

Case No. S-S-115-S

PERB Decision No. 773-S

September 29, 1989

Before Porter, Craib and Shank, Members.

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Peace Officers Association (CSPOA) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ) on a severance petition filed by CSPOA. The ALJ found insufficient justification to grant the proposed severance, and further found that his authority was limited to granting or dismissing the severance petition as filed and did not extend to

granting a severance different than that proposed in the petition.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free of prejudicial error. We are also in agreement with his conclusions of law, and therefore affirm his decision, consistent with the discussion below.

PROPOSED DECISION

The criteria for determining the appropriateness of a proposed unit under the Ralph C. Dills Act (Dills Act) are set forth in Government Code section 3521(b),¹ which provides:

(b) In determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals; the history of employee representation in state government and in similar employment; the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements; and the extent to which the employees have common supervision.

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account such factors as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the state government, and the effect on the existing

¹Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.

(3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of state government and its employees to serve the public.

(4) The number of employees and classifications in a proposed unit and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship.

(5) The impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.

(6) Notwithstanding the foregoing provisions of this section, or any other provision of law, an appropriate group of skilled crafts employees shall have the right to be a separate unit of representation based upon occupation. Skilled crafts employees shall include, but not necessarily be limited to, employment categories such as carpenters, plumbers, electricians, painters, and operating engineers.

In reaching his decision, the ALJ properly analyzed the factual record before him with reference to these statutory criteria. His extensive comparison between the classifications sought to be included and excluded from the proposed unit, as well as his other factual determinations, are supported by the record and are therefore adopted by the Board and incorporated herein. What follows is a brief summary of those comparisons and factual conclusions.

California Union of Safety Employees (CAUSE) has been the exclusive representative of employees in existing state bargaining Unit 7, the Protective Services and Public Safety Unit, since the creation of the unit in 1979. The board of directors of CAUSE is composed of representatives of affiliate organizations. CAUSE has internally organized itself into four subunits or groups: uniformed, investigator, regulatory and support. Representatives of each of these subunits have participated in bargaining. Issues pertaining primarily to a particular subunit have been bargained separately. As for bargaining history, vis-a-vis the proposed unit, none of the provisions in the collective bargaining agreements that were negotiated prior to the hearing in this case were both common to and limited to the classifications in the proposed severance unit.

On March 2, 1987, CSPOA filed a petition with PERB seeking to sever a group of employees from existing state bargaining Unit 7.² The proof of support was found to be sufficient by the

²The fifth and final amended petition filed on December 22, 1987, included the following job classifications:

Fish & Game Warden Cadet
Fish & Game Warden, Dept, of Fish & Game
Lieutenant, Fish & Game Patrol Boat
Lifeguard
Hospital Peace Officer I
Sergeant, OSCP
Sergeant, State Fair Police
State Fair Police Officer
State Fair Police Office, Seasonal
State Security Officer
State Park Cadet (Lifeguard)
State Park Cadet (Ranger)

Sacramento Regional Director of PERB. Both CAUSE, the exclusive representative for Unit 7, and the Department of Personnel Administration (DPA) opposed the original petition. CSPOA amended its petition four times before the hearing commenced and once during the hearing, and the parties modified their positions depending upon the proposed severance. Finally, DPA opposed the fifth and final amended petition while CAUSE took a neutral position.

All of the classifications in the proposed unit are part of the uniformed sub-unit within the CAUSE organization, but the proposed unit does not include all employees in the uniformed sub-unit. Most, but not all, employees within the proposed unit wear easily identifiable uniforms. Employees in other classifications, outside the proposed unit, however, also wear uniforms. Generally, most, but not all, of those sought to be included in the proposed unit are engaged in high visibility patrol duties with set geographical areas. Employees in the proposed unit share many, but not all, duties. Those included in the proposed unit perform some duties that are also routinely performed by employees not included in the severance petition.

Interaction among employees in the proposed unit also varies. Generally, there is greater interaction between job classifications within the proposed unit than between included

State Park Ranger I
State Police Officer
State Police Officer Cadet (Female)
State Police Officer Cadet (Male)
Warden-Pilot, Dept, of Fish & Game

and excluded classifications. Yet, situations do arise where employees included in the proposed unit work alongside employees excluded from the severance petition.

The proposed unit would contain some, but not all, of the peace officers and cadets who are currently a part of Unit 7. Training practices for the various classifications within the proposed unit vary, with some classifications being required to complete the POST (Commission on Peace Officers Standards and Training) basic training, and others being subject to a less intensive training program. Training for classifications within Unit 7 but outside the proposed unit also varies, with some classifications subject to specialized POST training requirements and others subject to the POST basic. Many peace officers, both in and out of the proposed unit, are eligible for physical fitness incentive pay, and all peace officers are eligible for peace officer retirement. Many employees, both in and outside the proposed unit, use standard peace officer protective equipment.

In applying the criteria of Government Code section 3521(b) to the factual record before him, the ALJ reached the following conclusions. While employees within the proposed unit share a strong community of interest among themselves, these similarities are not limited solely to those included within the petition for severance, but are shared with other Unit 7 employees. The two major dissimilarities between those sought to be included and excluded from the proposed unit are that, generally, those

included in the severance petition wear uniforms and they patrol a set geographical region. The many exceptions to this general rule, however, blur these dissimilarities as a notable distinction between those included in and excluded from the proposed unit.

Significantly, the bargaining history indicates that the interests of the classifications sought to be severed have not been trampled upon or ignored by CAUSE. In fact, the evidence suggests that a stable bargaining relationship exists between CAUSE and DPA.

While the ALJ declined to find that the granting of a severance petition would lessen DPA's efficiency of operations, he did conclude that a severance in this case could lead to the proliferation of units that the Board sought to avoid when it created Unit 7.

Regarding the applicability of Government Code section 3521.7, the ALJ concluded that even assuming arguendo that PERB has a duty to create a law enforcement unit, the proposed unit is flawed because it excludes large numbers of classifications having an almost identical community of interest to those included in the proposed unit.

During the hearing, both CSPOA and DPA contended that should the ALJ find the proposed unit inappropriate for severance, he could fashion what he believed to be an appropriate unit based upon the evidence before him. CAUSE took the position that PERB does not have the authority to sever from Unit 7 classes not

included in the petition for severance. After accepting briefs on the issue, the ALJ held that his authority was limited to granting or dismissing the severance petition before him, and did not extend to severing a unit of a different configuration.

EXCEPTIONS

In its exceptions, CSPOA asserts that the ALJ had the authority and was duty-bound to determine if a unit other than the unit proposed in the severance petition was appropriate for severance. Secondly, CSPOA excepts to the ALJ's application of Sacramento City Unified School District (1977) EERB³ Decision No. 30 on the ground that the case holds that a separate unit is not warranted merely because a group shares a community of interest when it is part of a larger group with similar interests. CSPOA contends that other factors differentiate the proposed unit from the excluded classifications besides the internal community of interest. Thirdly, CSPOA excepts to the ALJ's reliance, as one reason for denying the severance petition, upon his conclusion that the granting of the petition could lead to a proliferation of units.⁴ Finally, CSPOA excepts to various factual findings

³Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

⁴The Board must look to the statutory criteria for determining an appropriate unit as set forth in section 3521 and consider:

The impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.
(Section 3521(b)(5).)

drawn upon by the ALJ in making his comparisons between the various classifications included in and excluded from the proposed unit.⁵

DISCUSSION

Scope of PERB's Authority in Ruling on Severance Petitions

CSPOA advances two theories in support of its contention that PERB has the authority to reconfigure the petitioned for unit. One of those theories is grounded in general language found within our statutes, regulations and case law pertaining to initial unit determinations. Thus, under section 3541.3, CSPOA argues, "the Board shall have all of the following powers and duties: (a) To determine in disputed cases, or otherwise approve, appropriate units. . . ." CSPOA contends that the word "determine" should be broadly interpreted to confer authority on PERB to go beyond the severance petition in deciding whether an appropriate unit should be severed from the existing one. We disagree.

When exercising the powers and duties conferred by section 3541.3 in a severance context, this Board must consider the constraints of our regulations specifically governing severance. The regulations pertaining to severance petitions require that:

Based upon the evidence of a stable bargaining relationship that has existed since creation of the unit (see discussion below), the ALJ could reasonably conclude that the granting of the severance petition would result in an undesirable fragmentation of Unit 7.

⁵As we find the ALJ's findings of fact to be free from prejudicial error, we reject CSPOA's exceptions thereto.

(1) A severance petition can only be filed by an employee organization (Reg. 40200(a));⁶ (2) a severance petition must be accompanied by sufficient proof of support of employees in the classifications sought to be severed (Reg. 40200(b)); (3) only the party filing a petition can seek to amend, modify or withdraw it (Regs. 40240, 40250); and (4) any amendments seeking to add job classifications to the petition after issuance of a notice of hearing must be supported by further evidence of proof of support. Read in light of the severance regulations, the word "determine" should be interpreted to mean that PERB has the authority to make a decision in a case where a proposed severance is disputed.

Furthermore, Regulation 40260(b)(2) provides that:

- (b) A petition shall be dismissed in part or in whole whenever the Board determines that:

.

- (2) There is currently in effect a memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees covered by the severance petition, unless the petition is filed less than 120 days but more than 90 days prior to the expiration date of such memorandum or the end of the third year of such memorandum; provided that, if such memorandum has been in effect for three years or more, there shall be no restriction as to time of filing the petition; or

⁶PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

The purpose of the contract bar contained in Regulation 42060(b)(2) is to foster stability in the employer-union relationship and to allow the exclusive representative to conduct its affairs during the insulated period "free from the 'threat of overhanging rivalry and uncertainty.'" (See 1 Morris, The Developing Labor Law (2d ed. 1983) pp. 361, 374.) That purpose would be frustrated if classifications not included in the original severance petition filed within the window period were later subject to severance by PERB. Additionally, nonexclusive representatives would be discouraged from filing valid severance requests and settlement of such requests would be deterred as the parties would fear an unknown result at the hands of PERB. (See Service Employees International Union. Local 614, AFL-CIO v. Solano Community College District (1981) PERB Decision No. 166.)

CSPOA also relies on Regulation 40260(a) as authority for its argument that the PERB regulations do not limit the Board to approval or denial of the severance petition. Regulation 40260(a) provides:

Whenever a severance petition is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election or take such other action as deemed necessary to decide the questions raised by the petition.

CSPOA's interpretation of this subsection of the regulation is overbroad, especially when it is read in the context of the entire regulatory scheme relating to severance. To adopt CSPOA's interpretation of Regulation 40260(a) would render the rest of the regulatory scheme meaningless.

Neither is the case law cited by CSPOA particularly supportive of its view of PERB's authority. All of the PERB cases cited by CSPOA pertain to initial unit determinations. (Centinela Valley Union High School District (1978) PERB Decision No. 62; University of California (HERRA Unit Determination) proceedings: (1980) PERB Order No. Ad-101-H, (1982) PERB Decision No. 270-H, (1982) PERB Decision No. 246-H.) Severance proceedings are obviously distinguishable from unit determination proceedings. In unit determination proceedings, PERB clearly has the power to determine an appropriate unit, and the unit ultimately decided upon may be different from the unit proposed by the parties. In contrast, in a severance proceeding, a unit that has previously been deemed appropriate by this Board is in place. Thus, the regulations governing severance were designed to balance the interests of the parties to an existing relationship.

PERB has previously recognized that the focus of its unit determination proceedings may shift, depending upon the background of the unit in question in terms of both its creation and subsequent bargaining history. Thus, in Redondo Beach City School District (1980) PERB Decision No. 114 the Board, in granting a severance petition, noted:

. . . The negotiating history is quite short; the Association had represented the unit for less than two years when the Federation filed its request for recognition The unit was the result of a voluntary recognition and was never reviewed or approved by the Board or its agents. . . .
(P. 10.)

In Redondo Beach, the district had refused to voluntarily recognize the association absent the inclusion of the disputed class. After two years, the association formally requested deletion of the class. The disputed class had not been involved in negotiations and while the record did not evince overt conflict, neither was there cooperation. The Board held:

It has been PERB's policy to encourage voluntary recognitions and settlements among the parties subject to its jurisdiction. The Board also has a strong interest in labor relations stability. Therefore we are loathe to upset working relationships and will not disrupt existing units by granting severance petitions lightly. In this case, however, the negotiations history does little to support a finding that stability would be enhanced by maintaining the existing unit.
(P. 11.)

In Livermore Valley Joint Unified School District (1981) PERB Decision No. 165, a severance case in which this Board specifically recognized both the similarities and differences between the initial unit determination and severance proceedings, the Board stated:

The severance setting is factually different from an initial unit determination because negotiating history must be considered when evaluating a severance request. Such a request, however, is governed by the criteria of section 3545(a) of the EERA, just as is an initial determination. Negotiating history, as one of these criteria, is an important factor, and a stable negotiating relationship will not be lightly disturbed. Nonetheless, it is but one of several criteria looked to by the Board. . . .⁷
(Pp. 5-6.)

⁷The criteria for determining an appropriate unit under the Dills Act are found in section 3521(b).

While the statutory criteria for unit determinations may be the same in initial unit determinations and later severance proceedings, just as the weighing of those criteria change in light of the intervening history of the parties, so must the Board's own role in the process. PERB's case law simply does not support CSPOA's argument that the Board has carte blanche to carve up an existing unit and, without regard to the interests of the affected employees and their exclusive representative, create a unit different from that proposed in a severance petition.⁸ In addition, the regulations discussed above, which require that a severance petition be filed within the window period by an employee organization with proof of support among the employees affected by the severance, compel rejection of CSPOA's broad interpretation of Livermore.

Another theory proffered by CSPOA in support of its argument that PERB does have the authority to reconfigure the proposed unit relies upon section 3521.7, which provides:

The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied

⁸Significantly, PERB's regulations do allow for the amendment of a severance petition, both before and after the issuance of a notice of hearing, to add job classifications to or remove job classifications from a proposed unit. (Reg. 40240.) In fact, in the instant case, petitioner made a motion during the hearing to file a fifth amended petition wherein four classes were deleted from the unit proposed in the fourth amended petition. The ALJ, relying on the criteria of Regulation 40240(c), granted the fifth amended petition. The fact that a severance petition may be amended during a hearing provides for some flexibility based upon the evidence produced at the hearing and should avoid, in most cases, the necessity of dismissing a severance petition based solely on the erroneous inclusion or exclusion of a few positions or classifications.

the right to be in a unit composed solely of such employees.

CSPOA argues that this statute gives the Board the discretion to designate classes of positions with duties consisting primarily of the enforcement of state laws and that, if the Board exercises its discretion in this regard, the employees so designated have a right to be in their own unit. We agree that, under section 3521.7, the Board does have the authority to apply reasonable standards to designate "law enforcement" positions and that, once designated, these classes have the right to be placed in their own unit, and could request severance on that ground.

At the time of the initial unit determination fin The Matter Of: Unit Determination for the State of California (1979) PERB Decision No. 110-S), this Board declined to designate the positions or classes of positions which have "duties consisting primarily of the enforcement of state laws." The Board held that the general unit determination criteria found in section 3521 were sufficient to make an appropriate unit determination. The Board expressly reserved its jurisdiction to make such a determination at a later date. Subsequently, an attorney general opinion ruled that, although PERB has the discretion to designate these positions, until PERB exercises that discretion no rights are conferred by section 3521.7. (61 Ops.Cal.Atty.Gen. 405, 410 (1978).)

We decline to exercise our statutory discretion in this case for two reasons. First, we find that the bargaining history does not justify a departure from our initial unit determination.

CSPOA failed to present convincing evidence that the employees to be included in the proposed unit have not been adequately represented during negotiations. In fact, the subunit of uniformed employees, which includes, among other employees, all of the employees in the severance petition, did participate in bargaining. Neither did CSPOA present evidence that the interests of the employees included in the severance petition were trampled upon or ignored. In fact, the ALJ concluded, and we agree, that the bargaining relationship between DPA and CAUSE has been stable and has produced successful agreements for Unit 7 over the last several years. Stability in bargaining and lack of dissension have been recognized by PERB as important factors in unit determinations in the severance context. (Livermore Valley Joint Unified School District, supra. PERB Decision No. 165, pp. 6-7; Redondo Beach City School District, supra. PERB Decision No. 114.)⁹

Second, even if we were to find that a severance of some nature would be appropriate, we agree with the ALJ that the proposed severance is not appropriate because it excludes large numbers of classifications that we find would fit within the statutory definition of "having duties consisting primarily of the enforcement of state laws." Furthermore, we do not believe

⁹The National Labor Relations Board has also been reluctant to disturb stable bargaining relationships in the severance context. (Mallinckrodt Chemical Works (1966) 162 NLRB 387 [64 LRRM 1011, 1014]. See generally, 1 Morris, The Developing Labor Law (2d ed. 1983) pp. 430-431).)

that section 3521.7 requires us to reconfigure the unit proposed in a severance petition.¹⁰

Application of Unit Determination Criteria

CSPOA excepts to the ALJ's reliance on the case of Sacramento City Unified School District, supra, EERB Decision No. 30. In that decision, the issue before the Board was whether skilled craft employees should be allowed a separate unit or be included within a larger operations-support services unit. The Board held that a separate unit is not warranted merely because a group of employees has a community of interest when that group forms only part of a larger group that shares a community of interest.

CSPOA argues that, in the instant case, there are additional factors which differentiate the proposed unit from the excluded classes apart from their internal community of interest (e.g., bargaining history, interrelationships between included classes, job function, equipment). The ALJ found that, although the employees within the proposed severance unit may share a community of interest among themselves, their commonality of skills, working conditions, duties, and training are also shared, to varying degrees with other Unit 7 employees. The ALJ also

¹⁰We do not decide, at this time, as to the most appropriate procedure or context for the exercise of the Board's discretion under section 3521.7. The Board could exercise its authority in a severance context should the Board find that the classifications in the proposed unit include all "law enforcement" positions. Alternatively, employees or employee organizations could petition the Board to adopt a regulation to implement the statute. A severance or unit modification petition could then be fashioned and decided in accordance with the regulation. In any event, the record before us presents us with no reason to exercise our discretion in this case.

made factual findings regarding interrelationships between classes, job function, equipment and, perhaps most importantly, bargaining history. CSPOA's argument is based on its own interpretation of the evidence and, as the factual findings of the ALJ on the same issues are supported by the record, CSPOA's argument is rejected.

ORDER

Based upon the foregoing and the entire record in this case, it is ORDERED that the severance petition filed by the California State Peace Officers Association is DISMISSED.

Member Porter joined in this Decision.

Member Craib's concurrence begins on page 19.

Member Craib, concurring: I agree with my colleagues that we should affirm the proposed decision and dismiss the severance petition filed by the California State Peace Officers Association (CSPOA); however, I write separately because I disagree with the majority's analysis concerning our authority to fashion an appropriate unit other than that requested in the severance petition.

The general authority in section 3541.3, subdivision (a)¹ gives the Public Employment Relations Board (PERB or Board) the authority to determine "an appropriate unit" in disputed cases.² Furthermore, the specific language in section 3521.7 gives the Board the authority to establish a unit composed solely of employees engaged in the enforcement of state laws.³

¹Section 3541.3 is part of the Educational Employment Relations Act (EERA). EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3541.3 is incorporated by reference in the Ralph C. Dills Act. (Section 3513, subd. (g).)

²Section 3541.3, subdivision (a) provides that the Board shall have the power

[t]o determine in disputed cases, or otherwise approve, appropriate units.

³Section 3521.7 provides:

The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

The majority takes the position that the Board is constrained by the language in PERB Regulations 40200, 40240 and 40250⁴ from modifying the specific unit petitioned for, in that only the petitioner may alter the proposed severed unit. While we are certainly required to act in accordance with our regulations, I believe that the analysis of the regulations pertaining to severance petitions is much too restrictive. Rather than restricting the Board from "modifying" a petition to determine an appropriate unit, I believe that the regulations are more appropriately read to restrict the incumbent exclusive representative and the employer from altering the proposed unit in the severance petition. I would, therefore, agree with CSPOA that Regulation 40260, subdivision (b), which directs the Board to "take such other action as deemed necessary to decide the questions raised by the [severance] petition," read in conjunction with section 3541.3, authorizes the Board to

⁴ PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 40200 provides, in pertinent part:

(a) An employee organization may file a petition to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative. . . .

(b) the petition shall be accompanied by proof of majority support in the unit claimed to be appropriate. . . .

Regulations 40240 and 40250 provide for amendment, modification and withdrawal of the severance petition by the employee organization which filed it, subject to certain conditions.

determine an appropriate unit different from that specified in the petition.

Even though the Board has the authority to determine a unit different from that petitioned for, as a policy matter, that authority should be exercised with discretion. Because of this, the interest of the incumbent exclusive representative and the employer in maintaining a stable bargaining relationship, as well as the incumbent's right to be free from uncertainty during the contract period, I would propose that the Board only alter the unit configuration if the unit petitioned for is over-inclusive. Thus, if the hearing officer determined that the unit petitioned for was inappropriate because it included classifications which, for example, did not share a community of interest with other classifications, he or she could fashion a smaller appropriate unit. The implementation of the hearing officer's determination would, of course, be subject to the willingness of the petitioning representative to represent the smaller unit. If additional proof of support were necessary, it would have to be provided prior to voluntary recognition or a representation election.

Since the administrative law judge determined that the petitioned for unit was both over and under-inclusive, and I agree with those findings, I concur with my colleagues that the petition should be dismissed.

proof of support was found to be sufficient by the Sacramento Regional Director of the Public Employment Relations Board (PERB or Board). Both the State of California (Department of Personnel Administration) (DPA) and the exclusive representative of Unit 7, the California Union of Safety Employees (CAUSE), opposed the petition. A settlement conference was held on May 22, 1987 but was unsuccessful. The petition was amended numerous times throughout the proceedings.²

When CSPOA amended its petition to delete certain job classes from the petition, CAUSE changed its position to a neutral one, neither opposing nor supporting the petition as amended. DPA remained opposed to the petition.

Between September 29, 1987 and December 23, 1987, nine days of hearing were conducted. A transcript was prepared, briefs

²The fifth and final amended petition filed on December 22, 1987 included the following job classifications:

Fish & Game Warden Cadet
Fish & Game Warden, Dept, of Fish & Game
Lieutenant, Fish & Game Patrol Boat
Lifeguard
Hospital Peace Officer I
Sergeant, OCSP
Sergeant, State Fair Police
State Fair Police Officer,
State Fair Police Office, Seasonal
State Security Officer
State Park Cadet (Lifeguard)
State Park Cadet (Ranger)
State Park Ranger I
State Police Officer
State Police Officer Cadet (Female)
State Police Officer Cadet (Male)
Warden-Pilot, Dept, of Fish & Game

filed and the case was submitted for decision on February 22, 1988.

As discussed below, this decision holds that employees within the proposed unit share a community of interest with employees excluded from the proposed unit, that other law enforcement personnel are excluded from the proposed unit, that a stable bargaining relationship exists and that, therefore, there is insufficient justification to establish the proposed unit.

FINDINGS OF FACT

Working Conditions

All the employees sought in the severance petition are either peace officers or cadets who are in training to become peace officers; however, the proposed unit does not include all peace officers in Unit 7. There are, within the existing Protective Services and Public Safety unit, 24 additional job classifications, with peace officer status, which are excluded from the severance petition.

While there are variations between job classes included in the petition, generally those sought are engaged in high visibility patrol duties within set geographical areas.³ The employees spend the majority of their time engaging in law

³**This** is, typically, motor patrol in marked vehicles. However, patrols are also made on horse, in off-terrain vehicles, patrol boats, fixed-winged aircrafts, helicopters, and snow-mobiles, and on skis, on bicycles and on foot.

enforcement duties such as issuing citations, traffic and crowd control, serving arrest and search warrants, making arrests, interrogating suspects, conducting crime scene investigations, gathering evidence, guarding dignitaries and/or individuals in custody, conferring with other law enforcement personnel and district attorneys and testifying in court.

Certain exceptions should, however, be noted. For example, large numbers of state police and some state fair police and game wardens do not engage in routine motor patrol and do not usually provide traffic control or issue traffic or parking citations. Many employees, such as wardens, hospital peace officers and rangers engage in traffic control only in emergency situations, such as when an accident occurs in their presence. Crowd control is also done on an emergency basis (e.g., a visit by the Pope).

Many of the typical law enforcement duties performed by employees included in the proposed severance unit are also routinely performed by other employees in Unit 7, who are not included in the severance petition. For instance, arson and bomb investigators, lottery agents and special agents of the Department of Justice (DOJ) make arrests, serve arrest and search warrants, gather evidence, interrogate suspects, guard individuals in custody, conduct crime investigations, confer with other law enforcement personnel and district attorneys, and testify in court. They may also be called upon to guard

dignitaries and engage in crowd control.

All peace officers in Unit 7 are eligible for the peace officer/firefighter retirement program. Many employees, both in and outside the proposed unit are also eligible for a physical fitness incentive pay program.

While there is slight variation in practices among departments, employees included in the proposed unit use standard peace officer protective equipment. This includes guns⁴, badges, mace, handcuffs, batons, and Sam Brown belts. Most are issued soft body armor and have riot helmets available. All have access to handheld as well as vehicle radios. Although the above equipment is common to the petitioned-for unit, it is also standard issue to other peace officers within Unit 7 but excluded from the petition.

There is a wide variety of training requirements not only within the proposed severance unit but within other Unit 7 classes as well. Some classes within the proposed unit, such as state police officers, park rangers, lifeguards, game wardens and state fair police officers must complete the POST⁵ basic training consisting of a minimum of 520 hours of

⁴Hospital peace officers are not allowed to carry guns on state hospital grounds. Local police officers entering the premises must also remove their guns. This policy is similar to policies established in many local jails and prisons.

⁵POST is the Commission on Peace Officers Standards and Training.

training. Others, such as state security officers and hospital peace officers, must complete only a 40-hour training course, although they are offered the opportunity to take the POST basic training. Employees in classes outside the proposed unit, such as DOJ special agents, lottery agents, and arson and bomb investigators, are required to take the POST specialized investigators course consisting of a minimum of 220 hours of training.⁶ Law enforcement coordinators within the Office of Emergency Services are currently required to complete the POST basic 520-hour course, although employees hired prior to a certain date are only required to complete a shorter POST specialized course.

Most employees, although not all, within the proposed severance unit wear easily identifiable uniforms. A significant exception is in the state police, where approximately one third of the officers and sergeants wear civilian clothes while performing duties as detectives, investigators or in threat analysis or dignitary protection programs. There is also a special unit of the state fair police, which is formed during major events and consists of plain clothes investigators. A special unit of plain clothes game wardens also exists to perform investigations and "sting"

⁶However, many employees in those classes have already completed the POST basic course.

operations. The uniforms of lifeguards vary, depending upon their specific assignment, from a simple T-shirt and bathing suit to a uniform similar to a park ranger's.

Other employees outside the proposed severance unit, such as firefighters, seasonal lifeguards, or museum security officers, also wear uniforms. Many nonuniformed peace officers wear raid jackets during large scale police actions so that they are easily recognizable as police officers.

Interaction among employees in the proposed severance unit varies; however, there is generally greater interaction among job classes within the proposed unit than between included and excluded classes. For example, lifeguards and park rangers often work together because they sometimes share common jurisdiction within state parks. Park rangers and fish and game wardens may interact for the same reasons. Hospital peace officers have some limited contact with rangers and/or state police when a hospital facility is contiguous with a state park (Yountville and Sonoma) or houses California Conservation Corp's barracks (Agnews). State security officers are housed in the same office and work hand-in-hand with state police in protecting state property. Game wardens utilize state police dispatch centers.

There are occasions, however, when the individuals included in the proposed unit work with other Unit 7 employees excluded from the petition. For example, DOJ special agents

occasionally interact with state police and state security officers when the latter are sued civilly or are criminally accused with respect to actions performed in the course and scope of their duties. Park rangers may interact with DOJ agents as part of the CAMP marijuana eradication program.

State police could interact with arson and bomb investigators if there are bomb threats at state facilities. Both included and excluded employees may interact in mutual aid or in dignitary-protection situations.

Bargaining History

CAUSE has been the exclusive representative of the employees in Unit 7 since it was created. CAUSE and DPA have negotiated Memoranda of Understanding (MOU) or reopener clauses for Unit 7 employees in 1982, 1983, 1984, 1985 and 1987.

The board of directors of CAUSE is composed of the representatives of a number of affiliate associations, most of whom historically represented groups of employees within Unit 7 prior to the formation of CAUSE and the creation of the bargaining unit. CAUSE is internally divided into four organizational sub-units: uniformed, investigators, regulatory and support. All the classes in the proposed unit have been historically represented by five of the six associations which make up the uniformed sub-unit of CAUSE. The five organizations which previously represented employees included in the petition are the California State Police Association,

the State Park Peace Officers Association of California, the Hospital Police Association of California, the Fish & Game Wardens Protective Association, California, and the California Association of Lifeguards. The sixth organization included in the CAUSE uniformed sub-unit is the State Employed Firefighters Association, none of whose members are at issue in this case.

The uniformed sub-unit of CAUSE includes all of the employees in the severance petition as well as some employees who are not included in the petition.⁷

Representatives of each CAUSE sub-unit have participated in bargaining. Often, when an issue arose at the main bargaining table which pertained primarily to a sub-unit within CAUSE, the parties would either halt negotiations at the main table to resolve the sub-issue or schedule additional hours outside of the main-table negotiations so that the issues could be dealt with.

Although there have been many issues in bargaining which primarily affected the CAUSE uniformed employees' sub-unit or individual job classes therein, there were no provisions in any

⁷Firefighters (including both firefighters who are peace officers and those who are not peace officers), Pool Lifeguards, Seasonal Lifeguards, Communications Operators of the State Police, Security Officer I's, Museum Security Officers, State Park Rangers-Intermittent, and Parks Safety and Enforcement Specialists are all included with the CAUSE uniformed employees' sub-unit but are excluded from the severance petition.

of the MOU's which were both common to and limited to the classifications in the proposed severance unit. When MOU provisions did not pertain to the entire bargaining unit it was due to variations between state departments, differences between peace officer and nonpeace officer classifications or because of distinctions based upon job classifications having little relevance to the proposed severance unit.

CSPOA witnesses testified that the uniformed employees' affiliates within Unit 7 agreed upon approximately 80 percent of what should be proposed, whereas in Unit 7 generally only 20 percent of the bargaining proposals were agreed upon by all CAUSE affiliates. In many areas the nonuniformed employees would simply go along with the wishes of the uniformed employees' sub-unit although their priorities differed.

Efficiency of Operation

DPA offered testimony that the state's efficiency of operation would be lessened if the petition were granted. According to DPA's witnesses, bargaining difficulties would be exacerbated because the petition proposes to split classifications within the same department into two different bargaining units. That would, according to DPA's witnesses, result in twice as much time being spent by departmental representatives and DPA's labor relations officers in negotiating contracts. In addition, DPA's witnesses speculated that establishing the proposed unit would create a greater

chance for error in administering MOU's, that the difficulties of the reeducation of employer representatives in remote locations would result in greater confusion and would ultimately interfere with employee rights to effective representation for quite some time. There was also evidence, however, that every department within the state currently has employees in more than one bargaining unit.

ISSUE

Whether a separate unit consisting primarily of uniformed peace officers should be severed from the established Protective Services and Public Safety unit.⁸

DISCUSSION

Government Code section 3521(b) (Ralph C. Dills Act, Government Code section 3512 et seq.) provides guidance to the Board in determining appropriate units for state employees. The criteria include but are not limited to: the internal and occupational community of interest; the history of representation; commonality of skills, working conditions,

⁸At the hearing, both CSPOA and DPA argued that the administrative law judge (ALJ) had the authority to modify the severance petition and create an appropriate unit if the proposed severance unit was inappropriate. A ruling was issued that the petition could not be reconfigured by the ALJ and that jurisdiction was limited to dismissal of the petition if it was found to be inappropriate. DPA filed an interlocutory appeal to that ruling; however, DPA's request to certify the appeal to the Board was also denied.

duties, training requirements and supervision; the effect the projected unit would have upon the meet and confer relationship and efficiency of operations; the size of the proposed unit and its effect upon employee representational rights; and the impact created by fragmentation of employees and proliferation of units.

Additionally section 3521.7 provides:

The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

In spite of section 3521.7 the Board decided not to establish a law enforcement unit saying:

The Board chooses, at this juncture, not to designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Rather, we believe that the unit criteria specified in section 3521, apart from section 3521.7, provide ample basis for the Board to make unit determinations. Thus, the Board declines to exercise the discretionary authority conferred on us by section 3521.7 but reserves the right to do so at some future date. State of California, supra.

Instead the Board created a more comprehensive unit finding the following:

. . . The activities performed by the employees in this unit include protecting state land and buildings, furnishing emergency services, issuing licenses or permits, arresting individuals violating

penal or administrative laws, and protecting the public from various fraudulent practices and schemes. It is common for a single classification of employees to have responsibilities in several of these areas of activity. For example, fish and game wardens perform almost all of the above functions.

Employment classes within this unit induce special agents employed by the Department of Justice, state police, state park rangers, various categories of persons involved in the provision of emergency services, fish and game personnel, security officers, intelligence and investigative personnel, as well as various inspectors and examiners. The unit also includes those fire service personnel not included in the firefighting unit. The performance of the job functions of these employees involves, to varying degrees, an element of personal danger to those providing the services. It is common for state park rangers, fish and game personnel, state police, fire personnel, and various other inspectors and investigators included in this unit to provide mutual aid and assistance under various circumstances.

Typically, the employees included in this unit perform their respective job functions away from an office environment and are frequently required to travel. While the on-the-job training, work experience, and general qualifications of many of the classifications included in this unit vary, several classifications receive common training, such as that provided under the Peace Officers Standards Training Program which includes instruction in the rules of evidence, firearms, citation procedures, and the laws of arrest and detention.

Employees in this unit share common concerns including hours of work, uniform allowances, holiday pay, scheduling and days

off, safety equipment and procedures, standby pay and compensation for court appearances, vacation scheduling, mileage allowances, special health insurance and retirement benefits, and physical examinations. State of California, supra.

It is clear that the employees within the proposed severance unit share a strong community of interest among themselves. They have a commonality of skills, working conditions, duties, and a similarity in the types, if not the amount, of training. These similarities are not, however, limited solely to those included within the petition. As the Board noted in its original unit decision, these interests are shared, to varying degrees, with other Unit 7 employees.

A Board decision under the Educational Employment Relations Act (EERA)⁹ offers helpful guidance in such situations. In Sacramento City Unified School District (1977) EERB Decision No. 30¹⁰ the Board held that:

A separate unit is not warranted merely because a group of employees share a community of interest among themselves, when that homogenous group forms only a part of a larger essentially homogeneous group sharing similar conditions of employment and job functions.¹¹

⁹The EERA is codified at Government Code section 3540 et seq.

¹⁰Prior to January 1978, the PERB was known as the Educational Employment Relations Board.

¹¹The issue the Board was dealing with in the Sacramento City case was whether skilled craft employees should be allowed a separate unit or be included within a larger

The petitioner argues that the Board, in its original unit decision, implicitly recognized a duty to create a law enforcement unit at some future date. Even if that argument is correct, and is supported by legislative intent as expressed in section 3521.7, the proposed severance unit is critically flawed since it excludes large numbers of other law enforcement classes having an almost identical community of interest.

The two major dissimilarities between those sought and those excluded is that most of those included in the proposed unit wear some sort of uniform and patrol a set geographical region. Considering the large number of exceptions noted in the factual findings above, these are distinctions without a difference and do not warrant the establishment of a separate unit. Because of the great degree of commonality with many other peace officers excluded from the petition, the petitioner has not demonstrated that wearing some sort of a uniform and having a geographically defined patrol area separates the petitioned employees from other classes performing clearly

operations-support services unit. Earlier in that same decision the Board created a separate unit of security officers. That portion of the decision can be distinguished from the case at hand because the decision was based upon long recognized policy considerations that the employer is entitled to a nucleus of protection employees without being confronted with a division of loyalty inherent in the inclusion of security guards in the same unit with other employees. These policy considerations are not applicable in the instant case. See also NLRB v. Jones & Louahlin Steel Corp. 331 U.S. 416.

analogous law enforcement duties.¹²

The bargaining history between CAUSE and the DPA also supports the dismissal of the severance petition. Almost all large bargaining units have some diversity of interests. Unit 7, when it was created by the Board, was no exception. The record indicates however, that the exclusive representative took specific organizational steps to accommodate pre-existing differences. It organized special sub-units to insure representation of the individual concerns of all unit employees. Although no one group of employees could expect to achieve all its bargaining goals, issues of primary concern to the uniformed employees' sub-unit were addressed in negotiations.

There has been no showing that the interests of the petitioned-for employees have been trampled upon or ignored, or that their representational rights have been abrogated because of the existing unit structure. What emerges instead is a

¹²While many comparisons were made between the employees included in the petition and DOJ special agents, lottery agents, arson and bomb investigators and law enforcement coordinators, this decision should not be seen as an endorsement of the appropriateness of a law enforcement unit if the petition were to be amended or refiled to include those classes. There were large numbers of investigator classes, and other peace officer classes about which little evidence was offered at this hearing. These additional classes could have an impact on the description of any law enforcement unit, assuming, for the sake of argument only, that the Board chose at some time to reverse itself and create a law enforcement unit.

picture of a stable bargaining relationship. Since the unit was established successful agreements have been negotiated in 1982, 1983, 1984, 1985 and 1987. Such stability is an important factor and should not be disturbed lightly.

Livermore Valley Joint Unified School District (1981) PERB Decision No. 165.

Little weight is given to DPA's argument that granting the severance petition would lessen its efficiency of operations. That argument is based primarily upon the fact that an additional bargaining unit would be created and employees within the same department would be placed into different bargaining units. That would, according to DPA, require a greater time commitment, create a greater chance for error in administering MOUs and ultimately jeopardize employee rights to effective representation.

If all other factors supported establishment of the unit, the time expended in bargaining with a single additional unit would not be sufficient reason to deny the petition. As the Board noted in Antelope Valley Community College District (1981) PERB Decision No. 168 and Pleasanton Joint School District (1981) PERB Decision No. 169, the potential loss of time which must necessarily be spent in negotiations was a burden considered by the legislature but found not to outweigh the benefits of an overall scheme of collective bargaining.

The argument that the state would be prejudiced because employees within a single department would be placed into different units is unpersuasive because there is not currently a single department within the state that has employees in only one bargaining unit. The remaining ill effects put forth by DPA were speculative and unconvincing.

However, some credence is given to DPA's argument that granting this petition could potentially lead to the proliferation of units the Board sought to avoid when it created Unit 7. As PERB has recognized in creating separate units of highway patrol and correctional officers, section 3521.7 does not require all law enforcement employees to be in the same bargaining unit. If this petition were granted, other employees who share an equally strong community of interest and are also engaged primarily in the enforcement of state laws could with equal justification, demand their own law enforcement severance unit.¹³

CONCLUSION

Although employees listed in the proposed unit share a community of interest among themselves, that interest is also shared with other employees within the Protective Services and Public Safety Unit. Other employees within Unit 7, not sought by the severance petition, also have duties which consist

¹³**These** employees include for example DOJ special agents, lottery agents, arson and bomb investigators and possibly a myriad of other investigators or peace officer classes.

primarily of the enforcement of state laws. There is a history of stable and successful negotiations between the employer and the existing exclusive representative. Although there is little evidence that creating a single additional unit would impact negatively on DPA's efficiency of operations, granting the petition might lead to a proliferation of other law enforcement units. In short, the petitioner has failed to set forth sufficient justification for dismantling the unit established by the Board.

For the above listed reasons, the severance petition filed by CSPOA should be dismissed.

PROPOSED ORDER

Based upon the foregoing and the entire record in this case, it is ordered that the severance petition filed by the California State Peace Officers Association is DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually

received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: March 15, 1988 _____

JAMES W. TAMM
Administrative Law Judge