

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JEFFERSON ELEMENTARY SCHOOL DISTRICT,)	
)	
Employer,)	Case Nos. SF-D-41
)	SF-D-12
and)	
)	
JEFFERSON FEDERATION OF TEACHERS,)	PERB Decision No. 164
LOCAL 3267, AFT/AFL-CIO,)	
)	
Employee Organization,)	
)	June 10, 1981
and)	
)	
JEFFERSON CLASS ROOM TEACHERS ASSOCIATION,)	
CTA/NEA,)	
)	
Employee Organization.)	

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Jefferson Federation of Teachers, Local 3267, AFT/AFL-CIO; Kirsten L. Zerger, Attorney (California Teachers Association) for Jefferson Classroom Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Members Moore and Tovar.

DECISION AND ORDER

In the instant case, the Public Employment Relations Board (hereafter PERB or Board) has considered the objections to the conduct of the decertification election as submitted by the Jefferson Classroom Teachers Association, CTA/NEA (hereafter CTA). As a result of that decertification election conducted on May 6, 1980, the Jefferson Federation of Teachers, Local 3267, AFT/AFL-CIO (hereafter AFT) was selected by the

majority of voters to serve as the exclusive representative of the certificated employees of the Jefferson Elementary School District (hereafter District). CTA, which had been the exclusive representative since June 2, 1976, filed objections to the conduct of that election on May 15, 1980. A hearing was conducted before a PERB hearing officer on June 2, 1980. Thereafter, CTA filed a written request to amend its objections to the conduct of the election. This request was granted by the hearing officer on June 20, 1980, during the second day of hearing. Post-hearing briefs were filed by both parties, and on July 22, 1980, the hearing officer issued his proposed decision overruling CTA's objections. Pursuant to an agreement of the parties, PERB's executive assistant granted CTA an extension of time to file exceptions to the hearing officer's decision, and on August 22, 1980, timely exceptions to that decision were submitted by CTA.

In conformity with the following discussion, we affirm the hearing officer's decision and direct that, as a result of the decertification election, AFT be certified as the exclusive representative of the District's certificated employees.

FACTUAL SUMMARY

Based on our review of the record, we find that the hearing officer's findings of fact as set forth in his proposed decision, which is attached hereto and incorporated by reference, are free from prejudicial error. We therefore adopt

his factual conclusions and have examined CTA's exceptions to the conduct of the election in accordance with those findings.

DISCUSSION

Our consideration of the objections lodged by CTA begins with reference to PERB rule 32738(c)¹ which permits the Board to entertain objections only on the following grounds:

(c) Objections shall be entertained by the Board only on the following grounds:

(1) The conduct complained of is tantamount to an unfair practice as defined in Government Code sections 3543.5 or 3543.6 of the EERA, 3519 or 3519.5 of the SEERA, or 3571 or 3571.1 of the HEERA, or

(2) Serious irregularity in the conduct of the election.

Two of CTA's objections are entertained by the Board as assertions that specific conduct constituted serious irregularities in the election process.²

In San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111, the Board considered the employee organization's objection to the conduct of an organizational security election and its charge that the results of that

¹PERB rules are codified at California Administrative Code, title 8 section 31000 et seq.

²CTA asserts in its exceptions to the hearing officer's decision that the District's refusal to bargain was conduct tantamount to an unfair practice and, because that refusal was an issue in the election campaign, it constitutes a basis for setting aside the election. Our consideration of that assertion is set forth infra.

election should be overturned because the employer had engaged in conduct tantamount to an unfair practice under the Educational Employment Relations Act (hereafter EERA or Act).³ While a majority of the Board concluded that the employer had engaged in conduct tantamount to an unfair, it noted that such a determination was a threshold matter and that it was additionally necessary to determine whether that conduct was sufficient cause to set aside the results of the election. The PERB rule permitting election objections ". . . merely provides this Board with the authority to entertain objections to elections. . . ." (Emphasis in original.) We affirmed that PERB ". . . will not, necessarily, in every situation where conduct tantamount to an unfair practice is evidenced, order that the election be rerun."

In assessing CTA's allegations in the instant case, we find no reason to attach a different interpretation to that portion of PERB's rule regarding election objections based on assertions of serious irregularities. While the election misconduct itself may be of a serious or weighty nature, it may not, under all circumstances, evidence sufficient cause to disturb the results of the election. Thus, as with objections based on conduct tantamount to an unfair practice, it is

³The EERA is codified in Government Code section 3540 et seq.

necessary to examine the alleged objectionable conduct and to determine if that conduct had a probable impact on the employees' vote. As recognized in San Ramon, the objecting party is required to satisfy its burden of establishing a prima facie case that specific activities interfered with the election process to the degree of certainty set forth above.

In the election objections and in the exceptions to the hearing officer's decision, CTA first posits that PERB agent Jerilyn Gelt disseminated inaccurate information about a key election issue to Patricia Bell, a teacher in the District, on the day of the decertification election. More specifically, CTA asserts that on the day of the decertification election, Bell asked Gelt whether both organizations, CTA and AFT, could sit at the bargaining table as a coalition bargaining team. In CTA's view, Gelt inaccurately responded that that was permissible and that this misinformation affected the election results because a key issue in AFT's decertification campaign was to promote the concept of a coalition of employee organizations representing the Jefferson teachers.

In our review of this objection, we have found that the transcript can be cited to demonstrate either that Bell asked Gelt whether employees could be members of the bargaining team or that she asked Gelt about the propriety of both organizations jointly functioning as the bargaining team. Because the record is replete with both vagueness and

contradictions, we cannot conclusively determine which question Bell asked or, alternatively, whether Bell may in fact have asked two different questions. Since we are unable to ascertain the specific nature of the question, we are likewise unable to conclude that Bell was necessarily provided with inaccurate information. Rather, we find that because Bell's question was at best ambiguously phrased, that confusion cannot be disassociated from the answer she received. Reasonable reliance on Gelt's answer cannot be justified where Bell's own testimony displays uncertainty as to the information sought. The testimony indicates that the call made by Bell was made between classes and that she was in a hurry. This seems to have contributed to the confusion and uncertainty of the discussion. CTA has failed to demonstrate with any certainty that Bell was in fact inaccurately advised and, having failed in that proof, has not satisfied its burden of evidencing that Gelt's conduct was a serious irregularity which infected the results of the decertification election thereby warranting that those results be disturbed.

CTA has also taken exception to the hearing officer's decision regarding its objection that AFT members unlawfully engaged in last minute electioneering and improperly escorted voters into the polling area. The hearing officer overruled these objections, and we are in agreement that the specified conduct does not amount to a serious irregularity sufficient to set aside the election results.

First, based on the hearing officer's specific finding of fact that the statement made by Jane Bennett was heard only by Jean Kaldahl, CTA president and election observer, we affirm the conclusion that her statement could not have affected the election results. The record fails to demonstrate that Bennett's words, "Here's five more votes for AFT," were audible except in Kaldahl's ears or that, in themselves, they were of such a nature as to persuade potential voters how they should cast their ballot.

Second, the hearing officer also reached the factual conclusion that James Herndon escorted two women into the District administrative offices on the morning of the election and similarly escorted one or two voters on two different occasions in the afternoon. He also concluded that Thomas Martin escorted one voter into the administrative offices in the afternoon. While the Board is in agreement with CTA's assertion that last minute electioneering is antithetical to the free and untrammelled election choice, we are at the same time guided by the fact that, absent a showing of serious irregularity, the results of an election should not be lightly disturbed or disregarded. The rule established by the National Labor Relations Board (hereafter NLRB) in Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395] articulates a similar concern by establishing a strict rule against such conversations,

regardless of the content, in order to avoid last minute electioneering or pressure and unfair advantage from prolonged conversations with waiting voters. This rule was adopted in the hopes of preserving the sanctity of the final minutes before an employee casts his or her vote. The NLRB also noted, however, that the application of this rule "will be informed by a sense of realism." While the content of the speaker's remarks will not be of critical concern, any chance, isolated, innocuous comment or inquiry "will not necessarily void an election."

CTA argues that the hearing officer misapplied the rule articulated in Milchem by concluding that because the instant conversations of Herndon and Martin were less than five minutes in duration they were de minimus. There is no rational basis, CTA argues, for the distinction between the prohibited five-minute conversation in Milchem and the hearing officer's conclusion in the instant case.

Contrary to CTA's argument, however, the hearing officer's conclusion does not suggest that the cited conversations were insufficient grounds to overturn the election because they were only of a slightly briefer duration than the impermissible conversation evidenced in Milchem. What the hearing officer concluded was that "the time which Herndon and Martin had to speak to voters as they walked the approximate 25-foot distance between the organizations' tables and the District

administrative offices was extremely short in duration" . . . and, as a result, "any conversations which occurred between Herndon, Martin and voters would, by necessity, have to be so brief as to be de minimus."

As the hearing officer set forth in his findings of fact, the parties agreed at the pre-election conference that the no-campaigning area was designated as the 25 feet between the organization tables and the board room where the balloting took place. Moreover, the parties also agreed that persons stationed at the organization tables or otherwise present outside of the administrative offices could use the restroom facilities inside the building. No factual evidence demonstrates that the content of the conversations with voters was in fact designed to persuade or influence voters. Nor is there any evidence as existed in Star Expansion (1968) 170 NLRB [67 LRRM 1400], relied on by CTA, that Herndon or Martin were asked to cease their conversations or to remove themselves from the no-campaigning area. In total, then, the sum of the objectionable conduct raised by these objections rests solely on the fact that employees, some of whom were voters, were escorted and verbally addressed while Herndon and Martin walked the 25 feet from the organization tables to the board room. Based on this evidence alone, we are not persuaded that the hearing officer erred in concluding that the conduct involved chance and innocuous encounters. We therefore find that the

strict rule of Milchem was not misapplied and, in any event, that these objections do not rise to the type of serious irregularity meriting disruption of the election results.

Finally, in its amendment to the objections to the election, CTA asserts that the election order directed by the Board in Jefferson School District (3/7/80) PERB Order No. Ad-82 was improper and states that "it must be assumed that any abandonment of the certified representative by unit members is a direct consequence of the refusal to bargain For this reason, ordering the election in this matter was completely improper and the election results must be set aside." (Request for Leave to Amend. Emphasis supplied.) This objection was not included in CTA's original submission and as a result of AFT's assertion that it would be prejudiced by such amendment, the hearing officer, on the first day of hearing, refused to permit CTA to introduce evidence on that issue. Thereafter, CTA filed the written request, excerpted above, and at the second day of hearing, referring to that written request, asserted:

. . . the basis for the request, as set forth in the written document is, essentially, to amend the objections to formally include an objection to this election based upon the refusal to bargain by the Jefferson School District and that that so severely tainted the bargaining relationship that it inevitably had an effect on the election and the exercise of the employees' choice of exclusive

representative. (T 2 Vol. p. 2, lines 1-7;
emphasis supplied.)

In its exceptions, CTA asserts that the hearing officer only addressed the issue of whether the election should have been conducted as directed by the administrative appeal and failed to make an independent evaluation of the impact on the election results of the District's refusal to bargain.

After a careful review of the record, we conclude that the hearing officer correctly assessed the nature of CTA's third objection. When CTA first raised the issue of the District's refusal to bargain in connection with the instant case, it argued that the issue was a legal one rather than a factual dispute and repeatedly advised the hearing officer that what it wished to pursue was whether it was appropriate to order the election in the first place. In its written objections as cited above, CTA urges that "it must be assumed" that the District's refusal to bargain directly caused employees to abandon CTA in favor of AFT's representation. And, when at the hearing it paraphrased its written amendment to the election objections, CTA again asserted that the District's conduct "inevitably" had an effect on the election. Thus, contrary to the arguments advanced in the exceptions under review, our reading of the record convinces us that CTA, through this exception, hoped to urge the Board that, as a matter of law, the decertification election should not have proceeded in the

face of the District's refusal to bargain. CTA did not advance any arguments not previously addressed and rejected by this Board in Administrative Appeal Ad-82, supra.⁴ In dismissing this objection, we remain unpersuaded that the District's refusal to bargain would have inevitably affected the results of the decertification election.

Finally, we are in agreement with CTA's contention that whether the District's refusal to bargain did, in fact, jeopardize its chances in the election was not determined or addressed by the Board's prior ruling. However, we find no basis in the instant record from which to conclude that such objection was timely raised either in the original objections or the amendments thereto. To the contrary, in its written amendment to the election objections and in its verbal representations, the thrust of CTA's argument is that unlawful interference must be assumed from the fact that the District refused to bargain. We therefore find that, until submission of the exceptions to the hearing officer's decision, CTA's objection was framed in terms of presumed rather than actual impact. Moreover, even if we were to accept the characterization of CTA's objection as proffered in its exceptions, CTA introduced only one document as evidence in

⁴Member Tovar did not participate in the PERB Decision No. Ad-82.

support of this claim. Based on that evidence alone, which demonstrated only that past bargaining had been an issue in the election campaign, we are unable to conclude that the election results should be overturned.

ORDER

Based on the foregoing, we direct that the results of the decertification election be certified and that the Jefferson Federation of Teachers, Local 3267, AFT/AFL-CIO, be certified as the exclusive representative of the District's certificated employees. The objections raised by CTA are hereby DISMISSED.

By: Barbara D. Moore, Member

Irene Tovar, Member

Chairperson Gluck, dissenting:

My opposition to proceeding with the decertification election prior to this Board's determination of the blocking unfair labor practice charge was set forth at some length in my dissent in PERB Decision No. Ad-82. Nothing has transpired since which either causes me to believe that my dissent was inappropriate or that its basis had been removed by the date that the election was held. Therefore, I find it unnecessary

to reach the matter of CTA's claim of election misconduct by certain PERB agents.

Harry Gluck, Chairperson

On May 15, 1980 the Jefferson Classroom Teachers Association, CTA/NEA (hereafter Association) timely filed objections to conduct of the election between itself and the Jefferson Federation of Teachers, Local 3267, AFT/AFL-CIO (hereafter Local 3267) for exclusive representation of certificated employees of the Jefferson Elementary School District (hereafter District) held on May 6, 1980 pursuant to Public Employment Relations Board (hereafter PERB) Regulation 32738.

After being duly noticed, the matter came on regularly for hearing before the above-named hearing officer of the PERB on June 2 and 20, 1980 at Daly City and San Francisco, California, at which time all parties were afforded full opportunity to present evidence and argue their respective positions.

On June 6, 1980 the Association filed a Request for Leave to Amend Objections to Conduct of Election which was granted at the hearing on June 20, 1980.

Local 3267 and the Association subsequently filed simultaneous post-hearing briefs in the matter post-dated to the attention of the above-named hearing officer on or before July 7, 1980.

THE OBJECTIONS

The Association in its Objections To The Conduct Of The Election, as amended, contends that the decertification election held in the District on May 6, 1980 must be set aside on three grounds:

(1) A PERB agent disseminated misinformation on crucial election issues, knowing it could affect the election but failing to take any affirmative steps to avoid detrimental impact;

(2) PERB did not sufficiently safeguard the polling conditions to ensure that voters could exercise a free choice in this election; and

(3) The election was improperly ordered prior to the resolution and remedying of pending unfair practice charges against the District for refusing to bargain with the Association.

FINDINGS OF FACT

Background

The Association was certified the exclusive representative of a unit of certificated employees of the District on June 21, 1976.

A valid decertification petition was filed by Local 3267 on September 23, 1977. On October 18, 1977 the San Francisco regional director directed that an election be held on November 17, 1977. The decision to direct an election was appealed by the Association and on November 10, 1977 the executive director of the PERB found that resolution of pending unfair practice charges in case numbers SF-CE-33 and SF-CO-6 might significantly influence the outcome of the election and therefore ordered a stay of all further proceedings in the representation cases until resolution of the pending unfair practice proceedings. The PERB itself subsequently upheld the executive director's stay on December 30, 1977 in EERB Order No. AD-22.

On March 29, 1979, Local 3267 again filed a decertification petition in the District. The San Francisco regional director perpetuated the stay of the decertification election until the

resolution of the above-mentioned unfair practice charges. Upon appeal by Local 3267, the Board itself held that PERB's discretion to stay a decertification election when unfair practice charges are pending may not be exercised by rote. Accordingly, the case was remanded to the San Francisco regional director to conduct an investigation to determine whether the pending unfair practice charges should continue to block the decertification election. Jefferson School District (6/29/79) PERB Decision No. AD-66.

Based on the results of his investigation, the regional director determined that the pending unfair practice charges should no longer block the decertification election.

The Association subsequently appealed the determination of the San Francisco regional director to proceed to a decertification election notwithstanding the pendency of mutual refusal to negotiate charges.

On March 7, 1980, the PERB itself sustained the San Francisco regional director's determination to proceed to a decertification election in the District notwithstanding the pendency of mutual refusal to negotiate charges holding:

Accordingly, we believe that the regional director reasonably determined that, absent other evidence of bad faith, when the parties have in fact reached an agreement covering the items enumerated supra at footnote 11 (including some of the disputed issues raised in the unfair practice charges), the section 3543.5(c) charge based on negotiability is akin to a technical

refusal to bargain and does not without other factors require a decertification election to be delayed.¹

The decertification election was accordingly held on May 6, 1980. The results of that election were as follows:

Votes cast for Local 3267, AFT/AFL-CIO.165
Votes cast CTA/NEA.163
Votes cast for No Representation.1
Valid Votes Counted329
Challenged Ballots.0
Valid Votes Counted Plus Challenged Ballots .	.329

A majority of the valid votes counted plus challenged ballots was therefore cast for Local 3267.

Time and Place of the Election

The election hours on May 6, 1980 were from 10:30 a.m. to 1:00 p.m. and from 2:30 p.m. to 4:00 p.m.

Balloting took place in the District's board room located at 101 Lincoln Avenue, Daly City, California, the same room where the hearing was held on June 2, 1980. There is a District parking lot adjacent and west of the board room. To enter the board room from the parking area one may use the Lincoln Avenue sidewalk in front of the District's offices. From the sidewalk there is then a walkway leading to the main entrance of the District's offices. At the main entrance of the District's offices are double glass doors inside of which is a foyer. On the west side of the foyer is the board room

¹ Jefferson School District (3/7/80) PERB Order No. AD-82.

where balloting took place, and on the east side of the foyer are the District administrative offices. The District board room is entered through two double wooden doors just a few feet past the double glass door entrance. On the east side of the foyer and past the double wooden doors into the board room is a long corridor leading to the District administrative offices. Just across the width of this corridor are restrooms and a public telephone.

One must walk past the entrance into the board room in order to get to either the men's or women's restroom or public telephone.

On the date of the election a long table was set up in the board room, one edge of which was approximately 6-1/2 feet from the double wooden doors. At that table Ms. Kaldahl, Mr. Dennis Carr and Ms. Anita Martinez were seated with Kaldahl seated closest to the doors, which were open, during the election. Ms. Kaldahl was the election observer on behalf of the Association, Mr. Carr was the election observer on behalf of Local 3267 and Ms. Martinez was the Public Employment Relations representative conducting the election on behalf of the PERB. Also in the board room was a polling booth and a ballot box, both of which were approximately 16-1/2 feet from the double wooden doors.

Outside and in front of the board room the Association and Local 3267 had set up respective tables for the purpose of

checking off the names of persons who had voted. These organization tables were set up on a grassy area located approximately 25 feet from the entrance to the board room. At a preelection conference on the morning of the election and by agreement between the Association and Local 3267, Ms. Martinez instructed representatives of the parties that there would be no campaigning in the area between the organization tables and the board room where balloting would take place.

After the closing of the polls on May 6, 1980 at 4:00 p.m. but prior to the tally of the ballots shortly thereafter, Ms. Jean Kaldahl, on behalf of the Association, and Mr. Dennis Carr, on behalf of Local 3267 signed PERB's Certification on Conduct of Election which states that as election officers of the PERB and authorized observers they observed the conduct of the balloting at the specified time and place and certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret and that the ballot box was protected in interest of a fair and secret vote.

Election Issues

Campaign literature from Local 3267 marked and entered as Association's Exhibits 1, 2, 3, 4, 5, and 7 and distributed to teachers in the District sometime before the election establish that the subject of "coalition bargaining" and agency shop were among the issues of the decertification election campaign.

With respect to coalition bargaining, Local 3267 proposed in its literature that should it win the decertification election it would create a bargaining team of three Local 3267 members combined with three open spaces which it hoped experienced Association members would fill.

Additionally, campaign literature from Local 3267 marked and entered as Association's Exhibits 6 and 8 and distributed to teachers in the District sometime before the election establish that the Association's progress at the bargaining table with the District was also an issue during the election campaign.

Objection 1

On the date of the election, May 6, 1980, at approximately 10:20 a.m. a teacher in the District, Ms. Patricia A. Bell, called the San Francisco Regional Office of the PERB and spoke to Ms. Jerilyn Gelt, a Public Employment Relations representative. Ms. Bell explained to Ms. Gelt that she was a teacher in the District and had been hearing conflicting reports regarding certain issues in the decertification election being held that day in the District. Ms. Bell informed Ms. Gelt that she wanted to determine the facts for herself regarding two issues--coalition bargaining and agency shop.

Regarding "coalition bargaining," Ms. Bell specifically asked whether people from both employee organizations in the

District could sit down at the bargaining table as a bargaining team with the District. Ms. Gelt then asked Ms. Bell if she was referring to organizations prior to the election or subsequent to the election. Ms. Bell responded, "after the election." Gelt responded that as far as she knew people from both organizations could sit down at the table as a bargaining team unless something in the respective organizations' by-laws prevented them from doing so.

Regarding agency shop, Ms. Bell then asked Ms. Gelt: if an agency shop clause was included in a collective bargaining agreement, did there have to be a separate election among the people voting on the contract in order for the agency shop clause to be effective. Ms. Gelt responded "no," that the only party who may require a separate election on an agency shop clause was the District although they were not required to do so.

Ms. Bell then asked Ms. Gelt if a group of employees could ask for an election regarding "that" agency shop clause. Gelt again responded "no," only the employer may ask for such an election.

Ms. Bell testified that in asking the question of Ms. Gelt regarding agency shop she was asking whether or not there had to be a separate vote regarding an agency shop clause at the time the contract between the exclusive representative and the employer was voted on and prior to implementation of the

clause. Ms. Gelt, appearing under subpoena and by order of the PERB itself, testified that the tone of the question regarding agency shop indicated to her that Ms. Bell was asking about an organizational security clause that was not then in effect as opposed to the right of employees once an organizational security clause is in place and the employees wish to rescind that organizational security clause.

The entire conversation between Ms. Bell and Ms. Gelt lasted no more than five minutes.

Immediately after speaking with Ms. Gelt, Ms. Bell spoke to Mr. Meneken, a teacher at Ms. Bell's school. Bell told Meneken that pursuant to the information she had received from Ms. Gelt, there could be a coalition bargaining team composed of members from both organizations, that only the District could require a separate vote on an agency shop clause when the contract was voted upon for ratification, and that Bell therefore concluded that both organizations were lying but that one side had given her more false information than the other. Ms. Bell did not identify that organization. Bell also spoke with Ms. Winifred Noble, a teacher at Ms. Bell's school, between 12:10 and 12:30 p.m. on the date of the election and just after Noble had returned from voting. Bell told Noble the same thing that she had told Meneken. Noble did not speak with anyone during the day about the substance of her conversation with Bell.

On the date of the election, Bell also spoke with Ms. Barbara Lewis, a teacher at Bell's school, at approximately 3:20 p.m. and before Lewis had voted. Bell told Lewis that she had called PERB that morning and had been told that only the District could require a "vote" on agency shop and not a group of teachers. Bell also told Lewis that PERB said that the two groups could bargain together. Lewis testified, however, that nothing Bell said to her influenced or changed her voting.

Lewis then spoke to Virginia Opperman, a teacher in the District, during the time that the polls remained open, about Lewis' conversation with Bell. Opperman has been on the Association's bargaining team since January or February of 1979 until the present.

Objection 2

(1) Jane Bennett's Alleged Statement

The evidence is in conflict regarding the Association's allegation that a member of Local 3267, Ms. Jane Bennett, said in a loud voice upon entering the board room, "Here's five more votes for AFT" in the presence of at least five other teachers on May 6, 1980. Ms. Jean Kaldahl, the Association's election observer, testified that Ms. Bennett made the statement although she was unsure of the time of the occurrence. Mr. Dennis Carr, election observer for Local 3267 testified that he did not hear Ms. Bennett make such a statement. Ms. Anita Martinez, Public Employment Relations Representative for

the PERB appearing under subpoena and by order of the PERB itself², also testified that she does not recall

Ms. Bennett making such a statement.

Ms. Kaldahl testified that Bennett spoke in a tone loud enough for everyone in the room to hear. However, both Carr and Martinez testified that they did not hear Bennett make the alleged comment. The hearing officer thus concludes that if Bennett made the statement at all, it was in a tone too soft for Carr and Martinez to hear even though both Carr and Martinez were seated right next to Kaldahl. Since the Association did not call any of the other persons in the voting room at the time the alleged comment was made to testify, the hearing officer is unable to conclude that anyone, other than Ms. Kaldahl, the Association's election observer and president of the Association, heard the alleged statement by Bennett.

(2) Escorting of Voters

(a) James Herndon

The testimony is again in conflict regarding the Association's allegation that James Herndon, President of Local 3267, on several occasions escorted members of the bargaining unit into the polling room:

²Jefferson Elementary School District (6/19/80) PERB Decision No. 135.

[1] Deborah Ford, an employee of the California Teachers Association (hereafter CTA), testified that on one occasion, while walking to the ladies' room inside the District offices, she saw Herndon standing three to four feet from and facing the entrance to the board room.

[2] Phil Schneider, an employee of CTA and present at the polls between 11:30 a.m. and 12:40 p.m. and also at 3:30 p.m., testified that he saw Herndon enter the District offices three times. On one of those occasions in the morning, he saw Herndon walk into the District offices with his arms about two young women. In the afternoon, Schneider saw Herndon enter the District offices twice escorting people. Before being escorted into the building the people checked in at the Local 3267's table to be checked off the list of eligible voters. Herndon escorted either one or two people into the building on each of the occasions in the afternoon. Schneider heard conversations occurring as Herndon escorted people into the building in the afternoon. Schneider also entered the building on one occasion to use the men's restroom. While in the men's restroom, Herndon came in also to use the facilities. Schneider did not see Herndon escort anyone into the actual board room.

[3] Loren Gammon, an employee of CTA and present at the polls from 10:30 a.m. to 12:00 a.m. and from 2:30 p.m. to 4:00 p.m., also testified that he saw Herndon enter the District offices 4-6 times. Gammon testified that Herndon had

his arms around the people that he escorted in and that he spoke to the people as he escorted them.

[4] On the other hand, Carol Burgoa, who was present at Local 3267's table during the hours when the polls were open, testified that she saw Herndon enter the District office building once in the morning and once in the afternoon but did not see anyone with Herndon as he entered the building.

[5] Dolly Keefe, who was also present at Local 3267's table during the hours when the polls were open, also testified that she saw Herndon enter the building two times alone.

[6] Lastly, James Herndon testified that he and Gammon agreed, before the election, that it was permissible for the parties to use the restrooms inside the District offices since they were the only ones available and it was going to be a long day. Herndon further testified that he entered the building three times during the day to use the men's restroom but that on each of those occasions he did not enter the building with anyone. Herndon admitted, however, that on several occasions he walked to the parking lot and visited with people as they arrived and escorted them into the area but stopped when he reached Local 3267's table.

The testimony of Burgoa and Keefe must be deemed inaccurate. In addition to the above, Burgoa testified that the list of voters from which she was working was on a clipboard enabling her to hold it up and observe those,

including Herndon, entering and exiting the District administrative offices. Keefe, however, also working at Local 3267's table with Burgoa, testified that she and Burgoa were checking names off the same list but that the list was sitting on the table and had to be held down with her hands due to the wind. Furthermore, both Burgoa and Keefe testified that they saw Herndon enter the District offices alone on only two occasions. However, Herndon himself admitted entering the District administrative offices on three occasions. Therefore, the hearing officer credits the testimony of Herndon to the extent he entered the District administrative offices on three occasions and finds the testimony of Keefe and Burgoa to be inaccurate. Based upon the preponderance of the testimony, including that of Schneider, Gammon and Ford, all of whom testified that they observed Herndon escort persons into the District administrative offices, conflicting testimony is resolved in favor of concluding that Herndon escorted two young women into the District administrative offices in the morning of May 6, 1980 with his arms around them (it was not, however, clearly established that those women were voters in the election) and that Herndon escorted voters into the District administrative offices on two occasions in the afternoon and conversations occurred between Herndon and the escorted voters at that time. Herndon's testimony to the contrary is not credited.

(b) Thomas Martin

The testimony is also in conflict regarding the Association's allegation that Thomas Martin escorted Gloria Alhambra into the District administrative offices:

[1] Mike Ford, an employee of CTA and present at the polls at approximately 1:00 p.m. and 3:00 p.m., testified that at approximately 3:00 p.m. he saw Martin escort Gloria Alhambra, a building representative for Local 3267 at Columbus School, into the District administrative offices. Ford heard Martin speaking to Alhambra as he escorted her.

[2] Martin, on the other hand, testified that he entered the building two times to use the men's room, once at approximately 11:00 a.m. and again later in the day. Alhambra arrived to vote at 3:00 p.m. When she arrived, Martin met her out on the sidewalk for a moment to say "hello." Martin, however, denies escorting Alhambra beyond Local 3267's table.

The testimony of Martin and Ford is hopelessly in conflict. Ford testified that he observed Martin escort Gloria Alhambra into the District administrative offices at approximately 3:00 p.m. Martin confirms that Alhambra arrived at 3:00 p.m., that he met her on the sidewalk and said "hello" when she arrived at the District offices but denies escorting her beyond Local 3267's table.

The hearing officer concludes that to believe that Martin walked over to where Alhambra exited the car in which she

arrived, greeted her and walked with her to Local 3267's table but stopped at that point and proceeded no further with Alhambra strains credulity beyond its reasonable limits. The hearing officer believes it more probable that Martin continued to walk with Alhambra into the District administrative offices after greeting her when she arrived as testified by Ford. The hearing officer credits the testimony of Ford and accordingly concludes that Martin escorted Alhambra into the District administrative offices and spoke with her while doing so.

Objection 3

No additional evidence regarding Objection 3 was presented other than the fact, as found above, that unfair practice charges stemming from negotiations between the Association and the District were pending for a considerable period of time and that the Association's progress at the bargaining table with the District was an issue during the election campaign. Those findings of fact under the sub-caption "Background" are therefore incorporated herein by reference as if fully stated.

Additionally, those findings of fact under sub-caption "Election Issues" are incorporated herein by reference as if fully stated.

ISSUE

Whether the decertification election held in the District between the Association, Local 3267 and no representation on May 6, 1980 must be set aside pursuant to PERB Regulation 30076 because:

(1) A PERB agent disseminated misinformation on crucial election issues;

(2) PERB did not sufficiently safeguard the polling area conditions to ensure that voters could exercise a free choice in the election; or

(3) The election was improperly ordered prior to the resolution and remedying of prior unfair practice charges against the District.

CONCLUSIONS OF LAW

Objection 1

As found above, Gelt answered Bell's questions regarding "coalition bargaining" and agency shop. It is concluded that Objection 1 must be overruled.

The testimony regarding Gelt's response to Bell's question regarding whether people from both employee organizations in the District could sit down at the bargaining table as a bargaining team with the District shows that Gelt answered that as far as she knew people from both organizations could sit down at the bargaining table as a bargaining team unless something in the respective organization's by-laws prevented them from doing so. Gelt's response was therefore proper and in accordance with precedent developed pursuant to the National Labor Relations Act (hereafter NLRA).

In addressing the issue of whether a union's inclusion of members of other unions on its bargaining committee justifies

an employer's refusal to bargain, the Second Circuit declared:

[The] right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations, is fundamental to the statutory scheme. [71 LRRM at 2421]

While noting that the freedom to select representatives was not absolute, the court held that for an employer to prevail in its objections to the presence of outside members of the union negotiating committee, the employer must sustain the burden of proving a "'clear and present' danger to the collective bargaining process." Finding no such clear and present danger, the Second Circuit held that General Electric Company was not lawfully entitled to refuse to bargain with a multi-union committee so long as the committee sought to bargain solely on behalf of the employees who would be covered under the contract being negotiated. General Electric Co. v. NLRB (2d Cir. 1969) 412 F.2d 512 [71 LRRM 2418.]

Regarding agency shop, the evidence shows that Bell asked Gelt if there had to be a separate election among the people voting on a contract in order for the agency shop clause to be effective. It was clearly established that Bell was referring to the time of the initial contract ratification and not a subsequent rescission. Gelt's response that only the employer may require a separate election on agency shop clause was therefore entirely appropriate in view of the question asked.

It is thus clear that Gelt's answers to Bell's questions regarding "coalition bargaining" and agency shop were correct responses to the narrow questions asked. Any misinformation or possible confusion which may have resulted from Bell's subsequent conversations with other members of the bargaining unit regarding the information given by Gelt are entirely the responsibility of Bell.

It is therefore concluded that because Gelt's responses were accurate, Objection 1 is overruled.

Objection 2

Resolution of conflicting testimony regarding the allegation that Jane Bennett said upon entering the board room "Here's five more votes for AFT" has led the hearing officer to conclude that no one, other than Kaldahl, heard Jane Bennett state "Here's five more votes for AFT."

In Tamalpais Union High School District and Tamalpais Federation of Teachers, CFT/AFT/AFL-CIO and Tamalpais District Teachers Association, CTA/NEA (7/20/76) EERB Decision No. 1, the Board itself held:

In adopting Rule 30076, [now Regulation 32738] it was the intent of the EERB [now PERB] to overturn representation-election results only when conduct affecting the results of the election amounts to an unlawful practice under Article 4 of the Rodda Act or constitutes "serious irregularity in the conduct of the election." [Footnote omitted.]

It is concluded by the hearing officer, based upon an objective test, that the alleged statement by Jane Bennett, heard by only Jean Kaldahl, president and election observer for the Association, was not "conduct affecting the results of the election" pursuant to PERB Regulation 32738 and is therefore accordingly overruled.

Regarding the allegation of escorting of voters, resolution of conflicting testimony has led the hearing officer to conclude that James Herndon escorted two young women into the District administrative offices on the morning of May 6, 1980 with his arms around them and escorted either one or two voters on two different occasions in the afternoon.

Regarding the allegation that Thomas Martin escorted Gloria Alhambra into the District administrative offices, resolution of conflicting testimony has led the hearing officer to conclude that Martin did escort Gloria Alhambra into the District administrative offices at approximately 3:00 p.m. on May 6, 1980.

The National Labor Relations Board (hereafter NLRB), in considering allegations of electioneering, declared its policy in Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395] by stating that elections would be overturned where representatives of any party to the election engaged in "prolonged" conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. (170 NLRB at 362.)

The NLRB reasoned that the potential for distraction, last minute electioneering, and unfair advantage, justified a "strict rule" against such conduct, without requiring an examination into the substance or effect of the conversations. Recognizing the impossible task of eliminating all conversations in the polling area, however, the NLRB stated that its rule in Milchem would not necessarily void elections upon the occurrence of "any chance, isolated, or innocuous comment." Id. at 363. In Milchem, therefore, the NLRB set aside an election where a union representative had engaged in an estimated five-minute conversation. It is therefore clear that a five-minute conversation is not de minimus and requires a second election.

The PERB itself has not addressed the issue of similar alleged irregularities in the conduct of the election and has accordingly not adopted the strict rule of Milchem. However, the hearing officer concludes that even the application of the strict rule of Milchem would not require the overturning of the election in this case.

As found above, by agreement between the parties at the pre-election conference, Martinez declared that there would be no electioneering between the respective organization's tables and the board room which constituted a distance of approximately 25 feet. The evidence shows that Herndon and Martin both escorted voters as they walked into the District

administrative offices. There was, however, no evidence to show that either Herndon or Martin escorted voters beyond the double glass doors of the District administrative offices and into the board room where polling was actually being conducted. It is therefore concluded that the time which Herndon and Martin had to speak to voters as they walked the approximate 25-foot distance between the organizations' tables and the District administrative offices was extremely short in duration and would not fall within the prohibited "prolonged" conversation rule of Milchem. Any conversations which occurred between Herndon, Martin and voters would, by necessity, have to be so brief as to be de minimus. Such a de minimus approach is in accordance with the NLRB which has held that where conversations are over a much shorter duration than the one condemned in Milchem, Milchem's per se rule is inapplicable and it is necessary to make a case-by-case inquiry into the nature and effect of the conversations, which inquiry must be tempered by a sense of realism. NLRB v. Bostik Division USM Corp. (6th Cir. 1975) 517 F.2d 971 [89 LRRM 2585]. Accordingly, Objection 2 is overruled.

Objection 3

The propriety of conducting this election pending the resolution of unfair practice charges stemming from negotiations between the Association and the District was addressed by the PERB itself in Jefferson School District

(3/7/80) PERB Order No. AD-82. There the Board concluded, in sustaining the San Francisco Regional Director's determination to proceed to an election in this case notwithstanding the pendency of mutual refusal to negotiate charges:

Accordingly, we believe that the regional director reasonably determined that, absent other evidence of bad faith, when the parties have in fact reached an agreement covering the items enumerated supra at footnote 11 (including some of the disputed issues raised in the unfair practice charges), the section 3543.5(c) charge based on negotiability is akin to a technical refusal to bargain and does not without other factors require a decertification election to be delayed.

The PERB itself, therefore, has addressed the issue of whether the election in the District should have been held pending resolution of unfair practice charges. The hearing officer believes that he is bound by that decision as res judicata, and accordingly, Objection 3 is overruled.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record of this matter, the objections to the conduct of the election filed by the Jefferson Classroom Teachers Association, CTA/NEA are hereby overruled.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 11, 1980 unless a party files a timely statement of exceptions. See California Administrative Code,

title 8, part III, section 32300. Such statement of exceptions and supporting brief must actually be received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 11, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Should no exceptions to this Proposed Decision be filed within the time specified above and this Proposed Decision becomes final, the regional director will immediately certify the Jefferson Federation of Teachers, Local 3267, AFT/AFL-CIO as the exclusive representative of certificated employees in the Jefferson Elementary School District.

Dated: July 22, 1980

James W. Tamm
San Francisco Regional Director

By: _____

Kenneth A. Perea
Hearing Officer