CALIFORNIA TEACHERS ASSOCIATION

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LEGAL DEPARTMENT

June 13, 2019

E-MAIL & U.S. MAIL

PERB Board Members
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

J. Felix De La Torre, General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Re: Proposed Regulation Revisions

Dear PERB Board Members and Mr. De La Torre:

I am Legal Director for the California Teachers Association ("CTA"), and I write to comment on the proposed changes to the regulations of the Public Employment Relations Board ("PERB" or "the Board"). Thank you for the opportunity to provide feedback regarding the proposed changes. In general, CTA supports the modifications. They appear to tackle issues that have long confronted practitioners at PERB and will likely encourage earlier and faster resolution of cases. Increased efficiency in processing cases not only preserves the resources of the parties and PERB, but also ensures employees see PERB as an institution that can swiftly and effectively safeguard their rights to engage in concerted activity.

Proposed Regulations Regarding Subpoenas, Motions and Authority of Board Agents

Pre-hearing Document Subpoenas

The proposed change permitting parties to subpoena documents in advance of hearing would partially remedy the information asymmetry that often exists between employers and unions, providing unions a better opportunity to prepare an organized presentation of evidence and preventing the parties and the Administrative Law Judge from spending hearing time resolving document disputes.

Exchanging documents in advance of hearing is also likely to allow parties to better evaluate the merits of their positions earlier and to provide an opportunity for the parties to settle disputes before resources are expended on litigation. Although PERB's statutes and decisional law provide some parties with rights to request information relevant to representation, enforcing a party's right to that information can itself require a slow and cumbersome process. Further, that process is not available to employees who are still seeking recognition of their

exclusive representative and who may require information in a representation or interference dispute. Pre-hearing document exchange is particularly valuable in such cases where there are no rights to receive documents through any information request procedure.

Evidentiary Sanctions

The proposed changes would explicitly permit the Board to issue evidentiary sanctions if a party refuses to comply with a valid subpoena. This is an appropriate step to ensure that subpoena-related disputes at PERB are handled fairly and efficiently. Providing the Board with an opportunity to draw an adverse inference from a party's failure to produce documents or permitting the Board to restrict the presentation of evidence on an issue regarding which a party has failed to produce documents is a modest step that is well within PERB's authority.

Employers are often in possession of information that is critical for charging parties to bear their burden of proof. Evidentiary sanctions can help ensure that employers cannot use this information gap to significantly delay proceedings by forcing PERB to go to superior court to enforce a subpoena. *See* Gov. Code §3541.3, subd. (j); PERB Regulation 32150, subd. (f). Evidentiary sanctions are an interim step that can help conserve PERB's litigation resources. In the private sector, the National Labor Relations Board ("NLRB") has long permitted evidentiary sanctions against parties who refuse to comply with subpoenas or discovery orders. (*See, e.g., McAllister Towing & Transportation Co.* (2004) 341 NLRB 394, 396, enfd. (2d Cir. 2005) 156 Fed.Appx. 386.)

There are also safeguards within PERB's procedures that can be used to ensure the proper application of evidentiary sanctions. If a party's objections to a subpoena are valid, such objections may be considered by an ALJ – or later the full Board -- when a party requests an evidentiary sanction. At the NLRB, objections to the underlying subpoena are also justifications for the Board to, in its discretion, decline to apply an evidentiary sanction when the requesting party seeks one. (*See, e.g., Sisters Camelot* (2015) 363 NLRB No. 13, slip op. at 8 (refusing to apply evidentiary sanction where subpoena request was not clear)). In addition, responding parties subject to evidentiary sanctions would have the right to challenge the sanction as part of any appeal.

Regulations on Filing Requirements

In general, the changes to PERB's filing regulations provide clarity and streamline the filing process for practitioners.

Electronic Signatures on Proof of Support Documents

CTA supports PERB's proposal to permit electronic signatures on proof of support documents. Providing employees with the right to electronically sign a proof of support will make it simpler for employees, particularly employees of large, geographically dispersed employers, to

join together to advocate for improvements to their working conditions. Employees submitting electronic signatures are also better able to exercise a critical right when organizing: the right to keep their activities private.

CTA also recognizes the importance of ensuring that the signatures are *bona fide*. Although the regulation does call for the use of "generally accepted security protocol," some additional guidance regarding what protocols will be acceptable to PERB would assist unions and employees when submitting electronic signatures. (PERB Regulation 32700, subd. (e)(5).) Because technology evolves quickly, guidance issued apart from the rules themselves may be appropriate.

Service Regulations

Regulation 32142, the "Proper Recipient for Filing or Service" provision, states that documents filed with a public school employer are to be filed with "the superintendent, deputy superintendent, or a designated representative of a school district; or to the school board at a regular or extraordinary meeting." (PERB Regulation 32142, subd. (c)(1)). This regulation is slightly unclear when the public school employer is a public charter school. Charter schools often do not have a superintendent structure and are not referred to as "school districts." Charter schools may be led by individuals with many different titles, such as executive director, principal or chief executive officer. Service at a board meeting is an impractical alternative for many documents, particularly given how rarely some charter boards meet.

As an alternative, PERB could amend the rule to provide that service to a charter school could be made on "the individual designated to receive service or to the president or if there is no president, an officer of the organization," which is the current language for serving an employee organization. (PERB Regulation 32142, subd. (d)). The current regulation could also be broadened to capture roles analogous to that of superintendent, such as executive director or chief executive officer.

CTA is pleased to support the proposed regulations as discussed above. Thank you for your consideration.

Sincerely,

Jesus Quinonez
Legal Director