STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA, Employer, and JUDICIAL AND LEGAL COALITION (ADMINISTRATIVE LAW JUDGES' COUNCIL, STATE TRIAL ATTORNEYS ASSOCIATION AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION), Employee Organization, and ACSA - ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND HEARING OFFICERS Employee Organization.	)	Case No. S-SR-2 PERB Decision No. 198-S March 10, 1982

Appearances: Christine A. Bologna, Attorney for the Judicial and Legal Coalition (Administrative Law Judges' Council, State Trial Attorneys Association and California State Employees Association); Dennis M. Eagan, Representative for the Association of California State Attorneys and Hearing Officers.

Before Gluck, Chairperson; Jaeger, Moore and Tovar, Members.

DECISION

The Judicial and Legal Coalition (Coalition)[1] excepts to the attached hearing officer's decision dismissing all of the organization's objections to the conduct of the election of the exclusive representative for state employee Unit No. 2.

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[1]The Coalition constituent members are the Administrative Law Judges' Council, State Trial Attorneys Association, and California State Employees' Association.

The Coalition's objections are three-fold: (1) that certain inaccuracies in the voter list used by the Public Employment Relations Board (PERB) to mail ballots to employees in Unit No. 2 and inaccuracies in the Excelsior list provided by the state employer to employee organizations caused "scores" of employees to be disenfranchised and rendered the election invalid; (2) that the employer's mail distribution policy,[2] which was adjudged by PERB to be an unfair practice shortly after the election, substantially interfered with the ability of unit employees to freely choose an exclusive representative; and (3) that the employer caused a benefit to be granted to one group of employees within the unit which, in turn, caused that group to endorse the rival organization.

The Board has considered the record as a whole in light of the Coalition's exceptions and hereby adopts the hearing officer's findings of fact[3] and conclusions of law except as modified hereafter.

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[2]In State Trial Attorneys Association v. State of California, California Department of Transportation, and Governor's Office of Employee Relations (7/7/81) PERB Decision No. 159b-S, the Board found that a memo promulgated by the Governor's Office of Employee Relations on September 5, 1978 violated Government Code section 3519(a) and (b) by discriminatorily restricting delivery of employee organization mail at employees' work sites.

[3]The hearing officer states at p. 46 of his decision that "the Coalition never tried to mail anything to the work site addresses of Unit No. 2 voters." The record indicates that some employees did receive Coalition mail at their work site. (R.T. v. IV p. 61-2.) This oversight by the hearing officer is not prejudicial.

DISCUSSION

In dismissing the Coalition's second objection, the hearing officer reasoned that because the Coalition never tried to mail to work site addresses, although it had reasonable grounds to believe it was being delivered, it cannot be heard to complain of discriminatory treatment.

As noted in footnote 2, the Coalition did mail to work site addresses. It was one of its constituent organizations, the State Trial Attorneys Association (STAA), which made no attempt to utilize the internal mail system, pending the outcome of its charge filed with PERB on that issue. Knowledge that the larger organization was conducting mailings can be imputed to STAA, who cannot now complain, through the Coalition, that the employer's policy interfered with the election. Nor can STAA's choice be made the basis for a claim that the Coalition was harmed.

We also note, as did the hearing officer, that alternative means of communication were available, such as home addresses provided by the State Controller as early as mid-May 1980, bulletin boards, personal contact, and leafletting.

In sum, we affirm the hearing officer's conclusion that the Coalition failed in its efforts to show that the mail policy prevented the employees from freely choosing their representative.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is hereby ORDERED that the objections to the election in state employee Unit No. 2 be DISMISSED consistent with the discussion herein.

PER CURIAM

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of:	
STATE OF CALIFORNIA,	
Employer,	
-and-	
JUDICIAL AND LEGAL COALITION (ADMINISTRATIVE LAW JUDGES' COUNCIL, STATE TRIAL ATTORNEYS ASSOCIATION AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION),	Representation Case No. S-SR-2
Employee Organization,	PROPOSED DECISION (9/29/81)
-and-	
ACSA - ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND HEARING OFFICERS,	
Employee Organization.	

Appearances: Christine A. Bologna, Attorney for the Judicial and Legal Coalition; Dennis M. Eagan, Attorney for the Association of California State Attorneys and Hearing Officers; Rebecca Taylor, Labor Relations Officer for the Department of Personnel Administration, State of California.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

In this case one of the employee organizations competing to become the exclusive representative of state attorneys and hearing officers has challenged the conduct of an election in state employee unit no. 2. The organization also has

challenged the eligibility of some 275 voters who cast ballots in the election. The election under attack was conducted by mail ballot during the period from May 11 through June 11, 1981.

On June 10, 1981, prior to the completion of balloting, the Judicial and Legal Coalition (hereafter Coalition) mailed to the Public Employment Relations Board a list containing the names of 344 persons whose ballots the Coalition had decided to challenge. Prior to the vote count, agents of the Public Employment Relations Board (hereafter PERB or Board) determined that 275 of the 344 persons on the Coalition's list actually had voted. Those 275 ballots were then segregated as challenged and were not opened.

The ballot count for state employee unit no. 2 was conducted on June 30, 1981. Prior to the ballot count, PERB agents for various reasons challenged 36 ballots. The tally of ballots produced the following result: 500 votes cast for the Coalition, 525 votes cast for ACSA-Association of California State Attorneys and Hearing Officers (hereafter ACSA), 21 votes cast for no representation and 311 challenged ballots. The unopened challenged ballots were determinative.

On July 8, 1981, the Coalition filed timely objections to the election. The statement of objections alleged 10 specific grounds for overturning the election. Three of those allegations actually concerned challenged ballots. The other seven related to the objections. On July 22, 1981, the

undersigned hearing officer, acting as an agent for the Sacramento Regional Director, dismissed the following portions of the objections for failure to state a prima facie case: subparagraphs 6 C, D, E, F and G, paragraph 7 in its entirety, paragraph 8 in its entirety, paragraph 9 in its entirety and paragraph 10 in its entirety. On August 3, the Coalition timely filed an administrative appeal to the dismissal of paragraph 7 of the objections. Also on August 3, the Coalition filed a motion for continuation of a hearing in this matter which had been scheduled to begin on August 10. In addition, the Coalition filed with the hearing officer a motion to set aside the election and with the PERB itself, a request for stay in activity.

On August 4, the undersigned hearing officer denied the request for continuance. On August 7, the PERB issued Order No. Ad-111-S in which the Board itself reversed the hearing officer and reinstated Objection No. 7. The Board denied the request for a stay of activity. The hearing was commenced on August 10. At the start of the hearing, the undersigned hearing officer denied the motion to set aside the election. The hearing was conducted at PERB offices in Sacramento on August 10, 11, 12, 13, 14 and 20, 1981. The briefs from the parties were filed on September 8, 1981, and the case was submitted for decision.

FINDINGS OF FACT

Challenged Ballots

The election in which the contested ballots were challenged was held by the order of the PERB's Sacramento Regional Director. It was the culmination of a process which began shortly after July 1, 1978 when the State Employer-Employee Relations Act (hereafter SEERA) became effective.[1] Various employee organizations filed petitions with the Board seeking to represent employees in negotiating units they considered appropriate. Hearings on the unit question commenced in December of 1978 and continued well into 1979. On November 7, 1979, the PERB issued a decision dividing the state's rank and file civil service employees into 20 negotiating units.[2] Attorneys and hearing officers were placed in unit no. 2.

On December 3, 1979, ACSA filed a request for the PERB to conduct an election in unit no. 2.[3] On February 21, 1980, the Administrative Law Judges Council filed an intervention to appear on the ballot in unit no. 2. There followed similar

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[1]The State Employer-Employee Relations Act may be found at Government Code section 3512 et seq. Hereafter, all references are to the Government Code unless otherwise indicated.

[2]In the Matter of: Unit Determination for the State of California (11/7/81) PERB Decision No. 110-S.

[3]The procedure is outlined in the California Administrative Code, title 8, section 41210.

requests on March 3, 1980 from the State Trial Attorneys Association and on March 11, 1980 from the California State Employees' Association. All of these requests were determined to be valid by the Sacramento Regional Director.

After further hearings, the PERB itself on December 31, 1980 issued a decision resolving numerous disputes about whether certain employees should be excluded from the negotiating units as being either managerial, supervisory or confidential. This decision cleared the way for SEERA elections to be conducted in 1981.

On February 2, 1981, PERB was notified by the Administrative Law Judges Council, the State Trial Attorneys Association and the California State Employees Association that the three organizations wished to appear jointly on the ballot as the Judicial and Legal Coalition. This request was granted by the Sacramento Regional Director on March 2, 1981. ACSA appealed this decision but subsequently withdrew the appeal.

On March 31, 1981, the Sacramento Regional Director issued a directed election order for unit no. 2, attorneys and hearing officers. The order listed various instructions concerning the manner in which the election would be conducted and the method by which the eligibility of voters would be determined. Specifically, with respect to eligibility, the order reads as follows:

> 3. Voter Eligibility. The eligible voters shall be those employees within the unit described below who were employed on the eligibility cutoff date indicated below, and who are still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote.

Under the terms of the election order, the cutoff date for voter eligibility was December 31, 1980. The first day for the casting of ballots was May 11, 1981. The last day for the casting of ballots was June 11, 1981.

The 275 voters whose ballots were challenged by the Coalition were on all relevant dates employed in one of these job classifications: Deputy Attorney General IV, Deputy Attorney General III, Deputy Attorney General II, Deputy Attorney General I or Associate Deputy Attorney III in the Department of Transportation. The directed election order lists each of the five job classifications as being within unit no. 2. Twelve of the challenged voters were on leave of absence during all or part of the period between December 31, 1980 and June 11, 1981. The remainder of the 275 voters challenged by the Coalition were regularly employed throughout the period from December 31, 1980 through June 11, 1981.

The 36 voters whose ballots were challenged by PERB election officials can be divided into these categories: 27 individuals whose names do not appear on the official list of

eligible voters but who stated to PERB election officials that they believed they were eligible to vote; eight individuals who were eligible to vote challenged ballots per the directed election order for unit no. 2; and one individual who cast a ballot without using official PERB materials.

At the hearing, the parties entered stipulations concerning the eligibility of all 36 of the PERB challenged voters. They stipulated that the ballots of 32 of the challenged voters should be counted and that the ballots of four of the challenged voters should not be counted.

Objections to Election---Alleged Irregularities

It was stipulated by the parties that at all times relevant the Association of California State Attorneys and Hearing Officers and the Judicial and Legal Coalition were employee organizations and that the Department of Personnel Administration was the state employer.[4]

The election to determine an exclusive representative in state unit no. 2 was, as with all 20 state units, conducted by mailed ballot. In a mailed ballot election the accuracy of the voter address list is of crucial importance. In an early effort to secure up-to-date addresses, the Sacramento Regional Director prepared a notice to state employees which was

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[4]The term "employee organization" is defined at section 3513(a). The term "state employer" is defined at Section 3513(i).

distributed with their January paychecks. The notice advised employees that ballots would be mailed to the address on record with the state controller's office and urged them to check for accuracy the address on their 1980 W-2 Wage and Tax Statement Form. The notice further advised employees of the steps they should take to update their addresses if they were not current. Some employees, the total number unknown, updated their address records following receipt of this notice.

On March 31, 1981, the Sacramento Regional Director issued an election order for unit no 2. The order set the election period and detailed the manner in which the election would be conducted. In all respects, the election was conducted in strict accord with the election order. Ballots were mailed on May 11, to be returned not later than 5 p.m. on June 11, 1981. Voters who did not receive a ballot at their homes by May 18, 1981 were given a two-week period, May 18 through May 29, to contact the PERB election office and request a ballot. Upon request, voters who did not receive ballots, even though their names were on the eligibility list, were sent duplicate ballots. Upon request, voters whose names were not on the eligibility list were sent challenged ballots.

The state employer was ordered to provide to the regional director, not later than April 13, 1981, two kinds of voter

lists. One list, popularly known as the Excelsior list,[5] was for the use of the competing employee organizations. The Excelsior list was to contain the name, classification title, class schematic, class code, agency code, reporting unit and county code for each employee and the home address of all employees except those who had completed a written request that his/her home address not be released.[6]

The other list the state employer was directed to provide was a voter list containing the home addresses of all employees in unit no. 2. This second list was to be used by the regional director to mail the ballots. This list was to be in zip code

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[5]The term is derived from the National Labor Relations Board decision Excelsior Underwear Inc. (1966) 156 NLRB 1236. In that case the NLRB announced a rule that henceforth it would require an employer to provide for delivery to the union a list of names and home addresses of employees eligible to vote in a representation election.

[6]Specifically, the directed election order provided that the Excelsior list should not contain the home address of any employee who had "filed with the employer a written request that his/her home address not be released pursuant to Civil Code section 1798.62."

Civil Code section 1798.62, which is contained in the California Information Practices Act, reads as follows:

> Upon written request of any individual, any agency which maintains a mailing list shall remove the individual's name and address from such list, except that such agency need not remove the individual's name if such name is exclusively used by the agency to directly contact the individual.

rather than alphabetical order and was to be in the form of computer magnetic tape.

Finally, the directed election order provided for three types of election notices: a posted notice, a paycheck notice and a mailed notice. The posted notice was to be up at all state employee work sites not later than April 20, 1981. The paycheck notice was to be delivered with the April 1981 pay warrants. The mailed notice was to be sent to employees at their home addresses not later than April 20, 1981.

In accord with the election order, notices of the impending election were distributed and posted throughout state offices. The Department of Personnel Administration, at that time known as the Governor's Office of Employee Relations, was given 25,000 copies of an election notice for posting in state agencies. The notice measured 25 inches by 40 inches and was printed in two colors, black and blue, on a white background. It described the election process, identified in broad categories the types of eligible voters and depicted a sample ballot for each of the 20 units. In letters more than one-fourth inch in size, the notice described the process for voters to follow if they failed to receive a ballot by May 18. In letters one-half inch in size, the notice listed the election headquarters telephone number and stated that voters could call the number collect.

Copies of this notice were posted at employee work locations throughout the state. Responsibility for insuring that the notices actually were posted was delegated by the Department of Personnel Administration to the labor relations officers in each agency. To emphasize the importance of the notice, labor relations officers were required to personally pick up copies of it at the Department of Personnel Administration. They were told to place copies of the notices at all locations where notices to employees customarily are posted. They also were told, "when in doubt, post" and advised that they would be held "accountable" for insuring that the notices actually were posted at state employee work sites. The notices were widely posted, sometimes at numerous locations at the same work site.

Except for size and ink color, the paycheck notices were essentially identical to the posted notices. The paycheck notices measured 19 inches by 25 inches and were printed entirely in black ink. As required by the election order, the paycheck notices were distributed with the April 1981 state employee pay warrants. This distribution was not limited to persons whose names were contained on the voter list but also included persons in specifically excluded job classes.

In accord with the election order, voter lists were delivered to the regional director by the state employer on April 13. The Excelsior list for unit no. 2 came in two

parts. One part was a computer printout containing the names of all eligible voters and the home addresses of all voters except those who had completed a request for nondisclosure of address. The second list contained the names and work site addresses for most of the persons whose home addresses were not disclosed. Collectively, the two lists provided the addresses of all but 56 of the 1,727 persons on the unit no. 2 voter list. Employees of the California State Employees' Association (hereafter CSEA), one of the three constituent organizations of the Coalition, were able to determine the work site addresses of 46 of the missing 56 employees through the use of the state employee telephone book. No addresses were determined for the remaining 10 voters.

The voter list supplied to the PERB had home addresses for all 1,727 unit no. 2 voters. On April 20, 1981, agents of the Sacramento Regional Director mailed sample ballots to all persons on the voter list for unit no. 2. The sample ballot was printed on a page which also contained a notice of the election, the telephone number of the PERB election headquarters, instructions for what a voter should do if he or she did not get a ballot and other election information. Of the 1,727 sample ballots mailed, 43 were returned by the post office as "undeliverable as addressed." Subsequently, the regional director obtained corrected addresses for 28 of the 43 employees whose sample ballots were returned. Working through

the weekend prior to the mailing of the actual ballots, agents of the regional director corrected the 28 addresses by hand.

In the week prior to the mailing of ballots, the regional director and the parties discovered that the directed election order did not list the newly created classifications of Hearing Officer I and II in the Department of Social Services. To rectify this omission, the parties on May 5, 1981 entered a stipulation that the 59 affected social services hearing officers were "employees" as defined in the State Employer Employee Relations Act. The stipulation signed by the parties contained an address for each of the 59 persons. Following receipt of the stipulation, the regional director amended the election order to add the Hearing Officer I and II job classifications. Of the 59 names in the stipulation, two already were contained in the unit no. 2 voter list and one was for an employee who did not go to work for the state until after the December 31, 1980 voter cutoff date.

On May 11, PERB agents mailed 1,783 ballots to voters in unit no. 2, including the social services hearing officers. By the 5 p.m. June 11 cutoff date, the PERB had received 1,379 unit no. 2 ballots. Of these, 1,357 were determined to be valid while 22 were determined to be void. Most of the 22 ballots determined to be void were rejected because the persons who cast those ballots either had failed to sign the outer envelope or had failed to use the secret inner envelope as

required by the election order. Thirty unit no. 2 ballots were returned by the post office for being undeliverable as addressed. Nine of the 30 voters whose ballots were returned had requested and were sent duplicate ballots.

The Coalition produced evidence about three persons who had difficulty receiving ballots, Kevin Toole, Charles Fergerson and Richard Wehe.

Mr. Toole is a Hearing Officer II for the Department of Social Services. He became aware that he did not receive a ballot in the election after hearing a discussion about the election among persons in his office. He called a telephone number someone gave him but he did not recall the identity of the agency or organization which the telephone number reached. He said the person on the other end of the telephone at first told him that hearing officers were not eligible but then told him that they were eligible and that a ballot had been sent to him. He told the person that he had not received a ballot and she responded that it was too late for her to help him. He did not recall the date he placed the telephone call. On the basis of this testimony it is concluded that Mr. Toole had called the PERB election office but the call was placed after the May 29 deadline for requesting a duplicate ballot.

The address for Mr. Toole listed in the May 5 stipulation between the parties was in Monterey Park. Mr. Toole had not lived in Monterey Park since June or July of 1980 when he moved

to Sacramento. After arriving in Sacramento, Mr. Toole lived at one address for about six months and then moved to a different address in about December of 1980. He had informed a clerk in his office of his address changes.

Mr. Fergerson is a Hearing Officer II for the Department of Social Services. He did not receive his ballot for the unit no. 2 election until about the middle of July, 1981, some weeks after the close of voting. The May 5, 1981 stipulation between the parties lists a Danville address or Mr. Fergerson. However, since March 8, 1980 he had lived in Pleasant Hill. He had informed a clerk in his office about his address change. Mr. Fergerson recalled seeing an election notice but did not call the PERB election number when he failed to receive a ballot because he thought he "would be receiving it eventually and didn't pay much attention to it."

Mr. Wehe is an attorney III for the Department of Transportation, a job classification within state unit no. 2. He voted in the election but received a ballot only after an acquaintance called the election headquarters and requested that a ballot be sent to his most recent address. Mr. Wehe had moved in April of 1980 and again in April of 1981. A ballot was not delivered to either Mr. Wehe's current address or the address he occupied just prior.

In its allegations, the Coalition contends that the PERB failed to send ballots to George Coan and John Willd, both of

whom are hearing officers at the Office of Administrative Hearings. The parties stipulated that George Coan was an eligible voter in state unit no. 2. However, there was no evidence to establish that he did not receive a ballot and/or that he was not mailed a ballot. There was no evidence at all about Mr. Willd.

The valid ballots received in unit no. 2 represented 76.1 percent of the eligible voters. The voter turnout in all 20 state units had a collective average of 61 percent. The voter turnout in unit no. 2 was the fifth highest among the 20 units.

Objections to Election---Mail Distribution Policy

The development of a satisfactory mailing list was one of the early tasks facing the employee organizations interested in representing employees in unit no. 2. In an effort to solve this problem, one of the Coalition's constituent groups, the State Trial Attorneys Association, joined with ACSA in a 1978 effort to develop a mailing list. The Trial Attorneys obtained a list of names of state-employed attorneys and hearing officers from the controller's office and then determined the work addresses for some of the persons on the list. After the Trial Attorneys had identified as many addresses as it could, it turned the list over to ACSA. Using the state employee telephone book for reference, ACSA officers determined the work site addresses of additional numbers of state attorneys and hearing officers. When ultimately completed, the jointly

produced mailing list had the work site addresses of about 95 percent of the employees on the list.

Following the development of the list, both organizations commenced mailings to state-employed attorneys. During 1978, the Trial Attorneys completed four mailings to attorneys at their work addresses.

At about the same time as the Trial Attorneys Asociation was mailing literature to state lawyers, the State Employees Trades Council commenced mass mailings of literature to Department of Transportation (hereafter CalTrans) maintenance workers. The Trades Council mailings totaled some 4,000 to 5,000 pieces of mail, most of which went to the 83 CalTrans field offices throughout the state. Because the massive size of the Trades Council mailings presented distribution problems at the field offices, CalTrans Labor Relations Chief Robert Negri decided that restrictions had to be placed on the delivery of personal mail at the work site. On August 1, 1978, a memo drafted by Mr. Negri was distributed to all department administrators over the signature of G.V. Hood, CalTrans chief of administrative services. The memorandum stated that the department's long-standing policy was not to permit the distribution of personal mail. According to the memo, personal mail when identified should be returned to the sender as undeliverable. The memo continued:

> In the past, when we have been aware of such volume personal mailings, we have returned

> the mail to the sender as undeliverable. It will be our practice to continue doing this in the future.
>
> The purpose of our policy, which applies equally to private individuals, businesses and employee organizations who have not received an official State business sanction, is to minimize unnecessary expense to the State in terms of distribution costs.

The Trial Attorneys Association, whose members were primarily CalTrans employees responded to the memorandum by filing an unfair practice charge on August 9, 1978.[7] On September 5, 1978, the Governor's Office of Employee Relations, over the signature of Deputy Director Allen P. Goldstein, distributed a supplemental policy on employee mail. This policy, which applied to all state departments, permitted departments to adopt different rules for the delivery of employee organization mail from the rules for other personal mail. Specifically, as to mass mailings by employee organizations the policy provided:

> If a department determines that the sorting, distribution or handling of volume mailings, not related to state business, would create an added expense or impact on the efficiency of its internal mail delivery, such mail should be placed in a central location at the work site for pick up by employees or their representatives during non-work time.

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[7]This charge, case S-CE-2-S, ultimately was resolved in State Trial Attorneys Association v. State of California (7/7/81) PERB Decision No. 159b-S.

The Trial Attorneys Association responded to the directive from the Office of Employee Relations by amending its charge on October 10, 1978.

Mr. Negri interpreted the September 5 memorandum from the Governor's office as a rescission of his policy of returning personal mail to the post office. He believed that the bin system discussed in the Governor's office memorandum was optional, depending upon the circumstances. Therefore, CalTrans established bins in its field offices but did not do so at the department's headquarters office in Sacramento, the work location of about 40 of the department's 100 attorneys.

After the September 5 memo from the Governor's office, Mr. Negri instructed the mail room supervisors at the CalTrans building that they should contact him in each individual case where they were in doubt about whether or not to deliver personal mail. It was his intention to make ad hoc decisions based upon such circumstances as the volume of mail in question. However, no one from the mail room ever inquired about the bulk deliveries of organizational mail they might have received.

Following the filing of the unfair practice charges, the Trial Attorneys Association never mailed organizational literature to attorneys at their work locations. The last mailing by that organization occurred in the summer of 1978. The organization likewise did not attempt to mail literature to

state attorneys at their home addresses. John L. Sullivan, the treasurer and principal moving force behind the Trial Attorneys Association, explained the decision not to mail to home addresses with the observation that "if it was difficult to get the work addresses, it was even more difficult to get the home addresses."

Mr. Sullivan, who is an attorney at CalTrans, testified that even though he received some mail from other employee organizations at this work address, the Trial Attorneys elected not to attempt a mass mailing. He said he considered the cost too high to attempt a mass mailing that might not be distributed.

Throughout the pre-election period, the Department of Justice, which employs more attorneys than any other state agency, distributed all personal mail without restriction.

After a hearing, the PERB itself ultimately concluded that no violation of SEERA rights had been established by the Trial Attorneys as to the August 1, 1978 CalTrans memorandum. However, the PERB did find a violation in the September 5, 1978 memo from the Governor's office because the policy it proclaimed was discriminatory on its face toward employee organization mail.[8]

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[8]PERB Decision No. 159b-S, supra.

During the initial year of dispute over the work site mailing policy, employee organizations also had difficulty in obtaining employee home addresses from the state controller. Ultimately an organization named Professional Engineers in California Government, which was seeking to represent employees in State unit no. 9, successfully sued the controller over the home address issue. On April 3, 1980, a Los Angeles Superior Court held that the employee organization had a right to the names and addresses under California Public Records Act.[9] On May 8, 1980, the state controller released to the Professional Engineers the names and addresses of all unit no. 9 employees, except for those who had filed a nondisclosure request. After that date, the controller released disclosable employee home addressses to all employee organizations which sought them.

As early as mid-May of 1980, a full year before the elections were held, Trial Attorneys Treasurer Sullivan was advised that the controller's office would make most home addresses available to employee organizations. At no time, however, did Mr. Sullivan request the home address list from the controller's office.

During the second half of 1980, ACSA continued to use the work site address list it had developed jointly with the Trial Attorneys Association. But it became increasingly apparent

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[9]Government Code section 6250 et seq.

that the list was defective. Over the years mail addressed to employees of both the Franchise Tax Board and the Unemployment Insurance Appeals Board had been returned by the post office. Because of his fears that work site address list was defective, Richard Baker, a labor relations consultant retained by ACSA, in February of 1981 obtained from the controller a unit no. 2 home address list. The list had about 1,400 names with home addresses and an additional 400 to 500 names without a home address. ACSA relied on its 1978 work site address list to fill in the blank addresses.

CSEA, a constituent organization in the Coalition, obtained a unit no. 2 home address list from the controller much earlier than did ACSA. CSEA first obtained the home address list on July 1, 1980 and then got an updated version in December of 1980. CSEA already had home addresses of its own members and because organization officers had confidence in their own list they did not use controller-supplied addresses for any CSEA members. After substituting member addresses on the controller list, CSEA had the names and home address of 1,230 unit no. 2 members. It had no addresses for 395 unit no. 2 employees. In December, after CSEA and the other constituent organizations in the Coalition had merged their various home address lists, the Coalition had a home address list for all but about 200 unit no. 2 employees. No effort was made to find addresses for those missing 200. The Coalition's third constituent organization, the Administrative Law Judges Council, received

an address list from the controller's office on or about February 10, 1981.

The Coalition presented no evidence to indicate that it had difficulty reaching unit no. 2 employees through such alternative means as the use of employee bulletin boards or personal solicitation.

Objections to Election---CalTrans Staffing Ratio

Staffing ratios for state attorneys have been a source of controversy for years. In most state departments, attorney positions are divided into three classifications, typically denominated as staff attorney I, II and III. The Department of Justice, the Department of Transportation, the State Public Defender and the Office of the Legislative Counsel also have an attorney IV classification. In the Department of Justice that classification is known as Deputy Attorney General IV. At CalTrans, the classification is known as Deputy Department of Transportation Attorney IV.

Staffing ratios fix a certain relationship between the classifications. In a particular department, for example, the ratio might provide that no more than two-thirds of the staff can be employed in a position higher than staff attorney I. Exactly such a rule existed within both the Department of Justice and the Department of Transportation until 1978.

On February 21, 1978, the State Personnel Board revised its policies on attorney position control. Under the 1978

revision, the Department of Justice, the Department of Transportation, the State Public Defender and the Office of Legislative Counsel were authorized to promote their employees to the attorney III level according to merit. All artificial limitations were removed. However, the total number of positions at the attorney IV level was restricted to a maximum of 20 percent of the attorney work force. In other state departments which do not have positions at the attorney IV level, the number of attorney III positions was set at 20 percent of the total attorney work force.

It was not long before the Department of Justice began to seek modifications in the implementation of the policy. Specifically, what the department sought was to exempt the class of Senior Assistant Attorney General from the staffing ratio. The position of Senior Assistant Attorney General is paid the same as the position of Deputy Attorney General IV. Because the two classifications are at the same pay level, the number of Senior Assistant positions was added to the number of Deputy IV positions for calculation of the 20 percent limitation. If the Senior Assistant positions were not counted in calculation of the 20 percent figure, the department would be entitled to a larger number of deputy IV positions.

Discussions about the question took place during the 1979-80 fiscal year between the staffs of the State Personnel Board and the Department of Justice. Initially, the department

proposed that the 16 Senior Assistant positions be reclassified as career executive appointments, thereby removing them from the ratio. After consideration of this proposal, the staff of the Personnel Board told the Department of Justice staff that if they would withdraw the career executive proposal the Personnel Board staff would re-examine the ratio question the following year. The Department of Justice agreed.

In December of 1980 the Department of Justice submitted to the State Personnel Board a request that the Senior Assistant Attorneys General be excluded from the 20 percent ratio because they were supervisors. The request from the Department of Justice received high priority at the Personnel Board because the department had made the matter a priority item in its annual performance contract with the Personnel Board. The Personnel Board enters performance contracts each year with various state agencies. Under these contracts the Personnel Board agrees to perform certain work according to priorities set by the individual departments. The Department of Justice rapidly responded to requests for information made by the Personnel Board, a factor which further sped a decision on the Justice request.

On April 14, 1981, the Personnel Board granted the exemption of the Senior Assistant Attorney General class from the 20 percent staffing ratio. The effect of this change was to allow the Department of Justice to promote an additional 12

attorneys to the position of Deputy Attorney General IV. Although the department received authority on April 14 to make the promotions, it had not filled the positions by August 20, 1981, the last day of hearing in the present case.

Like the Department of Justice, CalTrans was not happy with the limitations the 1978 policy placed on the promotion of its lawyers to the attorney IV classification. On August 13, 1980, CalTrans Chief of Personnel Bill Bertken wrote to the State Personnel Board complaining about attorney position control standards in general and the 20 percent restriction at the attorney IV level in particular. Mr. Bertken advised the Personnel Board that CalTrans was losing a significant number of lawyers at the attorney III level because of the limitation on promotions to attorney IV. He asked the Personnel Board to create a task force to study the staffing problem.

On September 5, 1980, David Leighton of the Personnel Board staff responded to the CalTrans letter, denying the request. Mr. Leighton stated that before such a request could be considered CalTrans would have to "provide more specific information" on how circumstances had changed since the original attorney staffing policy was enacted in 1970. Moreover, Mr. Leighton continued, if CalTrans wished to pursue the matter further it should "identify the pertinent issues and submit appropriate recommendations with supporting information" for Personnel Board review. After receipt of such information,

the Personnel Board staff "would then determine if these were sufficient reasons to invest the considerable resources that would be required for a study of attorney ratios."

In October of 1980, State Director of Transportation Adriana Gianturco wrote to the Personnel Board, stating that she felt the Personnel Board's response to the department was inadequate and that the Personnel Board should reopen the issue of attorney staffing ratios. On the basis of testimony at the hearing, it is concluded that Ms. Gianturco's October letter did not contain the "specific information" requested in the Personnel Board's September 5 letter.

These events occurred simultaneously with the Department of Justice attempt to get the Senior Assistant Attorney General classification removed from calculation of the 20 percent ratio for Deputy Attorney General IV. As the Department of Justice and the Personnel Board began to evolve a conceptual solution to the ratio problem, it became apparent that the developing approach with the Attorney General might work also with CalTrans.

Accordingly, the Personnel Board staff on January 15, 1981 wrote to Transportation Director Gianturco and advised her that "issues in other departments have arisen which have a bearing on attorney allocations" and might affect CalTrans. Specifically, the January 15 letter states that the Personnel

board has "decided to review the appropriateness of continuing to include supervisory positions when applying the established ratio of the allocation of positions." The letter notes that the removal of the supervisory positions would increase the number of positions to be allocated to the attorney IV level. The letter states that the Personnel Board intended to address the issue on a department-by-department basis and that if CalTrans wished to have such a review it would have to make adjustments in its performance contract with the Personnel Board. The letter thus returned the initiative for going forward on the request to CalTrans.

It was not until February 17, 1981 that CalTrans Director Gianturco responded to the January letter from the Personnel Board staff. In her February letter, Ms. Gianturco agreed with the conceptual approach of exempting supervisors from calculation in the ratio and to an adjustment of priorities in the department's performance contract with the Personnel Board.

The CalTrans supervisory position equivalent to Deputy Department of Transportation Attorney IV is the Assistant Chief, Legal Division. On June 3, 1981, the Personnel Board notified the Department of Transportation that effective immediately the Assistant Chief positions no longer would be used in the calculation of the 20 percent limitation. This change had the effect of permitting the department to

promote three additional attorneys to the attorney IV classification. These promotions were made in June, prior to the close of balloting in unit no. 2.

On the basis of the evidence it is concluded that as between the Attorney General and CalTrans, the Attorney General proposal to exempt supervisors from the staffing ratio was the earlier proposal. Although CalTrans had complained to the Personnel Board about the staffing ratio in a letter as early as August 13, 1980, it was the Department of Justice which made the earliest specific request for a supervisory exemption from the ratio. This approach was developed in conversations between the staffs of the Personnel Board and the Department of Justice. Only then was the CalTrans proposal made. The August 13, 1980 letter from CalTrans must be seen as but one in a series of written and oral contacts both departments had made with the Personnel Board about the staffing problem over a number of years.

This sequence of events must be considered in order to evaluate the Coalition's contentions about a May 8, 1981 meeting between Coalition officers and Rebecca Taylor, a labor relations officer with the Department of Personnel Administration.

Rebecca Taylor was assigned responsibility in early 1981 as the Governor's representative for matters involving state unit no. 2. In order to inform herself about issues that might

arise in unit no. 2 negotiations, Ms. Taylor met with James Pearce, a Personnel Board staff member knowledgeable about matters pertaining to state-employed attorneys. During this meeting, which took place in April of 1981, Mr. Pearce mentioned the impending change in the calculation of the 20 percent ratio for Deputy Attorney General IV.

Following the meeting with Mr. Pearce, Ms. Taylor contacted Jim Mosman, personnel manager for the Department of Justice, and asked him why the department was pushing for such a change at that time. She reminded him that because of the impending elections for exclusive representatives the Governor's office had a policy against changes in employee benefits. She told him that she considered the proposed staffing ratio change contrary to the policy of the Governor's office and asked him to discuss the matter with Department of Justice administrators. Mr. Mosman replied that the department had been pursuing the change for several years, that it was on record with its employees in favor of the change and that it did not believe it was appropriate to switch its position in the face of the proposal's impending approval.

Ms. Taylor next called George Lloyd, the Personnel Board program manager under whose supervision the staff work on the attorney proposal was being completed. She told Mr. Lloyd that she considered the subject of adjustment of attorney staffing ratios to be a matter more appropriate for the bargaining

process. Mr. Lloyd responded that the Personnel Board considered the matter to be a classification issue, an area within the Personnel Board's jurisdiction. He said that the Personnel Board had made commitments to the departments to perform this work, that the work was underway, that he appreciated her concern but that the Personnel Board was going to proceed with the matter as planned. Mr. Lloyd told Ms. Taylor that the only way the Personnel Board would drop the question would be at the request of the Department of Justice. Because the Department of Justice refused to withdraw its request, the Personel Board went forward with its study and the manner of calculating the staffing ratio was changed for deputies Attorney General.

On May 8, 1981, Ms. Taylor and several other representatives of the state employer including Mr. Mosman met with John Sullivan and other representatives of the Coalition. The meeting followed an invitation by the Department of Personnel Administration to meet with employee organizations about pay and benefits for state employees in the 1981-82 fiscal year. The Coalition accepted the invitation and the meeting was held at the Department of Personnel Administration.

During the course of the meeting Mr. Sullivan inquired about whether the Personnel Board had acted on the staffing ratio for the class of Deputy Attorney General IV. The question was directed at Mr. Mosman and he responded that the

Personnel Board had approved the Department of Justice request. At that point Ms. Taylor stated that she had "hit the ceiling" when she learned about the Department of Justice request. She stated that she considered the request to be a violation of the Governor's prohibition against changes in bargainable matters. She also disclosed that she had contacted the Personnel Board staff about the action but that the change was a fait accompli by the time she learned about it.

There is a conflict in the testimony about what Ms. Taylor said next. According to Mr. Sullivan, Ms. Taylor said she also had contacted the Personnel Board and had stopped the further processing of the CalTrans request for a similar relaxation in the application of the staffing ratio. Ms. Taylor denied making such a statement. She testified that at the time of the May 8 meeting she did not even know that CalTrans had such a request pending before the Personnel Board. She testified that she did not at any time contact the Personnel Board and ask it to disapprove the CalTrans request. Mr. Mosman testified that he could recall no statement by Ms. Taylor at the May 8 meeting about the CalTrans request. The testimony of Ms. Taylor was in part corroborated by Mr. Lloyd of the Personnel Board who testified that Ms. Taylor did not specifically raise the issue of the CalTrans request in any conversation with him.

It is concluded that Ms. Taylor did not contact anyone at the Personnel Board about the CalTrans request and she did not

state that she had done so at the May 8 meeting. Several factors support this conclusion. Ms. Taylor was a forthright witness. She freely acknowledged her attempt to frustrate the Department of Justice efforts to get a change in the application of the staffing ratio. Having freely acknowledged that she attempted to kill the Department of Justice request, Ms. Taylor would have no reason to deny having made a similar attempt to kill the CalTrans request had she done so. Moreover, it was obvious from the testimony of both Mr. Mosman and Mr. Lloyd that the Department of Justice and the State Personnel Board were unabashedly unimpressed with what Ms. Taylor had to say on the issue. Mr. Lloyd, a precise witness with years of service in the state bureauracy, plainly considered Ms. Taylor's efforts to derail the Justice request to be something of an attack on the jurisdiction of the State Personnel Board. Having encountered a stone wall in her attempt to kill the Justice request, Ms. Taylor would have had little reason to pursue her position on the later CalTrans request.

The effect on the election of the staffing ratio change was marginal at most. There is no evidence that ACSA played any substantial role in pushing the Department of Justice request. The evidence establishes that the request was that of the department and thus any credit or blame for the ultimate result would have to go to the Department of Justice. When the

Personnel Board approved the proposal, ACSA did not attempt to claim the glory.

It is true that employee groups within the Department of Justice endorsed ACSA at about the same time as the staffing ratio revision was approved. However, the reasons for these endorsements had more to do with the manner in which Department of Justice attorneys perceived the Coalition than anything else. Department of Justice lawyers for some time had been annoyed with the position CSEA had taken with regard to state employee pay raises. In the view of those attorneys, CSEA had supported flat dollar pay increases rather than percentage pay hikes. Because they are more highly paid, attorneys would receive larger pay increases under a percentage approach than under flat dollar pay plans. Attorneys employed by the Department of Justice also believed that they would not have as large a voice in the operation of the Coalition should it become exclusive representative as they would have with ACSA. In recent years, five Department of Justice lawyers have held seats on the 15-member ACSA Board of Directors. By comparison, Department of Justice lawyers have had virtually no voice in the control of the Coalition or its constituent organizations.

For these reasons, it is concluded that the change in the method of calculating the staffing ratio at the Department of Justice had esssentially no effect on the election for exclusive representative in State unit no. 2.

LEGAL ISSUES

1. Should all or any of the challenges to the 311 unit no. 2 ballots be sustained?

2. Should the unit no. 2 election be set aside because of:

A) Gross irregularities in the conduct of the election?

B) The unfair practice in the state's mail distribution policy which was found by the PERB?

C) The actions of a representative of the Department of Personnel Administration in opposing a change in attorney staffing ratios while that matter was before the State Personnel Board?

CONCLUSIONS OF LAW

Challenged Ballots

At the conclusion of the presentation of evidence about the 275 ballots challenged by the Coalition, counsel for ACSA made a motion that a ruling be issued on the record about the challenges. The basis for the motion was that the evidence "clearly indicates that all of the 275 . . . people were eligible to vote at all material times." At the time the motion was made, counsel for the Coalition had stated that she had no further evidence to present on the question. The undersigned hearing officer then ruled on the record that the 275 ballots were cast by eligible voters and "that the ballots should be opened and counted."

Even though a ruling already has been made on the 275 challenged ballots, it is appropriate to state the rationale for that ruling. The terms of the directed election order set forth the specific requirements for voter eligibility. In order to be eligible to vote in unit no. 2, a rank-and-file state employee had to have been employed in a job class within unit no. 2 on December 31, 1980 and on the date the employee cast a ballot. Persons on leave of absence were eligible to vote under the terms of the directed election order. The evidence unequivocably establishes that all of the 275 voters whose ballots were challenged by the Coalition met all of the requirements. The five job classifications to which the 275 persons belonged are all within unit no. 2. Each individual was employed by the eligibility cutoff date and was either on active duty or a leave of absence during the balloting period. Having met all of the requirements, the 275 voters are therefore entitled to have their ballots counted.

By stipulation the parties resolved all 36 of the challenges made by PERB election officials. Under the terms of the stipulation, all of the PERB-challenged ballots should be counted except for those cast by: Michael C. Cohn, Martin F. Dingman, Ronald R. Small and Nathaniel Sterling.

It therefore is concluded that all challenged ballots should be counted except for those cast by the above-named four individuals.

Objections to Election---Alleged Irregularities

PERB rules provide two grounds for objections to the conduct of an election: 1) the conduct complained of is "tantamount to an unfair practice" and 2) "serious irregularity in the conduct of the election." The Coalition raises both grounds in the present case. The allegation that there was "serious irregularity in the conduct of the election" will be considered first.

Essentially, the Coalition argues that the Excelsior list given to the employee organizations before the voting and the election address list used by the PERB in mailing the ballots were both "incorrect, outdated [and] invalid." The deficiencies in the two lists were so serious, the Coalition contends, that the election result could not possibly be valid.

With respect to the Excelsior list, the Coalition observes, there were 420 unit no. 2 employees who had completed nondisclosure requests. Business addresses were supplied for 364 of these employees but, the Coalition continues, no address at all was supplied for the remaining 56 unit members. Thus, the Coalition argues, the employee organizations were given home addresses which were unreliable, work site addresses which may have been useless because of the employer's policies against delivery of employee organization mail and no addresses at all for 56 eligible voters. These problems made a

substantial portion of the electorate unreachable, according to the Coalition.

With respect to the voter list used by the PERB, the Coalition asserts, the addresses were so inaccurate that 30 ballots were returned as undeliverable. In its statement of objections, the Coalition contended that eligible employees were not sent ballots, including the hearing officers I and II at the Department of Social Services and George Coan and John Willd at the Office of Administrative Hearings. In its brief, the Coalition cites Kevin Toole and Charles Fergerson as examples of Department of Social Services hearing officers who did not receive ballots. The Coalition also points to CalTrans attorney Richard Wehe as an eligible voter who did not receive a ballot at his current address and would not have gotten a ballot at all but for the assistance of a co-worker.

ACSA dismisses the Coalition's complaints as allegations "utterly" unsupported by the evidence. ACSA argues that the PERB made efforts to ensure that both the Excelsior list and the voter list had the most accurate possible addresses. In January of 1981, ACSA points out, every state employee received a notice from the PERB stressing the importance of having a current address on file with the controller. In April of 1981, ACSA continues, three election notices were distributed, each one of which described procedures by which eligible voters

could obtain a ballot if they failed to receive one in the mail. Thus persons who did not receive a ballot had a way to get a ballot if they wanted one.

When some sample ballots were returned because of faulty addresses, ACSA notes, PERB election officials immediately sought better addresses and ultimately updated 28 addresses. As a result, ACSA continues, "only 30 ballots out of 1,787" were returned as undeliverable. ACSA argues that no evidence whatsoever was presented in support of the Coalition's contention that the PERB failed to mail ballots to the hearing officers in the Department of Social Services. The evidence shows that the ballots were mailed. As for faulty addresses in the mailing to the Social Services hearing officers, ACSA continues, the Coalition was a party to a stipulation which contained some of the out-of-date addresses used by the PERB.

PERB regulations requiring the preparation of a voter list prior to an election are consistent with the practice of the National Labor Relations Board (hereafter NLRB). The NLRB has held since 1966 that an election may be set aside if the employer fails to file a timely pre-election list of the names and addresses of eligible voters. Excelsior Underwear, Inc. (1966) 156 NLRB 1236 [61 LRRM 1217].

In enforcing this rule, the NLRB requires substantial but not perfect compliance. The NLRB has found substantial compliance where there was an error rate of 7 percent in the

names and addresses, Kentfield Medical Hosp. (1975) 219 NLRB 174 [89 LRRM 1697], where there was an error rate of 13 percent in addresses but not names, Days Inns of America, Inc. (1975) 216 NRLB 384 [88 LRRM 1224], and where the list was not received by the union until eight days before the election, Peerless Eagle Coal Co. (1975) 220 NLRB 357 [90 LRRM 1229].

Here, the Excelsior list contained 1,727 names but was missing the home addresses of 420 unit no. 2 voters who had completed nondisclosure requests. Business addresses were supplied for 364 of the 420 but no addresses of any kind were supplied for the remaining 56. In addition, the home addresses of at least 43 voters were incorrect because that many sample ballots were returned to the PERB by the post office.

In omitting from the Excelsior list the home addresses of those unit no. 2 voters who had completed nondisclosure requests the state employer was following the terms of the directed election order. The order plainly excluded disclosure of home addresses for employees who had completed a nondisclosure request pursuant to Civil Code section 1798.62.[10] The absence of those 420 home addresses therefore cannot be considered evidence of any irregularity in the

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[10]See footnote no. 6, supra. For a discussion of how Civil Code section 1798.62 relates to the Excelsior list requirement in PERB representation rules, see 63 Ops. Atty. Gen. 120 (1980).

election process. The state employer was directed, however, to supply the work addresses for the 420 and in fact supplied only 364 work addresses. The lists were defective, therefore, by at least 56 addresses.

An additional defect in addresses on the list can be inferred from the return by the post office of 43 sample ballots. Assuming for discussion that none of the 43 voters whose sample ballots were returned were among the 56 whose work addresses were not provided, the Excelsior list would have been in error by at least 99 addresses out of 1,727 voters, an error rate of .057 percent.

For the purpose of calculating the error rate in the Excelsior list, the Department of Social Services hearing officers cannot be considered. Those positions were created after the issuance of the PERB unit decision for state employees. The Department of Social Services hearing officers were not added to the unit until after the May 5, 1981 stipulation between the parties and the May 7, 1981 amendment by the regional director to the election order.

The Coalition's contention that unit no. 2 employee organization mail was not delivered to employees at those work site addresses on the Excelsior list fails totally for lack of proof. There was evidence about the nondelivery of certain ACSA mail to the worksite addresses of Unemployment Insurance

Appeals Board hearing officers and Franchise Tax Board lawyers. But those nondeliveries occurred prior to the issuance of the Excelsior list. There was no evidence about the nondelivery of Coalition mail to work site addresses at any time.

The error rate on the actual ballot mailing was somewhat lower that the error rate on the Excelsior list. Only 30 ballots were returned by the post office out of 1,783 which were mailed, an error rate of .0168 percent. Nine of the 30 voters whose ballots were returned had contacted the PERB election office and obtained duplicate ballots, a factor which minimizes the effect of the mistaken addresses still further.

That the state employer would supply a perfect set of home addresses for the Excelsior and ballot mailing lists was never contemplated. It was known from the beginning that there would be errors. For that reason, the regional director prepared a memorandum encouraging employees to update their home addresses and had it distributed with employee paychecks nearly four months before the election. Three kinds of election notices were issued, each one of which contained a toll free telephone number for voters to call if they did not obtain their ballots in a timely fashion. In a still further effort to ensure that all eligible voters got a ballot, the regional director updated addresses when the return of some sample ballots showed which employee addresses were incorrect.

The Coalition contends that the regional director failed to "send ballots to employees who should have received ballots." As stated by ACSA in its brief, proof of that contention is "utterly" lacking in the record. The record establishes that ballots were mailed to all persons on the voter list as well as to all persons who timely requested duplicate or challenged ballots. Specifically, the Coalition alleges that no ballots were mailed to the Department of Social Services hearing officers. The record unequivocably establishes that the ballots were mailed.

Inconsistent with its allegation that no ballots were mailed to Department of Social Services hearing officers, the Coalition at the hearing actually proved that ballots were sent to Kevin Toole and Charles Fergerson but were mailed to incorrect and outdated addresses. Nevertheless, as ACSA observes in its brief, the addresses used for those two hearing officers were the addresses attached to the stipulation entered into by the Coalition. Having been a party to the development of the mistaken addresses, the Coalition should not now be heard to complain that the addresses were incorrect.

The Coalition alleged that hearing officers George Coan and John Willd were not sent ballots by the regional director. This allegation is totally devoid of support in the record. Finally, the Coalition points to the mailing of a ballot to CalTrans attorney Richard Wehe at an outdated address.

Mr. Wehe, however, received a duplicate ballot and voted in the election. It is of no consequence, therefore, that the original address on the mailing list was out of date. That he voted at all is proof that the system had a successful method for correcting errors.

In summary, it appears that the Excelsior list had omissions and errors in the addresses of about .057 percent of the eligible voters. It appears further that the ballot mailing list had errors in the addresses of about .0168 percent of the eligible voters. Both of these deficiencies are so small that they reasonably can be described as insignificant. Rather than proving "gross irregularities" in the conduct of the election, the Coalition has established the existence of some inconsequential and probably unavoidable errors. In its preparation of the Excelsior and voter lists the state employer obviously satisfied the "substantial compliance" requirement found in National Labor Relations Board decisions.

The errors proven by the Coalition were de minimis.

Objections to Election---Mail Distribution Policy

The Coalition argues that the state policy concerning the distribution of employee organization mail at the work site was a denial of rights sufficiently grievous to justify a new election. Comparing the policy to a no-solicitation rule, the Coalition argues that the rule was not only unlawful on its face but it was applied in a discriminatory manner. Mail sent

by other organizations, including the rival ACSA, continued to be delivered after the policy was in force. This, in effect, constituted differential treatment, according to the Coalition.

ACSA argues that the Coalition misread the policy and then, acting in reliance upon its own mistake, self-censored its own mailings. "It's true that ACSA mail was delivered and STAA [State Trial Attorney's Association] mail was not; but not because of any discrimination," ACSA argues. "There was no STAA mail." Thus, ACSA contends, the Coalition engaged in a self-fulfilling prophesy. It asserted that it could not get its mail delivered because of the state policy and then it declined to send any mail, insuring nondelivery. Moreover, ACSA continues, even had there been a ban on delivery of mail to the work site, alternative means---a home address list from the state controller---were available.

That the state policy under attack was an unfair practice already has been determined by the PERB itself.[11] However, merely proving that an unfair practice existed in an election context does not justify a new election. It takes more than that. Determining the existence of an unfair practice or conduct tantamount to an unfair practice is a threshold inquiry. The decision about whether to grant a new election

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[11]PERB Decision No. 159b-s, supra.

"depends upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief granted. (Citations omitted) In general, this will require that the objecting party satisfy its burden of establishing a prima facie case that specific activities interfered with the election process." San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111.

Here, the Coalition has totally failed in its effort to show that the mail policy interfered in any way with the election. The Coalition never tried to mail anything to the work site addresses of unit no. 2 voters. It is apparent on the face of the September 5, 1978 memo from the Governor's office that the mail policy was intended to be applied in a flexible manner. Only when an individual department determined that the "sorting, distribution or handling of volume mailings" would create an undue burden could the department refuse to deliver the mail.

It also should have been apparent to Mr. Sullivan and other officers of the Coalition that the policy was flexible as enforced. When mail from other employee organizations was delivered at the work site Mr. Sullivan had reasonable grounds to believe that mail he might send also would get through. Yet he never even tried a mailing. In these circumstances, Mr. Sullivan can hardly complain of discriminatory treatment.

Had Mr. Sullivan conducted a mailing and had that mailing not been delivered when ACSA mailings were delivered, there would have been discrimination. That did not occur and the Coalition cannot complain of discrimination on the basis of a self-imposed censorship.

Moreover, as ACSA argues, even had there been a ban against the delivery of all mail at the work site, alternative methods of communcation were available. As early as mid-May of 1980, a full year before the elections, the state controller's office was releasing to employee organizations the home addresses of all state employees except those who had completed written nondisclosure requests. Although Mr. Sullivan and the State Trial Attorneys Association did not seek such a list, the other constituent organizations in the Coalition obtained and used home addresses. It cannot be denied that the home address lists were imperfect, but there is no evidence to suggest that work site addresses were much better.

Finally, even had all access by mail been cut off there is no evidence to suggest that other means of communication with state employees could not have been used. There is no indication that the state in any way interfered with personal contact such as organizing in non-work areas during break periods. There is no indication that the state in any way restricted the use of bulletin boards at work or hampered the personal distribution of literature at the work site.

In summary, the Coalition has failed to show that the state mail distribution policy in any way "interfered with the election process." Neither in its wording nor in its application was the policy as prohibitive as the Coalition would suggest. In addition, during the last year prior to the election the Coalition could have obtained the home addresses of most unit members and communicated with them by mail or in person at their residences. Alternative means of communication were available.

Objections to Election---CalTrans Staffing Ratio

The Coalition argues that the staffing ratio modification for CalTrans attorneys was delayed in the crucial pre-election period because of the actions of Rebecca Taylor of the Department of Personnel Administration. This interference, the Coalition continues, constituted disparate treatment by the state employer between two employee organizations. In effect, the Coalition argues, benefits sought by one employee organization were granted while those sought by another organization were delayed.

ACSA argues that the evidence simply does not support the claims of the Coalition. The CalTrans proposal was made after the Department of Justice proposal and it was approved after the Department of Justice proposal, ACSA asserts. Moreover, ACSA continues, at no time did Ms. Taylor attempt to interfere with the processing of the CalTrans request. Finally, ACSA

concludes, there is no evidence to establish that the delay in the approval of the CalTrans request had any effect whatsoever on the election.

There is ample precedent for the Coalition's assertion that a discriminatory increase in benefits prior to an election will be found an unfair practice. See, e.g., Santa Monica Community College District (9/21/79) PERB Decision No. 103. However, the Coalition has failed to prove the occurrence of a discriminatory increase in benefits.

The evidence establishes, as argued by ACSA, that the Department of Justice request for a change in the staffing ratio was prior in time to the CalTrans request. The specific approach ultimately adopted by the Personnel Board was developed in discussions between the staff of the Department of Justice and that of the Personnel Board. The Department of Justice was the first department to complete the documentation requested by the Personnel Board and it was the first department to change its performance contract with the Personnel Board. In the normal course of events, the department which makes the earliest request should have the earliest consideration of that request. Exactly that sequence occurred.

The Coalition also has failed to prove that Ms. Taylor acted in any way to hamper the CalTrans request. Clearly, she attempted to derail the Department of Justice request. But her

efforts were totally unsuccessful. She didn't even try to delay the CalTrans request.

Moreover, even had the Coalition demonstrated a difference in the way the Personnel Board treated the two departments, there is no evidence of discrimination in the treatment of the competing employee organizations. While the Coalition might have been involved in furthering the CalTrans request, there is no evidence that ACSA was in any way involved in promoting the Justice request. There also is a paucity of evidence that the sequencing of the Personnel Board's action on the two requests had any effect whatsoever on the election.

In summary, this allegation like the others, must fail for a lack of evidence. Considered collectively, the evidence of irregularities in the election and of conduct tantamount to an unfair practice simply is too scarce to show sufficient interference with the election process to justify the setting aside of the election result.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record of this matter, it is the Proposed Order that:

1) The challenges to the ballots of the following named individuals are hereby overruled:

William S. Abbey, Calvin J. Abe, Steven V. Adler, Paul C. Ament, Andrew D. Amerson, Christopher Ames, Roosevelt R. Arnold, Shunji Asari, Merlin G. Askren,

Richard W. Bakke, William v. Ballough,
Joseph J. Barkett, Elizabeth A. Baron,
Gelacio L. Bayani, Joanna M. Beam, Garrett Beaumont,
Patricia D. Benke, Thedora P. Berger, Gary A. Binkerd,
Paul V. Bishop, Jay M. Bloom, Randall P. Borcherding,
Jean M. Bordon, Roger W. Boren, Michael R. Botwin,
Matthew P. Boyle, Lauren R. Brainard,
Elisabeth C. Brandt, Bruce J. Braverman,
Robert D. Breton, Janice R. Brown, John R. Burton,
Charles M. Buzzell,

Paul C. Cahill, Joel E. Carey, William L. Carter,
James Ching, Nancy K. Chiu, Randall B. Christison,
Joseph P. Collins, William E. Collins,
Joanne M. Condas, James M. Cordi, Rudolf Corona,
Michael L. Crow, Richard B. Cullather,
Patricia A. Cutler,

Maureen A. Daly, John Davidson, Anthony S. Davigo,
J. R. Davis, Janelle B. Davis, Ramon M. Delaguardia,
Bernard A. Delaney, Paul H. Dobson, Darryl L. Doke,
Thomas P. Dove, Edwin J. Dubiel, John R. Duree,

Harold L. Eisenberg, David Eissler,

Michael H. Fabian, Beverly K. Falk, Richard F. Finn,
Jane K. Fischer, Norman N. Flette, Bruce S. Flushman,
Edward T. Fogel, Robert M. Foster, Robert H. Francis,
Richard M. Frank, Carol S. Frederick,
Susan L. Frierson, Jeffrey J. Fuller,

David M. Galie, Richard G. Garske, G. M. Gates,
Charles W. Getz, Dane R. Gillette, Kathleen E. Gnekow,
Neal J. Gobar, John A. Gordnier, John R. Gorey,
Frederick C. Grab, Robert R. Granucci,

Mark A. Hart, Robert G. Hatton, Stanley M. Helfman,
John L. Henderson, Richard D. Hendlin,
Susan E. Henrichsen, Edward P. Hill, N. E. Hill,
Blair W. Hoffman, Charlton G. Holland, Elizabeth Hong,
Sharlene A. Honnaka, Carol Hunter,

Ronald N. Ito,

Richard C. Jacobs, Charles J. James, Gary M. James,
M. Anne Jennings, Ann K. Jensen, J. R. Jibson,
Linda C. Johnson, Ralph M. Johnson, Marian M. Johnston,
Willard F. Jones, Curtis K. Jorstad, David B. Judson,
Raymond B. Jue, Charles P. Just,

Charles M. Kagay, Steven M. Kahn, Eugene W. Kaster,
Robert F. Katz, Peter H. Kaufman, Stephen M. Kaufman,
Steven H. Kaufmann, Martin S. Kaye, Lawrence K. Keethe,
Ellen B. Kehr, Nelson P. Kempsky, Jack T. Kerry,
Alexander W. Kirkpatrick, Patti S. Kitching,
John J. Klee, Elizabeth A. Koen, Carole Ritts Kornblum,
Sandy R. Kriegler, Lawrence C. Kuperman, Owen L. Kwong,

Barry D. Ladendorf, James R. Lahana,
Michael E. Lasater, Morris Lenk, Dora Levin,
Herbert A. Levin, Ellyn S. Levinson, Robert P. Lewis,
Wayne M. Liao, Roy S. Liebman, Richard N. Light,
Rodney O. Lilyquist, Linda M. Ludlow,

Alan A. Mangels, Susan D. Martynec,
Linus S. Masouredis, Karl S. Mayer, Marilyn K. Mayer,
Harley D. Mayfield, Thomas D. McCrackin,
Edmund D. McMurray, Alan S. Meth, Nathan D. Mihara,
Kathleen W. Mikkelson, Robert D. Milam,
Martin H. Milas, Frederick R. Millar, Stephen A. Mills,
Stephen H. Mills, Craig E. Modlin, Dixie Moe,
Deborah R. Monheit, John M. Morrison,
Joel S. Moskowitz, Keith I. Motley, Barbara M. Motz,
John B. Moy, Robert E. Murphy,

Pamela M. Nelson, Shirley A. Nelson,
Richard E. Nielson, Eleanor Nisperos, Ronald E. Niver,
Barbara A. Noble, Douglas B. Noble, Gail Y. Norton,

Robert H. O'Brien, Susan J. Orton, Gordon R. Overton,

Timothy R. Patterson, A. W. Petersen,
Patricia S. Peterson, Donna M. Petre, Earl R. Plowman,
Tyler B. Pon, William R. Pounders, Ronald S. Prager,
William G. Prahl, Roy C. Preminger, Anne S. Pressman,
Joel S. Primes,

Lillian L. Quon,

Richard M. Radosh, Ronald A. Reiter,
Donald A. Robinson, David W. Robison, Jesus Rodriquez,
Donald F. Roeschke, Richard M. Ross, George J. Roth,
Wanda H. Rouzan, Asher Rubin, John W. Runde,
Joseph C. Rusconi, Ronald F. Russo, James E. Ryan,
Tiffany J. Rystrom,

Nancy A. Saggese, David D. Salmon, John H. Sanders,
John A. Saureman, Thomas M. Scheerer,
Lawrence P. Scherb, James M. Schiavenza,
Gary W. Schons, Howard J. Schwab, James R. Schwartz,
Arthur G. Scotland, Melven R. Segal, Daniel P. Selmi,
Peter K. Shack, Albert N. Shelden, Janet G. Sherwood,
Iver E. Skjeie, Denis D. Smaage, Winifred Younge Smith,
William F. Soo Hoo, Diane M. Spencer,
Michael I. Spiegel, John W. Spittler,
Julian O. Standen, William D. Stein, Jan S. Stevens,
Michael J. Strumwasser, Laurence K. Sullivan,
Anthony M. Summers, Juliet H. Swoboda,

Clayton S. Tanaka, Lawrence R. Tapper,
Linda L. Tedeschi, Alfredo Terrazas, Craig C. Thompson,
W. S. Thorpe, Calvin W. Torrance, Richard G. Tullis,
Jana L. Tuton, Robert F. Tyler,

Peter W. Van Der Naillen, Roger E. Venturi,
Louis Verdugo,

Nancy S. Wainwright, Stephanie H. Wald,
Roderick E. Walston, Michael H. Wayne,
Christopher J. Wei, Michael J. Weinberger,
Mark A. Weinstein, William R. Weisman,
Michael D. Wellington, James H. Wernicke,
Michael D. Whelan, Edmund E. White,
Gregory K. Wilkinson, Herbert F. Wilkinson,
Kenneth R. Williams, Diana C. Woodward,
Walter E. Wunderlich, Susanne C. Wylie,

Richard P. Yang, Thomas R. Yanger,

Pat L. Zaharopoulos, Gordon Zane.

2) In accord with the stipulations made by the parties, the challenges to the ballots of the following named individuals are hereby overruled:

Ronald A. Bass, Samuel A. Brewer, III,
Richard W. Clark, Alexander M. Correa,
Robert W. Daneri, Susan L. Durbin, Dennis P. Eckhart,
Dennis E. Ferris, Sharon R. Hindley, James W. Lewis,
Joanne P. Lyons, Elise B. Manders, John E. Marquez,
Paula R. Mazuski, John T. McArdle, David R. Meeker,
Bobbie L. Reyes, Victor Rojas, Earl N. Selby,
Robert B. Shaw, Allen E. Sommer, Shirley M. Thayer,
John A. Willd, Allene C. Zanger,

Robert A. Brown, Oliver Cox, Dennis O. Higgins, Jean Hume, Keith Levy, Steve Martini, Kenneth A. Reed, Leonard L. Scott.

3) In accord with the stipulations made by the parties, the challenges to the ballots of the following named individuals are hereby sustained:

Michael C. Cohn, Martin F. Dingman, Ronald R. Small, Nathaniel Sterling.

4) The objections to the election in state unit no. 2 filed by the Judicial and Legal Coalition are hereby dismissed.

5) Immediately upon this Proposed Order becoming final the regional director shall open and count the ballots determined to be valid, void the ballots determined to be invalid and issue a revised tally of ballots consistent with this decision.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and order shall become final on October 19, 1981 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 be actually received by the executive assistant to the Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on October 19, 1981 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 PERB itself. See California Administrative Code, title 8, part III, section 32300 and 32305, as amended.

DATED: September 29, 1981

FOR THE EXECUTIVE DIRECTOR

By Ronald E. Blubaugh
Hearing Officer