local 809, AFL-CIO (AFSCME), filed a Petition for Board Review (Petition) with the Public Employment Relations Board (PERB or Board) pursuant to PERB Regulation 60000.[1] The petition seeks to have PERB review the action taken by the City of Carson to grant a unit modification petition filed with the City by the Professional Association.[2] Both

[1] PERB Regulation 60000(a) provides:

> Any party to a determination by a public agency concerning unit determination, representation, recognition or elections may file a petition requesting the Board review the determination. Such a petition may only be filed within 30 days following exhaustion of administrative remedies available under the applicable local rules. A challenge to the validity of a local rule may not be filed under this section and may only be filed as an unfair practice charge pursuant to Section 32602 of these regulations.

[2] More specifically, AFSCME's Petition requests PERB to resolve a list of issues, including whether: (1) the Association's unit modification petition was timely and conformed to the requirements of the EERR; (2) the City denied AFSCME due process; (3) the City and the Association improperly colluded in the processing of the petition; (4) the City misapplied the definition of "professional employee" when granting the petition; (5) the City was barred

AFSCME and the Association are exclusive representatives of bargaining units in the City. AFSCME represents a unit of "middle management" employees, and the Association represents a unit of "professional" employees.[3] On April 10, the City filed its response to the Petition with PERB. In addition to refuting and denying the allegations contained therein, the City argued that PERB does not have jurisdiction to resolve the representation issues raised by the Petition. On May 3, 2002, AFSCME filed a responding statement, and the case was submitted for determination.

FINDINGS OF FACT

The Association filed a unit modification petition with the City on March 1, 2001, to transfer the positions of Public Information Specialist (PIS) and Code Enforcement Specialist from AFSCME's unit into the Association's unit pursuant to the City's Employer-Employee Relations Resolution (EERR).[4] At that time, there was an MOU between the City and the

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from granting the petition due to a pre-existing settlement agreement with AFSCME; (6) the petition should be denied due to the absence of changed circumstances and/or due to its destablizing effect on employee-employer relations; and (7) the City's granting of the petition was "otherwise rendered in accordance with the MMBA, the EERR, and applicable precedent." AFSCME's Petition requests, as a remedy, that the Board reverse the City's determination and find that the PIS should remain in its unit.

[3] When the Association's unit was established in 1998, a compromise was negotiated between the City and AFSCME in which AFSCME agreed to drop its overall appeal regarding the proposed unit in exchange for keeping certain classifications in its unit, including the Public Information Specialist.

[4] Article II of the EERR provides procedures for the modification of established units:

> Section 10. Requests by Exclusively Recognized Employee Organizations for modifications of established appropriate units represented by the Exclusively Recognized Employee Organizations may be considered by the Employee Relations Officer only during the open period specified in Section 6 of this Article II. Such requests shall be submitted in the form of a Recognition Petition and, in addition to the requirements set forth in Section 4 of this Article, shall contain a complete statement of all relevant facts and citations in support of the proposed

Association effective July 1, 1999 - June 30, 2001, and an MOU between the City and AFSCME effective July 1, 1999 - June 30, 2002.

On March 6, 2001, Director of Human Resources Ramona Lopez notified AFSCME in writing of the unit modification petition. Her memo stated that the petition was timely, and that she would call to confirm a meeting date to discuss the matter. AFSCME was given the opportunity to respond in writing to the petition, and both organizations were subsequently given opportunities to submit additional information in support of their positions. In addition, Ms. Lopez met with representatives of both organizations to discuss their positions.

In a letter responding to the unit modification petition dated June 18, 2001, AFSCME alleged that the petition was (a) untimely; (b) not in the form of a recognition petition as

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> modified unit in terms of the policies and standards set forth in Section 9 hereof.
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> . . . The Employee Relations Officer shall give written notice of the proposed modification to any affected employee organization and shall hold a meeting concerning the proposed modifications, at which time all affected employee organizations shall be heard. Thereafter, the Employee Relations Officer shall determine the composition of the appropriate unit or units in accordance with Section 9 of the Article II, and shall give written notice of such determination to the affected employee organizations. The Employee Relations Officer's determination may be appealed as provided in Section 11 of this Article.
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> Section 11. An employee organization aggrieved by a determination of the employee Relations Officer that a . . . Modification of Established Appropriate Units (Section 10). . . has not been filed in compliance with the applicable provisions of this Article may, within fifteen (15) days of notice of such determination, appeal the determination to the City Administrator. . . .The City Administrator may, in its discretion, refer the dispute to a third party for a hearing and advisory recommendation. Any decision of the City administrator on the use of such procedure, and/or any decision of the City Administrator or of the third party determining the substance of the dispute may be appealed to the City Council.

required by the EERR; and (c) did not contain factual justification for the proposed modification to its unit.

On September 24, 2001, Ms. Lopez issued a decision denying the unit modification petition as it pertained to the Code Enforcement Specialist and granting the petition as it pertained to the PIS. Ms. Lopez found that the PIS classification met the criteria for a professional position in the EERR,[5] and that PIS employees share a community of interest with other positions in the professional unit in that they share "a similarity in the kinds of work performed, types of qualifications required and the general working conditions." She noted that the compromise reached with AFSCME regarding this position in 1998 did not preclude the City from ever approving future unit modifications regarding this position or any other position.[6]

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[5] Article I, Section 2(m) defines professional employees as:

> employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

[6] Ms. Lopez stated that, should AFSCME wish to appeal the City Council's decision in this matter, an appeal could be filed with the Division of Conciliation of the Department of Industrial Relations (DIR) pursuant to Section 3507.3 of the Meyer-Milias-Brown Act (MMBA). The MMBA is codified at Government Code section 3500 et seq. Government Code section 3507.3 provides:

> Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of

AFSCME appealed Ms. Lopez's decision to City Manager Jerome Groomes, who provided AFSCME with another opportunity to submit a written position statement. Mr. Groomes subsequently upheld Ms. Lopez' decision. On January 30, 2002, AFSCME appealed to the City Council, requesting a full evidentiary hearing on the matter. AFSCME was allowed to present its position both in writing and orally at the City Council meeting on February 19, 2002. On that date, in a report to the Mayor and City Council recommending that they support his decision, Mr. Groomes reiterated AFSCME's right to appeal such a determination to the DIR pursuant to Government Code section 3507.3. The City Council upheld Mr. Groomes' decision.

On April 2, 2002, approximately two weeks after the filing of this Petition for Board Review, the City sent a letter to the State Mediation and Conciliation Service requesting mediation to resolve this dispute. To date, no mediation sessions have taken place.

ISSUES

(1) Is it within PERB's jurisdiction to decide the issues raised by the Petition for Board Review?

(2) If so, was the Association's unit modification petition processed in accordance with the City's rules, the MMBA and applicable precedent? City?

Industrial Relations for mediation or for recommendation for resolving the dispute.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

DISCUSSION

Jurisdiction

The MMBA was amended effective July 1, 2001, to grant PERB the authority to "enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections" and to process unfair practice charges. (Government Code section 3509.) PERB concurrently promulgated regulations to enable it to carry out this charge. As stated above, PERB regulation 60000 permits any party to a decision concerning unit determination to file a petition requesting the Board to review that decision. The City argues that PERB's jurisdiction in this matter is superseded by Government Code section 3507.3, which provides for disputes regarding the "appropriateness of a unit of representation for professional employees" to be submitted to the DIR for mediation. The City asserts that since AFSCME has not availed itself of this process, AFSCME has not exhausted all administrative remedies to the City's decision.

The Petition for Board Review, however, does not involve a dispute over the appropriateness of a unit of representation for professional employees. It involves a dispute as to whether the City followed its own rules when it processed a unit modification filed by the Association to remove a classification from AFSCME's unit and transfer it to the Association's unit. Government Codes section 3507.3 is thus inapplicable to the issues raised by the Petition for Board Review, and it is within PERB's purview to process the Petition for Board Review.

The City's Actions

PERB Regulation 60010 provides that:

> (a) Whenever a petition under Section 60000 is filed with the Board, the Board shall investigate and, where appropriate,

> conduct a hearing, or take such other action as deemed necessary to decide the questions raised by the petition.
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> (b) The petition shall be dismissed in part or in whole whenever the Board determines that:
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> > (1) The petitioner has no standing to petition for the action requested; or
> >
> > (2) The determination of the public agency was rendered in accordance with MMBA, the local rules of the public agency, and applicable precedent.

There is no dispute that AFSCME, as the exclusive representative of a unit of employees affected by the City's action, has standing to file the instant Petition. Therefore, this decision must first focus on whether the City's determination to grant the Association's unit modification petition as it pertained to the PIS classification was rendered in accordance with MMBA, the local rules and applicable precedent.

The threshold question decided by the City was the timeliness of the Association's unit modification petition. The language in the EERR regarding unit modification timelines is found in Article II, Section 10:

> Requests by Exclusively Recognized Employee Organizations for Modifications of established appropriate units represented by the Exclusively Recognized Employee Organizations for modifications of established units represented by the Exclusively Recognized Employee Organizations may be considered by the Employee Relations Officer only during the open period specified in Section 6 of this Article II.

Article II, Section 6 defines the open period as the 15 day period after a notice of election is posted in which a competing organization may file an intervening petition to become an exclusive representative. This definition is obviously not relevant to situations in which employee organizations have already been recognized as exclusive representatives, such as in

the filing of decertification and unit modification petitions. Both AFSCME and the City recognize this error, since they refer instead to the open period definition contained in Section 8 of Article II, which sets forth the procedure for filing a decertification petition:

> A Decertification Petition may not be filed within one year after a valid election or during the term of, or the negotiations leading to, a valid Memorandum of Understanding except during an "open period": the 30-day period commencing one hundred fifty (150) days and ending one hundred twenty (120) days prior to the termination date of a Memorandum of Understanding. (Emphasis added.)

Thus, it is the Section 8 definition which the City applied to its timeliness determination and which shall be controlling herein.

There is no dispute that the unit modification petition was filed during the open period of the Association's MOU, and that this is the basis for the City's ruling that it was timely. However, AFSCME contends that any petition which seeks to modify its unit should be filed during the open period of its MOU, which did not become operative until a year after the unit modification petition was filed.

The language in the EERR regarding the filing of unit modification petitions does not speak to which open period is controlling, that of the employee organization filing the petition or that of the organization whose unit is potentially affected. The City contends that it reasonably interpreted the EERR when it determined that the unit modification petition was timely filed during the open period of the Association's MOU. AFSCME argues here, as it did previously before the City, that "because the 'open period' described in §8 is designed to protect an incumbent employee organization - either during the term of a valid MOU or during

negotiations for a new MOU - the relevant open period for challenging AFSCME's representation of positions within its bargaining unit is AFSCME's open period."

The open period definition contained in Section 8 emanates from the contract bar doctrine which was developed through case law by the National Labor Relations Board (NLRB). This doctrine also served as the model for similar language contained in the Educational Employment Relations Act (EERA).[7] The contract bar doctrine holds that, in order to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives," a current valid contract will ordinarily prevent the conduct of an election involving an incumbent union and a rival union.[8] Thus, while rival employee organizations must be given an opportunity to challenge an exclusive representative on behalf of dissatisfied employees, this opportunity must be limited to a time certain during the life of a collective bargaining agreement in order to ensure stable employer-employee relations. PERB has supported this principle in a long line of cases in which the Board has also affirmed the value of definite, easily applied rules which will quickly resolve representational issues, avoid lengthy litigation

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[7] EERA is codified at Government Code section 3540 et seq. Section 3544.7(b)(1) provides:

> (b) No election shall be held and the petition shall be dismissed whenever . . . :
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> > (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

[8] Appalachian Shale Products Company (1958) 121 NLRB 1160 [42LRRM 1506].

and thereby promote stable employer-employee relations. (State of California (Department of Personnel Administration (1989) PERB Decision No. 348-S.)[9]

The City has de facto extended the principles of the contract bar doctrine to unit modification petitions by including open period requirements in Article II of the EERR. A similar requirement is contained in PERB's unit modification regulations, which apply to cases arising under the EERA, the Higher Education Employment Relations Act and the Dills Act.[10] These regulations require open period (referred to as "window period") filings when an employer seeks to remove classifications from a represented unit which it contends are management, supervisory or confidential or otherwise excluded from coverage, and there is a lawful written agreement or MOU in effect.

Permitting an exclusive representative to effectively "raid" another bargaining unit by filing a unit modification petition during the petitioner's open period would severely diminish the time certain in which an exclusive representative could work to stabilize its relationship with an employer insulated from challenges, and would create the very instability that the contract bar doctrine seeks to avoid. For these reasons, it is found that the City's determination that the Association's unit modification petition was timely was inconsistent with its own rules.

PROPOSED ORDER

Based on the discussion above, it is determined that it is within PERB's jurisdiction to process the Petition for Board Review filed by AFSCME Local 809. It is also found that the

[9] See also Pittsburg Unified School District (1978) PERB Order no. Ad-49; Downey Unified School District (1980) PERB Order No. Ad-97; Apple Valley Unified School District (1990) PERB Order No. Ad-209; Capistrano Unified School District (1994) PERB Order No. Ad-261.

[10] See PERB Regulation 32781 et seq.

City of Carson acted inappropriately when it ruled that the Professional Association's unit modification petition was timely filed. Therefore, it is hereby ordered that the position of Public Information Specialist be returned to AFSCME's bargaining unit.[11]

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, sec. 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

[11] Since this decision reverses the City's determination, it is unnecessary to address the other issues raised by AFSCME's Petition.

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, sec. 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, sec. 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Cal. Code Regs., tit. 8, sec. 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, sec. 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be

accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, sec. 32132).

Dated: March 19, 2003

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Jerilyn Gelt
Labor Relations Specialist