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REPRESENTING UNIONS, WORKERS, AND BENEFIT PLANS

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Via email to Kristina Gonzalez, Kristina.gonzalez@perb.ca.gov

Hon. Eric Banks
Hon. Erich Shiners
Hon. Arthur Krantz
Hon. Lou Paulson

Public Employment Relations Board
1031 18th St.
Sacramento, CA 95811

Re: Proposed Regulations

Dear Honorable Board Members,

We write to provide comments on proposed regulations set for public hearing on June 13, 2019. The proposed regulations are generally beneficial refinements on PERB procedure that will lead to more efficient hearings, shorter times to decision, and more focused decisional law. We encourage PERB to adopt them given the following comments.

I. Exceptions, Proposed PERB Regs. 32300, 32310, 32312

A. The Proposed Regulations Would Make Exceptions Briefing More Efficient

The proposed exceptions regulations streamline the exceptions procedure and update it in light of the widespread use of electronic documents. Under the proposal, "an original and five copies of" exceptions would no longer need to be filed, instead requiring parties to file only a single copy. Since the proposal also aligns the filing requirements with PERB Reg. 32135, in practice most parties will file exceptions electronically. This will greatly reduce consumption of paper and other resources needed to transmit hardcopies across the state to Sacramento. Apart from reduced financial costs, the reduced greenhouse gas emissions, though relatively minute, are also a laudable rationale behind the change.

The word-count limits of 14,000 for exceptions and responses, 28,000 for combination responses and cross-exceptions, and 5,000 for replies are ample to address the issues on appeal in even complex cases. (Proposed PERB Regs. 32300(b), 32310(c), 32312(a).) The addition of word-count limits will encourage parties to set bounds on the number of issues they attempt to raise in a single case. This will result in more focused PERB decisions and clearer decisional law, while no doubt also helping PERB to review and resolve cases more quickly.

B. The Proposed Regulations Would Not Overturn Existing PERB Law Applicable to Prevailing-Party Appeals, Rather They Would Focus PERB's Decisions on Dispositive Issues

Employer-side counsel Tim Yeung of Sloan Sakai Yeung & Wong LLP raises concern in a comment about the use of the word "impact" in PERB Reg. 32300, which would bar PERB from considering "arguments raised in the statement of exceptions that do not ***impact*** the outcome of a case." (Proposed PERB Reg. 32300(e) [emphasis added].)

According to Yeung, this would lower an existing standard applicable to prevailing-party exceptions, which PERB will not consider "unless the Board's ruling on the exceptions would ***change*** the outcome of the ALJ decision." (*Oak Valley Hospital District* (2018) PERB Dec. No. 2583-M, at p. 5 [citing *Fremont Unified School District* (2003) PERB Dec. No. 1528] [emphasis added].) As Yeung correctly notes, the rationale for this is to keep the Board from "expend[ing] its limited resources correcting harmless errors in the record." (*Id.*) In Yeung's view, the switch from "change" in *Oak Valley* to "impact" in Proposed PERB Reg. 32300 is legally consequential.

Proposed PERB Reg. 32300 does not read as intending to overturn *Oak Valley*, however. The proposed regulations are more expansive than *Oak Valley*, but not in conflict with it, applying not only to prevailing-party exceptions, but to exceptions by any party. The rule as proposed would limit PERB to considering only dispositive issues, which is in keeping with the arc of PERB's other proposals to encourage brevity and clarity in the parties' briefing and its decisions. It goes without saying that PERB should not waste its time on pointless arguments and purely tactical maneuvers lacking in real meaning to the disputes before it.

It is not apparent that "change" versus "impact" carries any legal significance. Both "change" and "impact" can occur by degrees. To the extent there is any meaningful difference between the terms, the lack of clear intent to overturn *Oak Valley* would leave that decision in effect as a more specific and stringent standard applicable to prevailing-party exceptions.

The general rule that harmless error is insufficient to warrant review of a lower decision is undisturbed by the Proposed regulations. (*See* Code Civ. Proc. § 906 [providing "the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily ***affects*** the judgment or order appealed from or which substantially affects the rights of a party . . . .' (emphasis added)]; *see also* Code Civ. Proc. § 657; *also* Fed. R. Civ. Pro. 61.)

II. Recusal, Proposed PERB Reg. 32155

The proposed recusal regulations beneficially expand and clarify the circumstances for recusal.

The existing regulations pertain only to Board members, "Board agent[s] performing an adjudicatory function" and State Mediation and Conciliation Service mediators and conciliators.

(PERB Reg. § 32155.) The proposed regulations further include "other PERB officer[s], employee[s], or contractor[s]." (Proposed PERB Reg. 32155(b).) This addition is important because, for example, PERB Regional Attorneys exercise discretion that can easily impact the outcome of cases at the ***investigatory*** phase, which is not clearly ***adjudicatory*** within the meaning of the existing regulations. Practically, even under the existing regulations, litigants would generally expect that a Regional Attorney with a conflict of interest would recuse him/herself at the investigatory phase. PERB's proposal would bring the text of its regulations in line with this expectation.

In addition, the existing regulations permit appeals by writ of extraordinary relief but only following a final adjudication by the Board on the merits. The current regulations read: "Any party aggrieved by a determination [not to recuse] may include the matter of claimed disqualification in a writ of extraordinary relief . . . seeking judicial review of the Board's decision on the merits." (PERB Reg. 32155(h).) This necessarily would exclude decisions to dismiss a complaint. The proposed regulations correct this by providing that decisions not to recuse may be reviewed "in a writ proceeding in superior court challenging the Board's refusal to issue a complaint." (Proposed PERB Reg. 32155(f).)

III. Subpoenas, Motions, and Authority of Board Agents, Proposed PERB Regs. 32150, 32170, 32190

PERB's current regulations do not adequately address pretrial discovery or motion practice. As a result, once a complaint has issued, the only rational way forward absent settlement is generally to proceed to a full hearing where every allegation and every piece of evidence is put before an ALJ for a full written decision. Every issue in dispute at the outset of a case tends to arrive before the ALJ, resulting in lengthier hearings, post-hearing briefs, ALJ decisions, and times to decision.

The proposed regulations will significantly increase the efficiency of the pre-hearing process and focus the issues submitted to ALJs for decision. The proposed regulations do this by providing PERB and its Board Agents with more case-handling tools and clarifying those that already exist. The proposed regulations empower Board Agents to issue subpoenas and rule on motions related to subpoenas, to revoke or limit them, as well as to set the course for pretrial discovery. (Proposed PERB Reg. 32170(c).) The proposed regulations also allow for resolution of dispositive motions as to the entire case or aspects of the case, including arbitration deferral. (Proposed PERB Reg. 32190(a).)

In sum, the proposed regulations will result in more efficient use of ALJ hearing time and generate cleaner, more focused ALJ decisions and records for the Board to review on appeal.

A. Subpoenas, Proposed PERB Reg. 32150

Under PERB's current regulations, during the investigative process the regulation applicable to "subpoenas duces tecum compelling the attendance of witnesses and production of records" specifies that the time for production of records is "at investigative proceedings."

(PERB Reg. 32149.) PERB's regulation applicable to hearing subpoenas similarly provides that the time to produce documents is "at the hearing." (PERB Reg. 32150(a).)

The sole subpoena enforcement mechanism in the current regulations is for the Board to exercise its discretion to seek an order in superior court to compel appearance or production of documents. (PERB Reg. 32150(f).) If the Board does decide to seek a court order, "the record will remain open in the matter" until the litigation over the subpoena resolves. (*Id.*)

1. PERB's Current Subpoena Regulations Are Out of Alignment With the Cal. APA, Hindering the Pre-Hearing Exchange of Evidence, and Leading to Inefficient Hearings

PERB's current subpoena regulations do not directly implement the subpoena and discovery process envisioned by the California Administrative Procedure Act (hereafter "Cal. APA"). The current regulations in fact narrow the tools that PERB could use.

Unlike under PERB's current regulations, the Cal. APA provides a formal discovery process that entitles the parties to obtain—well before a case goes to hearing—necessary and relevant information. (*See* Gov. Code § 11507.6.) For example, a party is entitled to obtain: the names and addresses of witnesses known to the other party, regardless of whether the witness will testify; any statements pertaining to the subject matter of the proceeding that have been made by any party; and any writing or thing that is relevant and would be admissible in evidence. (*Id.*) Should a party not reply to a discovery demand within thirty days, the requesting party can move to compel production, and the ALJ has the power to issue a contempt sanction for noncompliance. (Gov. Code §§ 11507.7; 11455.10, subd. (e).) In addition to its formal discovery procedure, the Cal. APA establishes a more useful subpoena process than PERB's. It provides that "Subpoenas and subpoenas duces tecum shall be issued for attendance at a hearing and for production of documents ***at any reasonable time and place*** or at a hearing." (Gov. Code § 11450.10(a) [emphasis added].)

Given that PERB does not have a formal discovery process, and that PERB's current subpoena regulations fall short, more robust subpoena procedures are sorely needed. Under the current PERB regulations, subpoenas can only be issued for production of documents at a calendared investigative meeting or adjudicative hearing. (PERB Regs. 32149, 32150(a).) In practice, PERB subpoenas essentially only ever result in production of documents on the first day of a hearing before an ALJ.

A procedure more aligned with the Cal. APA would permit a fluid discovery process between the parties, allowing for the exchange of evidence any time prior to the hearing, without artificial procedural bottlenecks. (*See* Gov. Code § 11450.10(a).) It would also eliminate the element of surprise inherent in delaying document production until the hearing itself. A party receiving documents under PERB's current regulations at the hearing has no opportunity to thoughtfully integrate those documents into the presentation of its case. The PERB regulations are also currently not clear in allowing for follow-up subpoenas once the hearing is underway. (PERB Reg. 32150(a).)

Rather than encourage compliance, furthermore, the limited enforcement mechanism in PERB's current regulations creates an incentive for respondents in unfair practice proceedings to ***not*** comply with subpoenas for production of documents. A party who refuses to produce records in response to a subpoena risks only that PERB will interrupt proceedings and delay resolution of the case until the conclusion of litigation in superior court over an order to compel. (PERB Reg. 32150(f).) The court-order process thus perversely incentivizes a respondent to cause delay and drive up litigation costs for a charging party, who may be forced to abandon pursuit of a subpoena simply to reach a resolution in the PERB case, albeit without all the evidence to which it is entitled. A respondent only gains leverage by doing this, as the worst-case scenario is that it will need to disclose documents subject to the subpoena after the conclusion of an enforcement action. Perhaps because responding parties can simply delay and then produce documents later, PERB rarely if ever seeks to enforce its subpoenas in superior court.

This experience has born out in our practice representing union clients before PERB. In current cases against the University of California under the Public Employee Communications Chapter, Gov. Code § 3555, the University failed to fully respond to the Unions' timely subpoenas by the date of the hearing, putting it at an advantage. Rather than focusing only on witness examination, furthermore, a substantial portion of the time at the hearing was devoted to subpoena enforcement while witnesses sat idle.

2. The Proposed Subpoena Regulations Improve on Current Language and More Closely Align PERB Procedure With the Cal. APA

The proposed regulations would allow subpoenas for records between parties to a PERB case to specify pre-hearing document production dates, as long as the responding party is given at least 20 days to respond. (Proposed PERB Reg. 32150(e).) This would eliminate the element of surprise under the current regulations that is inherent with day-of-hearing document production. It would also significantly reduce the incentive to delay responding to a subpoena, because a subpoena enforcement action could be brought and concluded well in advance of a hearing in the underlying PERB case without disrupting that timeline. Allowing for pre-hearing document production dates also would allow for follow-up subpoenas and discovery requests, which would lead to more efficient use of hearing time because parties would have the opportunity to fully develop the evidentiary record and their cases in advance.

The proposed regulations go further to all but eliminate the incentive to delay responding to a subpoena by providing a meaningful and immediate alternative to a subpoena enforcement action. Under the proposed regulations, rather than seeking subpoena enforcement in court, "the Board may draw adverse inferences from a responding party's failure to comply with a valid subpoena, and may prohibit such a responding party from presenting evidence or arguments, as the interests of fairness may require." (Proposed PERB Reg. 32150(h).) This puts parties who fail to respond to subpoenas at risk of fatally prejudicing their position in the underlying PERB case, all but eliminating the strategic value under the current regulations in delaying subpoena compliance. It symmetrically would repair the prejudice inflicted on parties whose valid subpoenas go unfulfilled by allowing them to present their cases based on inferences drawn

against the non-responding party. It would yet further conserve PERB's resources by allowing hearings to proceed efficiently without delay or costly subpoena enforcement litigation.

HEERA (and PERB's other statutes) empowers PERB to seek enforcement of its subpoenas in any "court of competent jurisdiction." (Gov. Code § 3563(i).) HEERA (and the other labor relations statutes) also empowers PERB "[t]o investigate unfair practice charges or alleged violations of this chapter, and to ***take any action and make any determinations*** in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter," as well as "[t]o ***take any other action*** as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter." (Gov. Code 3563(h), (m) [emphasis added].) Drawing adverse inferences to enforce its subpoenas is clearly within the scope of "any action and . . . any determination . . . necessary to effectuate the policies" of its statutes. Interpreting HEERA, PERB has already determined that it is appropriate to draw adverse inferences as an evidentiary sanction. (*Regents of the University of California* (1987) PERB Dec. No. 640-H, p. 11, ALJ Proposed Decision, p. 89 [discussing *Bannon Mills, Inc.* (1964) 146 NLRB No. 81, 611]. The NLRB has also long done so. (*Green Apple Super Market of Jamaica, Inc.*, (2018) 366 NLRB No. 124, ALJ Decision pp. 23, 28.)

Drawing adverse inferences as a sanction furthermore finds support in the Evidence Code. The Evidence Code Provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, . . . his willful suppression of evidence relating thereto, if such be the case." (Evid. Code § 413.) The California Civil Jury instructions when parties conceal or destroy evidence similarly provide: "you may decide that the evidence would have been unfavorable to that party." (CACI 204.)

In light of these provisions, it is clearly within PERB's statutory authority to exercise its adjudicative powers to draw adverse inferences against a party failing to respond to a valid subpoena. PERB's powers extend to the investigation and adjudication of disputed facts in unfair practice proceedings, and likewise to "make any determinations" to effectuate the policies of the state labor relations statutes. (Gov. Code 3563.2(b).)

3. The Proposed Subpoena Regulations Develop a Procedure for Revoking or Limiting Subpoenas That Provide Ample Safeguards to Responding Parties and Non-Parties

The proposed regulations also provide responding parties with ample safeguards by streamlining and clarifying a procedure for PERB to speedily rule on motions to revoke or limit a subpoena during the course of fluid pre-hearing discovery. The current regulations only provide that on a motion to revoke a subpoena, "[t]he Board shall revoke the subpoena if the evidence requested to be produced is not relevant to any matter under consideration in the proceeding or the subpoena is otherwise invalid." (PERB Reg. 32150(d).)

The proposed regulations retain this provision, adding structure. The proposed regulations state that parties seeking to revoke a subpoena may do so in most cases by written motion "no later than fifteen (15) days following service of the subpoena unless leave for a

different time period is ordered by the Board." (Proposed PERB Reg. 32150(e)(2).) Requesting parties under the proposed regulations may "submit any opposition to such a motion no later than seven (7) days after the responding party serves such a motion unless otherwise ordered by the Board." (*Id.*)

A responding party would not be required to respond to a subpoena subject to a motion to revoke or limit until the Board Agent ruled on the motion. The proposed regulations, as discussed further below, establish procedures for Board Agents to consider and rule on motions to revoke or limit without disrupting the flow of litigation. The time for ruling on motions to revoke or limit subpoenas under the proposed regulations would be at a pre-hearing conference, the hearing itself, during a telephonic or video conference, or at another appropriate time. (*Id.*; *also* PERB Reg. 32170(c), (e).)

In contrast, the current regulations allow for uncertainty, providing that motions to revoke a subpoena "may be filed prior to the proceeding or made by an oral motion at the commencement of the proceeding," without specifying a time for ruling on such motions. (PERB Reg. 32150(d).) The proposed regulations not only relieve this uncertainty by specifying a time for ruling, but also afford responding parties additional peace of mind by making explicit that there is no obligation to respond to a challenged subpoena until the Board Agent rules on the motion. (Proposed PERB Reg. 32150(e).)

B. Authority of Board Agents, Proposed PERB Reg. 32170

The current regulations focus the pre-hearing process and the Board Agent's authority on one main point of contact between PERB and the parties—the in-person informal conference—whose emphasis in practice tends to be on settlement of the case, rather than pre-hearing issues such as subpoena enforcement or narrowing the issues in dispute. (PERB Reg. 32650.) Although helpful for settlement purposes, in-person informal conferences represent a major investment in time and other resources, sometimes requiring travel between different regions of the State. They are accordingly ill-suited to resolving disputes over pre-hearing details, including subpoena enforcement or factual stipulations, which as a result often go unaddressed until the hearing, if they are ever addressed.

The proposed regulations retain in-person informal settlement conferences but additionally allow for telephonic and video conferences to address both settlement and pre-hearing motions. (Proposed PERB Reg. 32170(e).) To some extent, telephonic conferences between the parties and Board Agent for scheduling and other logistical purposes have already been a part of PERB practice; they are a natural way to handle many pre-hearing issues as they arise. The proposed regulations recognize this, while also clarifying that they can be used by Board Agents to resolve pre-hearing motions. (*Id.*)

Overall, the proposed regulations create more pre-hearing points of contact between Board Agents and the parties earlier in the process, which will help prune cases down to more focused sets of allegations and evidence for presentation to ALJs. This is in contrast to the current practice, where, if the case does not reach settlement, every issue in dispute at the start of

the case tends to arrive before of the ALJ, resulting in lengthier hearings, post-hearing briefs, ALJ decisions, and times to decision.

C. Motions, Proposed PERB Reg. 32190

PERB has historically recognized the ability of parties to file, and of ALJs to rule upon, dispositive motions in the course of adjudicating unfair practices. (*San Diego Unified Sch. Dist.* (1987) PERB Dec. No. 610 (applying Code Civ. Proc. § 437c, summary judgment). The proposed regulations merely formalize this longstanding practice in PERB's regulations. The proposed regulations would build on the proposed subpoena regulations and improve PERB's adjudicative efficiency by allowing the parties to trim the matters in dispute based on the pre-hearing investigative process. (Proposed Regulation 32190(a)(1).) The proposed regulations in this respect aid in clarifying existing Board practices and accordingly should be adopted, with one revision.

As written, the proposed regulation sets a default cutoff date for dispositive motions of "no later than thirty (30) days prior to the first day of the scheduled hearing." (Proposed PERB Reg. 32190.) A response would be due "within twenty (20) days of service of the motion." (*Id.*) This timeline would presumably mean that rulings on dispositive motions filed at the 30-day cutoff would issue sometime during the ten-day window before a hearing. Parties would accordingly be forced to prepare for hearing without knowing what issues might remain in dispute until the last moment.

The problem is even more acute in the event of service of the motion by mail, in which case the ten-day window for a decision would be effectively reduced to five days or potentially zero days under the mail-service rules in the current regulations. The current regulations provide,

> A five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and twenty days if the place of address is outside the United States.

(PERB Reg. 32130(c).) The mail-service rule could alternatively be read to require filing of a motion served by mail to be made earlier than 30 days before the hearing—an additional five, ten, or twenty days. This reading is not expressly directed by the existing regulations, however, as the extension of time "shall apply to any filing made ***in response*** to documents served by mail." (*Id.* [emphasis added].)

It would be simpler if PERB were to revise its proposed regulations to eliminate the possibility of last-minute rulings on dispositive motions and to account for the mail-service timelines by specifying a 60-day cutoff for filing dispositive motions under Proposed Reg. 32190. Parties could seek relief from this 60-day cutoff on a showing of good cause.

Notably, a 60-day cutoff would still be speedier than the timeline for motions for summary judgment and for judgment on the pleadings under the Code of Civil Procedure ("CCP"). The CCP requires 75-days' notice and that such motions "be heard no later than 30

days before the date of trial." (Code Civ. Proc. § 437c(3).) In contrast to the proposed regulations, the rule under the CCP also more explicitly addresses how the mail-service extensions are to be computed. (Code Civ. Proc. § 437c(2).)

IV. E-Filing Requirements, Proposed PERB Reg. 32700 *inter alia*

The proposed regulations supplement the e-filing requirements applicable to representation cases in which proof-of-support is required by providing that proof-of-support may be established by authorization cards bearing electronic signatures. The proposed regulations state that proof-of-support includes:

> A notarized list of employees who are not exclusively represented by an employee organization and who have electronically signed authorization cards indicating the employees' desire to be represented by an employee organization, provided that the list is accompanied by the date of each employee's electronic signature, a printout of a sample of the electronically signed forms, and a sworn declaration demonstrating that the employee organization has obtained electronic signatures using generally accepted security protocols or their equivalent.

(Proposed Reg. 32700(d)(5) "Electronic signature" is defined in the proposed regulations to mean "an electronic sound, symbol, or process attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record." (PERB Reg. 32092.)

This proposal appears responsive to PERB's holding in *Regents of the University of California* (018) PERB Order No. Ad-459-H, p. 8, that, under existing PERB Reg. 32700, it could not accept electronic signatures as proof-of-support in a representation case. In reaching this decision, PERB observed that it "has generally construed its regulations governing representation matters narrowly and declined to look to private-sector authority for guidance when PERB's regulations expressly address the policy concerns underlying the practice and procedure of private-sector labor boards such as the NLRB or Agricultural Labor Relations Board." (*Id.* at p. 7 [quoting *Regents of the University of California* (2016) PERB Order No. Ad-434-H, pp. 8-9].) Even though the NLRB had adopted "extensive" standards for accepting proof-of-support with electronic signatures, PERB declined to follow those standards because whereas PERB's regulations required "'original documents' (and therefore original signatures), the NLRB's do not." (*Id.* at p. 6-7.) PERB also acknowledged that a number of statutory provisions provide guidance on electronic signature security, even though they do not require PERB to accept them as proof-of-support: "Government Code section 16.5, Civil Code section 1633.7, and the federal Electronic Signatures in Global and National Commerce Act (ESIGN Act), 15 U.S.C. § 7001 et seq." (*Id.* at p. 5.)

PERB should be free to construe its law in light of state and federal statutes, including regarding the use of electronic signatures. (See *Cumero v. PERB* (1989) 49 Cal.3d 575, 583 [PERB's authority includes construing its statutes in light of constitutional standards].) The Proposed regulation as drafted would likewise allow PERB to tailor its approach, and would be an improvement over its existing inability to accept electronic signatures.

PERB nevertheless could head-off any likelihood of disputes regarding the use of electronic signatures by providing additional guidance to the parties. PERB could do this by providing as follows (with additions underlined):

> . . . a sworn declaration demonstrating that the employee organization has obtained electronic signatures has obtained electronic signatures using a digital signature provider that offers its service with a certificate issued by a digital signature certification authority approved by the California Secretary of State.

(Proposed Reg. 32700(d)(5).)

In practice, most unions will purchase and implement off-the-shelf solutions for recording and storing electronic signatures which are already listed as approved "Certification Authorities" by the Secretary of State. DocuSign is an example, with which employers are also certainly familiar. Adding this specification thus would not significantly burden parties, as a result, while eliminating disputes over signature authenticity between them in the vast majority of cases.

V. Conclusion

Subject to the foregoing comments, PERB should adopt the proposed regulations set for public hearing on June 13, 2019.

Sincerely,

Leonard Carder LLP

s/ Andrew J. Ziaja
Julia Lum