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December 11, 2003

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Re: Decision of the Director
Petition for Certification (AFSCME)
Santa Clara Valley Transportation Authority

Dear Parties:

Enclosed is the Proposed Decision and Order of Hearing Officer Jerilou H. Cossack. The Proposed Decision and Order is hereby adopted as the Decision of the Director pursuant to the Department's regulations, 8 California Code of Regulations section 15855

The Department's regulations, 8 California Code of Regulations section 15860, provide that any party may request review of the Decision by filing with the State Mediation Service a written statement setting forth exceptions or newly discovered evidence, together with two copies of a supporting brief, within 20 days from the date of service of this Decision. Any party may file a brief opposing review within seven days after the exceptions are filed or within 20 days from the service of the Decision, whichever is longer.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

cc: Jerilou H. Cossack
State Mediation/Conciliation Service
Keith E. Uriarte
Randy Johnese
Kaye L. Evleth
John Rea

Enclosure: Proposed Decision and Order

Dec 4, 2003

Jerilou H. Cossack
Arbitrator, Mediator, Factfinder
925-939-1904

PROPOSED DECISION AND ORDER OF THE HEARING OFFICER

In The Matter Of A Controversy Between:

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA)
Employer

and

COUNTY EMPLOYEES MANAGEMENT ASSOCIATION, (CEMA) Affiliated with OPERATING ENGINEERS LOCAL UNION NO. 3, IUOE, AFL-CIO
Incumbent Union

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), Local 101, AFL-CIO
Petitioner

APPEARANCES:

For the Employer: Suzanne B. Gifford, Esquire
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For the Union: Vincent A. Harrington, Jr., Esquire
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For the Petitioner: Sheila K. Sexton, Esquire
Stephen A. Sommers, Esquire
Beeson, Tayer & Bodine
1404 Franklin Street, Suite 500
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OPINION

The Undersigned Hearing Officer issued a Preliminary Decision on November 17, 2003. That Preliminary Decision, a copy of which is appended, is incorporated and adopted as part of this Proposed Decision and Order.

I.

A hearing was held on November 24, 2003 in San Jose, California. The parties stipulated: (1) The unit defined in the collective bargaining agreement has been recognized by VTA; (2) In Case Number 95 1495 the Director of the Department of Industrial Relations certified CEMA as the collective bargaining representative for the unit described in the collective bargaining agreement; and (3) At all times thereafter, that unit has been continuously recognized by the Employer as the bargaining unit for supervisory-administrative employees.

VTA raised certain arguments in addition to those addressed in the Preliminary Decision. The Hearing Officer determined these constituted a motion for reconsideration. The Director of the Department of Industrial Relations, in the BART decision,[1] determined the enabling legislation of the Southern California Rapid Transit District Act and the enabling legislation of VTA were identical and required the most rigorous adherence to relevant federal law. VTA asserts that the recent enactment of AB 199, expressly granting bargaining rights to supervisors of the Los Angeles County Metropolitan Transportation Authority (successor to Southern California Rapid Transit District), establishes that supervisors in that transit district did not previously enjoy bargaining rights. It therefore follows, according to VTA, that the legislature did not intend to grant VTA supervisors and managers bargaining unit rights.

CEMA responds that AB 199 is irrelevant. It deals with a totally separate employer, does not say anything about existing law, and is not even in effect yet.

AFSCME joins CEMA's assertion of irrelevance and adds that there was no

[1] *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555* (1993).

evidence about the underlying bargaining relationships within which to evaluate the import of the statutory change. The intent of AB 199 was to place these employees under the jurisdiction of the Public Employment Relations Board, not to grant them previously denied bargaining rights.

VTA also asserts *Herman v. County of Los Angeles*, 98 Cal.App.4th 484, 119 Cal.Rptr.2nd 691 (2002) precludes finding all federal law excluding supervisors and managers irrelevant. Neither CEMA nor AFSCME had the opportunity to review this case and took no position with respect to it.

II.

The parties agreed the election should be conducted by mail ballot. They further agreed that the eligibility cut off date is November 14, 2003.

III.

I do not find either of VTA's additional arguments persuasive. With respect to the recent enactment of AB 199, there is simply not enough evidence to evaluate the intent of the Legislature and the implications, if any, for VTA. The history of bargaining in the Los Angeles District is unknown. The explanation advanced by AFSCME of the motivating reason for this legislation is viable.

In the *Herman* case the Court reasoned the agreement reached between the Los Angeles County and the Los Angeles County Metropolitan Transportation Authority (MTA) when MTA abolished its police force and contracted with the County to provide law enforcement services was plainly intended "to make sure no employee of the MTA's police department would be left jobless" as a result. The Court found no ambiguity in the language of the contract between the County and MTA. I would agree with VTA that the analogy could be apt if the enabling PUC legislation at issue here stated that "all" federal law and administrative practice were to be applied in determining bargaining units. That is not the case, however. PUC Section 100301 mandates application of "**relevant** federal law and administrative practice". Where, as here, there is a significant difference between the PUC legislation and that of the NLRA in terms of the grant of substantive rights, federal law is not determinative.

IV.

For the reasons set forth above and in my Preliminary Decision, and based on my authority as set forth in Title 8 of the California Code of Regulations, Section 15855, and the stipulations of the parties, I conclude

1. The unit within which an election shall be held pursuant to the petition for certification/decertification filed by AFSCME is that certified by the Director of the Department of Industrial Relations in Case Number 95 1495 and described in the Memorandum of Understanding between VTA and CEMA effective June 21, 1999 to June 8, 2003.

2. The motion of VTA to exclude supervisors and managers from the bargaining unit is denied.

Respectfully submitted,

Jerilou H. Cossack
Hearing Officer

Submitted this 4th day of December 2003
Lafayette, California

Nov 17, 2003

Jerilou H. Cossack
Arbitrator, Mediator, Factfinder
925-939-1904

PRELIMINARY DECISION OF THE HEARING OFFICER

In The Matter Of A Controversy Between:

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA)
Employer

and

COUNTY EMPLOYEES MANAGEMENT ASSOCIATION, (CEMA) Affiliated with OPERATING ENGINEERS LOCAL UNION NO. 3, IUOE, AFL-CIO
Incumbent Union

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), Local 101, AFL-CIO
Petitioner

APPEARANCES:

For the Employer: Suzanne B. Gifford, Esquire
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For the Union: Vincent A. Harrington, Jr., Esquire
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For the Petitioner: Sheila K. Sexton, Esquire
Stephen A. Sommers, Esquire
Beeson, Tayer & Bodine
1404 Franklin Street, Suite 500
Oakland, CA 94612

OPINION

The Santa Clara County Transit District Act was passed in 1969.[1] It was last amended during the 1995-96 legislative session.

The pertinent provisions of the Public Utility Code, the governing legislation, are,

> 100300. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> 100301. Any question which may arise with respect to whether a majority of employees in an appropriate unit desire to be represented by a labor organization shall be submitted to the Director of the Department of Industrial Relations. In resolving such questions of representation including the determination of the appropriate unit or units, petitions, the conduct of hearings and elections, the director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act of 1947, as amended, and for this purpose shall adopt appropriate rules and regulations. . . .
>
> 100307. (a) Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code is not applicable to the district.[2]
>
> (b) The amendments to this section made at the 1995-96 Regular Session are not intended to modify, and shall not have the effect of modifying, an existing bargaining unit determination made by the Department of Industrial Relations pursuant to Section 100301.
>
> 100309. To the extent permitted by law, and until altered or revoked as provided by law, the district shall grant recognition to those employee organizations which served as the recognized representatives of the former county employees described in Section 100308 immediately prior to their employment by the district.
>
> The district shall assume and observe all applicable provisions, including wages, of existing written memoranda of understanding in effect between the county and the above

[1] See footnote 5, at page 11, of the Tentative Decision of the Director of Industrial Relations *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555.*

[2] Known as the Meyers-Milias-Brown Act.

> recognized labor organizations for those former county employees described in Section 100308 who are employed by the district in positions which would have been covered by those memoranda if the employees had remained employed by the county. . . .

In Case Number 95 1495 the Director of the Department of Industrial Relations certified CEMA as the collective bargaining representative for a unit defined as:

> All classified and unclassified employees in the coded classifications, and the positions held by such employees, in the Supervisory-Administrative bargaining unit, who transferred to the District effective as of January 1, 1995, as a result of the statutory reorganization mandated by Assembly Bill 2442 and who, prior to the transfer, held positions covered by a labor agreement in effect between County Employees Association and the County of Santa Clara.

The most recent collective bargaining agreement between the Employer and CEMA was a memorandum of understanding effective June 21, 1999 to June 8, 2003. The preamble of the memorandum of understanding contains the following paragraph:

> VTA and CEMA acknowledge that Public Utilities Code Sections 100308 and 100309 were enacted effective January 1, 1995, pursuant to Chapter 254, Statutes 1994 ("AB 2442"), and that pursuant there to certain employees formerly employed by the County of Santa Clara were hired by VTA, and this Memorandum of Understanding, and its appendices, are intended to, and do, among other things, implement the provisions of Section 100308 and 100309.

On March 6, 2003[3] AFSCME filed a petition for certification in the above-described unit. On March 21 Thomas Nagle of the California State Mediation and Conciliation Service verified that AFSCME had submitted a sufficient showing of interest to require an election. Mr. Nagle further advised that the incumbent union, CMEA, affiliated with Operating Engineers, Local 3, had filed a complaint under Article XX of the AFL-CIO Constitution and that further action on the petition would be deferred pending resolution by the AFL-CIO.

Valley Transportation Authority filed a petition to clarify the bargaining unit on April 1, seeking to exclude supervisors and managers. On April 23 Chuck Cake,

[3] Hereafter, all dates are 2003 unless otherwise specified.

Acting Director of the Department of Industrial Relations, dismissed without prejudice the petition to clarify the bargaining unit, relying on the Rules and Regulations of the National Labor Relations Board (NLRB) which bar action on a unit clarification petition while there is a question concerning representation pending. The AFSCME petition raised a question concerning representation.

The Employer submitted a new petition to clarify the bargaining unit on August 7, again asserting the inclusion of supervisors and managers in the bargaining unit irremediably poisoned any election conducted in that unit. The Employer's petition was again rejected by Acting Director Cake on September 5, again relying on NLRB Rules and Regulations baring action on a unit clarification issue while a question concerning representation exists.

On October 6 the undersigned was appointed as hearing officer in the matter described as "Petition for Certification (AFSCME)/Santa Clara Valley Transit Authority". The hearing officer was directed to

> . . . determine whether an election is to be held, and, if so, the appropriate unit or units within which such election shall be held and the categories of employees who shall be eligible to vote in such unit or units.

Following a conference call with all parties and in accord with the briefing schedule therein agreed upon, the hearing officer directed the parties to submit briefs setting forth their respective positions on the scope of the hearing scheduled for November 24 and 26. Provision was also made for reply briefs. All reply briefs were received on November 13.

Positions of the Parties

Santa Clara Valley Transportation Authority (VTA) (Citations omitted.)

The organic law governing the determination of appropriate units and subsequent bargaining requires the Department of Industrial Relations to apply "the relevant federal law and administrative practice developed under the Labor

Management Relations Act of 1947, as amended. . . ." Only federal labor law, not state labor law is applicable; Public Utility Code § 100307 explicitly exempts the Employer from the Meyers-Milias-Brown Act. The Department's decision respecting a representation question at VTA must be completely consistent with federal labor law.

The current unit within which an election is sought includes roughly forty rank-and-file employees and more than two hundred fifty supervisory and managerial employees. Allowing agents of management, supervisors and managers, to vote violates the laboratory conditions required and the right of rank-and-file employees to freely choose whether to be represented, and if so, by whom.

Allowing a unit with the gross over-weighting of supervisors and managers clearly constitutes an unfair labor practice in that it is an employer dominated or assisted bargaining unit. Allowing such a unit also exceeds the Department's jurisdiction, because the Department cannot compel the Employer to bargain with a unit of supervisors.

In the 1993 decision *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555* (hereafter referred to as the BART decision), the Department has already determined that in resolving representation questions at VTA it must apply the NLRA. When the NLRA is applied, supervisors and managers may not be included in a bargaining unit and may not vote in an election.

The initial stabilizing statute when VTA was created, requiring VTA to assume extant memoranda of understandings between Santa Clara County and employee organizations, does not trump and repeal the clear legislative command for the Department to apply the NLRA to VTA. Standard rules of statutory construction do not allow for such an extraordinary implied repeal. Further, the legislature as recently as this year reaffirmed its determination that VTA must adhere to the NLRA. Federal law, as the Department in the BART decision observed, allows the supervisory issue to be raised at any time.

Both of VTA's petitions for clarification were dismissed, without prejudice, by

the Department. What the Department delegated to the hearing officer is the determination of ". . . the appropriate unit or units within which such election shall be held and the categories of employees who shall be eligible to vote. . . ." Supervisors and managers must be barred from voting for the reasons set forth above. None of the cases cited by CEMA are relevant because none deal with the problem of non-statutory employees in a bargaining unit, nor with the unfair labor practice of having management's agents, supervisors and managers, participate in elections with rank-and-file employees.

The Department does not have jurisdiction to compel VTA to recognize or bargain with a unit containing supervisors or managers. The Department should determine that only statutory employees may vote.

County Employees Management Association (CEMA), Affiliated with Operating Engineers Local Union No. 3, IUOE, AFL-CIO (Citations omitted.)

The order referring this matter to the hearing officer does not incorporate the employer's unit modification petition. Accordingly, the hearing officer is requested to issue a ruling in limine, precluding the offer by VTA, or any of the parties, of evidence offered because of its tendency to show that the existing representation unit should be modified, or clarified, to exclude from it any classification of employees, or incumbents, presently included within the existing unit.

Any election conducted on the AFSCME decertification/certification petition must be conducted within and among the employees assigned to the bargaining unit which is currently certified or recognized. The decertification procedure, to the extent it challenges a union's ongoing recognitional status, and its support among the employees affected, must reflect the view of the entire existing collective bargaining unit, and not just a portion, or modified version of that unit. The only question before the hearing officer is what is the presently recognized unit. The hearing officer should issue a second ruling in limine precluding the tender of any evidence offered to show that some unit other than the presently recognized unit

covered by the present collective bargaining agreement is the unit in which a decertification election should be directed.

Any evidence offered to show that the unit presently recognized should be modified to exclude so-called "supervisory" employees should be rejected because it is not "relevant". Federal cases excluding supervisors from representation, and therefore from bargaining units, is not applicable to the labor relations of the employer. The Director in the BART decision has determined there is no "relevant law or administrative practice" which has arisen under the LMRA that relates to the representation rights of supervisors, because of the marked differences between the statutory definition of "employee".

VTA was obligated to recognize the employee organizations and existing collective bargaining agreements of its predecessor, without reference to or distinction between supervisory and non-supervisory employees. By virtue of its enactment of other legislation dealing with public employees in the state, it is obvious the legislature knows how to distinguish between supervisory, managerial and rank-and-file employees. It has not done so in the enabling legislation governing labor relations at VTA. One cannot invent statutory exclusions from substantial labor rights which the legislature itself has not created when it created the bargaining rights at issue.

There has never been an historical exclusion of supervisors from this bargaining unit, there is no statutory basis for excluding them from the unit, or from representation rights, and the Director has previously determined, in the BART decision involving an analogous situation and under the same set of regulations, that there is no relevant federal labor relations authority which would support the exclusion of supervisory employees from collective bargaining rights under this statute.

American Federation of State, County and Municipal Employees (AFSCME), Local 101, AFL-CIO (Citations omitted.)

For both procedural and substantive reasons, VTA's attempt to sever the supervisors and managers from the bargaining unit is inappropriate. The hearing officer has not been vested with jurisdiction over VTA's modification petition, but rather is vested solely with regard to the issues related to AFSCME's election petition. Assuming arguendo that the appropriateness of supervisors and managers in the existing bargaining unit is properly before the hearing officer, the historical and legal basis for appropriate unit determinations in transit districts leads to the conclusion the existing unit is appropriate and should be upheld.

Labor relations at VTA are governed by Public Utility Code § 100300, *et seq.* That code section does not distinguish between supervisors and rank-and-file employees in any manner. Neither do the regulations promulgated by the Director of the Department of Industrial Relations to certify and clarify bargaining units in the various transit authorities.

The enabling Code and corresponding regulations instruct the Director to "apply relevant law and administrative practice developed under the Labor Management Relations Act, 1947, as amended." The NLRB is without jurisdiction to certify bargaining units which contain certain individuals who do not fit the definition in the LMRA for "employee". The Public Utility Code (PUC) and DIR regulations diverge from the LMRA in regard to treatment of supervisors. Whereas the LMRA specifically excludes supervisors from the definition of employee, the DIR regulations and the PUC do not. Further, the industry practice is that transit districts throughout California regularly recognize and negotiate collectively with supervisor units and mixed supervisor/non-supervisor units. The PUC covering VTA employees is not in accord with the LMRA on this issue and thus the LMRA is not relevant, consistent with the Director's conclusion in the BART decision. Since there is no qualification to the term "employee" in the PUC provisions applicable here, as there is in the LMRA, the term embraces supervisory and managerial, as well as non-

supervisory, employees. Indeed, supervisory employees were determined to be within the meaning of "employees" under the NLRA until it was amended in 1947 to expressly exclude them.

VTA's assertion rank-and-file employees may not be placed in a bargaining unit along with supervisors and managers is unsupported by the law. The enabling statute prescribes no inherent limitation with regard to mixed rank-and-file and supervisory units. The hearing officer should not presume a limitation where none exists.

VTA has bargained with its mixed rank-and-file, supervisory and managerial unit for many years and over successive collective bargaining agreements. By its conduct VTA has waived its right to challenge the appropriateness of the unit. This assertion is buttressed by the fact that the 1995/1996 amendments to VTA's enabling legislation were not intended to modify or have the effect of modifying an existing bargaining unit determination made by DIR.

DISCUSSION

There is no pending petition for clarification of the bargaining unit currently represented by CMEA and sought by AFSCME. Both VTA-filed petitions for clarification have been dismissed by the Acting Director.

The issue of whether an election may be conducted and the results certified by the Director in a bargaining unit including purported supervisors and managers is not thereby resolved. If, as VTA asserts, the enabling legislation requires adoption of NLRA substantive law, the Director would be precluded from certifying a bargaining unit containing supervisors and managers. It would be necessary to hold an evidentiary hearing to determine which, if any, of the persons in the existing unit were supervisors or managers. VTA's reliance on NLRB precedent, however, is misplaced.

The LMRA both defines the term supervisor and provides for the exclusion of supervisors from bargaining units and from the Act's protection. There is neither

definition nor preclusion in the enabling PUC legislation applicable to VTA, nor may either be inferred. Where, as here, there is a significant statutory difference between the enabling legislation of the LMRA and that of the PUC, LMRA precedent cannot control, i.e., it is not "relevant". Nor does the recent enactment of AB 1064 render LMRA precedent on supervisors and managers determinative. AB 1064 mandates application of the LMRA to pension systems in the public transit industry. It has no bearing on bargaining rights or unit determinations.

VTA misconstrues the import of *Public Employees of Riverside City v. City of Riverside*, 75 Cal.App.3d 882 (1978). Although this case involved the Meyers-Milias-Brown Act, the critical holding relevant to the present matter is the analysis of the effect of the statutory differences between LMRA and Meyers-Milias-Brown with respect to supervisory employees. Significantly, the court reasoned,

> . . .[Meyers-Milias-Brown] extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. The act is silent about their unit placement. The California Legislature thus minimized the potential or actual conflict of interest that, as mentioned in *NLRB v. Bell Aerospace Co.* (1974) 416 U.S. 267, 271-272 [94 S.Ct. 1757, 40 L.Ed.2d 134, 141-142], was the basis for the total exclusion of management employees that obtains under federal law.

PUC Section 100300 extends the right of organization and representation to employees without restriction, including to supervisors and managers. This construction of the enabling PUC legislation is consistent with early NLRB and court decisions, which similarly extended bargaining rights to supervisors and managers prior to the 1947 Taft Hartley amendments. See *Packard Motor Car Co. v. NLRB*, 330 US 485 (1947), the Supreme Court decision which prompted the 1947 amendments reversing its holding, and the Court's lengthy discussion in *Bell Aerospace, supra*.

Absent evidence to the contrary, it is to be presumed the Legislature was knowledgeable about the composition and structure of transit bargaining units when it passed the PUC provisions here in question. The Legislature mandated bargaining in the very unit VTA now challenges. The Legislature, however, consistent with its

other ventures into public sector collective bargaining, has determined that the private sector model excluding supervisors and managers from representational rights is not the most desirable public policy. The Legislature placed the imprimature of approval on the existing bargaining unit.

Various California courts have recognized that bargaining in the public sector raises issues not present in the private sector. In *International Brotherhood of Electrical Workers, Local 889 v. Lloyd w. Aubry, Jr.*, 42 Cal.App.4th 861, 871 (1996) the Court of Appeal noted,

> The evaluation of what is an appropriate unit involves consideration of whether the employees of a unit are united by community of interest. . . In public sector employment, additional factors to be considered are the employer's authority to bargain effectively at the level of the unit and the effect of a unit on the efficient operation of the public service. . . .

The existing unit has been approved by the Legislature. The governing code has been amended with the specific admonition, at Section 100307(b), that the amendments not change the existing bargaining unit determination made by the Department of Industrial Relations. That determination described the existing unit. It shall not be disturbed.

Accordingly, for the reasons set forth above and based on my authority as set forth in the Director's October 6 appointment of the undersigned as hearing officer, I issue the following

Preliminary Proposed Decision and Order

1. The appropriate unit within which an election shall be held pursuant to the petition for certification/decertification filed by AFSCME is that certified by the Director of the Department of Industrial Relations in Case Number 95 1495 and as described in the recently expired Memorandum of Understanding between VTA and CMEA.

2. The motion of Employer VTA to exclude supervisors and managers from the bargaining unit is denied.

3. The motion in limine of CMEA to preclude evidence offered to show the existing representation unit should be modified to

exclude from it any classification of employees presently included is granted.

4. The motion in limine of CMEA to preclude the tender of any evidence offered to show that some unit other than the presently recognized unit covered by the present collective bargaining agreement is the unit in which a decertification election should be directed is granted.

Respectfully submitted,

Jerilou H. Cossack
Hearing Officer

Submitted this 17th day of November 2003
Lafayette, California