STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (MUSEUM OF SCIENCE AND INDUSTRY),	)	
Employer,	)	Case No. S-UM-578-S
and	)	Request for Judicial Review
	)	PERB Decision No. 1117-S
CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	PERB Order No. JR-17-S
Exclusive Representative.	)	February 23, 1996

Appearances: State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for State of California (Museum of Science and Industry); James P. Whalen, Legal Representative, for California Union of Safety Employees.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on request of the State of California (Museum of Science and Industry) (State) for PERB to join in seeking judicial review of its decision in State of California (Museum of Science and Industry) (1995) PERB Decision No. 1117-S.

In that decision, the Board adopted a Board agent's proposed decision which granted, in part, the petition for unit modification filed by the California Union of Safety Employees (CAUSE). In its petition, CAUSE sought to include within State Bargaining Unit 7 the classification of Supervising Museum Security Officer at the Museum of Science and Industry. The Board granted the petition for positions within the

classification serving as sergeants/watch commanders, and denied the petition for the position within the classification serving as a lieutenant.

STATE'S REQUEST FOR JUDICIAL REVIEW

The State requests judicial review of State of California (Museum of Science and Industry) (1995) PERB Decision No. 1117-S (Museum of Science and Industry) pursuant to section 3520(a) of the Ralph C. Dills Act (Dills Act)[1] and PERB Regulation 32500.[2]

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[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Dills Act section 3520 states, in pertinent part:

> (a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review. [Emphasis added.]

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32500 states, in pertinent part:

> (a) Any party to a decision in a representation case by the Board itself may file a request to seek judicial review within 20 days following the date of service of the decision. An original and five copies of the request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts that the case is one of special importance. Service and proof of service of the request pursuant to Section 32140 are required. [Emphasis added.]
>
> (c) The Board may join in a request for judicial review or may decline to join, at its discretion.

The State notes that PERB has previously joined in seeking judicial review of a decision it found to be of special importance because it was a novel issue involving construction of a provision unique to the Dills Act which was likely to arise frequently. (Los Angeles Unified School District (1985) PERB Order No. JR-13; State of California (Department of Personnel Administration) (1993) PERB Order No. JR-15-S.)

The State asserts that the issue presented by Museum of Science and Industry is novel because Supervising Museum Security Officers are watch commanders on evening, night and weekend shifts, and, as members of a police organization, are assigned unique supervisory responsibilities. The State argues that the case involves the construction of Dills Act section 3513(g), which defines "supervisory employee," and that this issue has and will continue to present itself to PERB frequently.

In response, CAUSE urges the Board to deny the State's request because this case does not present a novel issue or present issues of special importance.

DISCUSSION

It is within the Board's sole discretion to determine whether a case is "one of special importance," justifying its joining in a request for judicial review. The Board has applied a relatively strict standard in considering requests for judicial review. The Board has not agreed that the mere fact that a court has not ruled on an issue makes it one of special importance, stating that "such would be an abdication of our responsibility to interpret the statute which we enforce and would tend to

render this Board simply another administrative hurdle to be cleared on the way to unit certification." (Livermore Valley Joint Unified School District (1981) PERB Order No. JR-9.)

In evaluating a request for judicial review, the Board will find an issue to be of special importance if: (1) it is a novel issue; (2) it primarily involves construction of a statutory provision unique to the Dills Act; and (3) it is likely to arise frequently. (Los Angeles Unified School District, supra. PERB Order No. JR-13; State of California (Department of Personnel Administration, supra. PERB Order No. JR-15-S.)

The State has failed to meet this standard in its request for judicial review of Museum of Science and Industry.

The issue of whether a particular classification meets the statutory definition of supervisory employee is not novel. Rather, it raises the fundamental question of the right to representation which has been addressed by PERB in numerous cases. Similarly, the fact that the classification and positions in question in the underlying case here are involved in law enforcement activities does not make this matter novel within the meaning of the Board's standard for considering judicial review requests. Virtually every occupational area considered by PERB in its representation decisions, including law enforcement, presents some unique features and elements. PERB's evaluation of these unique elements in relation to the statutory criteria for supervisory employees is a standard component of its decision-making process, and is not a novel matter.

The State also argues that the Board's underlying

decision here raises statutory construction issues which "call into question the interpretation of Dills Act section 3513(g)." This argument is without merit. The Board in Museum of Science and Industry applied the criteria described in Dills Act section 3513(g), as it has on numerous occasions. It was the application of that statutory provision, and not its construction, which was the primary element of the Board's decision.

Finally, the State asserts that the issue presented in the underlying case here is likely to arise frequently. Although the issue of whether sergeants are supervisory or non-supervisory employees may arise again at PERB, the party seeking judicial review must satisfy all three prongs of the special importance test, which the State has failed to do in this case.

ORDER

The request that the Public Employment Relations Board join in seeking judicial review of its decision in State of California (Museum of Science and Industry) (1995) PERB Decision No. 1117-S is hereby DENIED.

Chairman Caffrey joined in this Decision.[3]

Member Garcia's concurrence and dissent begins on page 6.

[3]While joining in the denial of this request Chairman Caffrey notes that he continues to hold the views expressed in his dissent in State of California (Museum of Science and Industry) (1995) PERB Decision No. 1117-S.

GARCIA, Member, concurring and dissenting: I concur with the lead opinion's denial of the request by the State of California (Museum of Science and Industry) (State) for the Public Employment Relations Board (PERB or Board) to join in seeking judicial review of State of California (Museum of Science and Industry) (1995) PERB Decision No. 1117-S (Museum of Science and Industry). However, I dissent from the rationale that led the majority to reach this conclusion. My reasons are explained below.

In Museum of Science and Industry, the Board affirmed a hearing officer's proposed decision which granted the California Union of Safety Employees' (CAUSE) petition for unit modification, adding four previously excluded employees to Unit 7. The Board found[1] that those employees, who are Supervising Museum Security Officers (SMSO) (alternately referred to as watch commanders), were non-supervisory.[2]

The State made the instant request for judicial review of Museum of Science and Industry pursuant to the Ralph C. Dills Act (Dills Act) section 3520(a)[3] and PERB Regulation 32500.[4] The

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[1]Member Caffrey wrote a dissenting opinion, stating that he would have denied the petition.

[2]CAUSE petitioned to add five employees to Unit 7. However, the Board found that one of the five (acting as lieutenant) should continue to be excluded from the unit because he met the statutory definition of supervisor.

[3]Dills Act section 3520(a) provides that:

> (a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or

State argues that this case qualifies for judicial review because it presents matters of "special importance," as discussed in the lead opinion. CAUSE disagrees and urges the Board to deny the State's request.

The main issue in this request is whether or not some extraordinary reason exists that compels the Board to join in a request for judicial review. The State, through Dills Act section 3520(a) which applies only to unit determination decisions, asks the Board to rule upon whether this case is "one of special importance," so that it may seek judicial review of the ruling in Museum of Science and Industry.

> an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review. [Emphasis added.]

[4]PERB Regulation 32500 provides that:

> (a) Any party to a decision in a representation case by the Board itself may file a request to seek judicial review within 20 days following the date of service of the decision. An original and five copies of the request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts that the case is one of special importance. Service and proof of service of the request pursuant to Section 32140 are required.
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> (c) The Board may join in a request for judicial review or may decline to join, at its discretion. [Emphasis added.]

Properly classified, this petition does not follow a unit determination case and therefore Dills Act section 3520(a) is not available to the State in its request. We are not determining the configuration of the unit, nor have we been asked to modify the unit. The case came to PERB as a unit modification petition because PERB directs the parties to use that process when questions of supervisory status are to be determined. The real question in Museum of Science and Industry was whether the watch commanders should continue to be excluded from the unit because of Dills Act section 3513.[5] To answer that question, the hearing officer had to analyze whether or not these employees are

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[5]In order to be represented by CAUSE, the persons in question must be state employees under the Dills Act. Section 3513(c) defines a "state employee" as:

> . . . any civil service employee of the state . . . except managerial employees, confidential employees, supervisory employees [and other listed types of employees] . . .

Dills Act section 3513(g) defines a "supervisory employee" as:

> . . . any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

supervisors. If so, they cannot be in the unit. If not, they are part of the unit.

The parties had previously stipulated, and PERB had accepted, that the SMSO classification at issue was supervisory (Unit Determination for the State of California (1980) PERB Decision No. 110c-S). In considering the "unit modification petition" in the decision affirmed by the Board, the hearing officer applied the statute and prior decisions and concluded that the SMSOs were not supervisory. Therefore, they should not be excluded from the existing unit. The analysis is straightforward based on statutory law and other unit modification cases involving police sergeants.[6]

In essence, the State disagrees with the hearing officer's conclusion, affirmed by the Board, after applying the Dills Act criteria of section 3513. The State has not shown why this case warrants further consideration or the assistance of PERB if it wishes to pursue the matter through a court appeal. If the State believes PERB has misinterpreted the law it should proceed in other forums without the joinder of the Board rather than creating issues of "special importance" under non-applicable statutes.

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[6]See, e.g. the Board's interpretation of the Dills Act's definition of supervisory employee in State of California (1990) PERB Decision No. HO-R-125-S.