

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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| STATE OF CALIFORNIA, DEPARTMENT |) | |
| OF PERSONNEL ADMINISTRATION, |) | |
| |) | |
| Charging Party, |) | Case No. S-UM-301-S |
| |) | (S-SR-6) |
| v. |) | |
| |) | |
| CALIFORNIA CORRECTIONAL PEACE |) | PERB Decision No. 776-S |
| OFFICERS ASSOCIATION, |) | |
| |) | October 6, 1989 |
| Respondent. |) | |
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Appearance: Neyhart, Anderson, Nussbaum, Reilly & Freitas by Victoria Chin, Attorney, for the California Correctional Peace Officers Association.

Before Porter, Shank and Camilli, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of the PERB regional director's dismissal of its petition for unit modification. CCPOA challenges the regional director's determination that proof of majority support among employees in the classifications to be added to the unit was required.

The Board, upon a full review of the record herein, adopts the regional director's attached order in its entirety, consistent with the discussion below.

BACKGROUND

CCPOA, the exclusive representative for state bargaining Unit 6 (Corrections), filed a unit modification petition alleging that various Corrections classifications should be added to the

unit on the ground that changed circumstances made their exclusion as "supervisory employees"¹ no longer appropriate. The proposed modification would add approximately 2,000 employees to a unit of approximately 9,000 employees.

Subsequent to the filing of the petition, the PERB regional director informed CCPOA that the petition raised a question concerning representation which, pursuant to PERB Regulation 32781(a)(1) and (f),² required the filing of proof of support.

¹Government Code section 3522.1 provides as follows:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

²PERB Regulation 32781 provides, in pertinent part, as follows:

Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(a) A recognized or certified employee organization may file with the regional office a petition for unit modification:

(1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive

CCPOA requested two extensions of time for filing the requisite proof of support, both of which the regional director granted. Ultimately, however, CCPOA did not submit proof of support, and the regional director thereafter dismissed the petition in his attached order.

DISCUSSION

CCPOA asserts, on appeal, that the discretionary language regarding proof of support contained in PERB Regulation 32781 is not applicable to this dispute inasmuch as the true issue is simply whether certain classifications are no longer excludable as supervisory due to changed circumstances.

This argument must fail for the reasons stated by the regional director in his order. We find that the regional director did not exercise the agency's discretion arbitrarily on these facts, particularly because the size of the group

representative of the unit.

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(f) If the petition requests the addition of classifications or positions to an established unit pursuant to section (a)(1) or (c) above, the Board may require proof of majority support of persons employed in the classifications or positions to be added. Proof of support is defined in section 32700 of these regulations.

It should be noted that Regulation 32781 was amended in 1989, with the result that the proof of support provision is now found at 32781(e).

of employees to be added to the unit in this instance is substantial, and could reasonably be expected to change the structure of the unit if added thereto.

CCPOA further contends that, even if the imposition of the proof of support requirement were appropriate herein, it is proof of majority support within the entire unit once modified which must be demonstrated.

Regulation 32781(f), during the relevant time period, clearly stated that the Board may require "proof of majority support of persons employed in the classifications or positions to be added" to the unit. (Emphasis added.) We fail to see how this section could be interpreted to require a showing of majority support among employees in the entire unit once modified.

Lastly, CCPOA argues that, should the Board find that Regulation 32781 was properly applied by the regional director herein, the regulation should be repealed, and it requests the opportunity for oral argument on this issue.

Whether an existing regulation should be amended or repealed is not, however, a matter we can address and resolve in the context of this appeal. The procedural requirements for the adoption, amendment and repeal of administrative regulations are set forth in article 5 of the Administrative Procedure Act. (Gov. Code, secs. 11346-11347.5.) Should CCPOA wish to pursue this course of action, it may make such a request of PERB outside of this proceeding.

ORDER

Based upon the foregoing and the entire record in this case, it is hereby ORDERED that the unit modification petition filed by the California Correctional Peace Officers Association in Case No. S-UM-301-S is DISMISSED WITHOUT PREJUDICE.

Member Shank joined in this Decision.

Member Camilli's concurrence begins on page 6.

Camilli, Member, concurring: I concur with my colleagues that the unit modification petition should be dismissed without prejudice based upon California Correctional Peace Officers Association's (CCPOA) failure to submit proof of majority support. Additionally, I find that this case presents an opportunity to further clarify PERB Regulation 32781(f)¹ and the statement that: "... the Board may require proof of majority support of persons employed in the classifications or positions to be added ..." (Emphasis added.)

The discretionary language of Regulation 32781(f) leaves to the Board the determination of whether proof of majority support should be required. The CCPOA argues that the application of proof of majority support is "both illogical and contrary to other provisions of the Act." Elimination of the Regulation would prevent the Board from ensuring that employees' rights are protected. The Regulation as it now stands is prudent as employees' rights are protected by allowing the Board to exercise its special expertise in determining on a case-by-case basis whether proof of majority support should be required.

¹see footnote 2 of majority Decision.

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STATE OF CALIFORNIA. DEPARTMENT OF
PERSONNEL ADMINISTRATION,

Employer,

V.

CALIFORNIA CORRECTIONAL PEACE
OFFICERS ASSOCIATION,

Petitioner.

Case No. S-UM-301-S
(S-SR-6)

ORDER DISMISSING PETITION
FOR UNIT MODIFICATION

BACKGROUND

The above entitled petition for unit modification was filed on January 10, 1986 by California Correctional Peace Officers Association (CCPOA). The petition alleged that the classifications of Correctional Sergeant, Senior Group Supervisor, Senior Youth Counselor, Assistant Head Group Supervisor, Head Group Supervisor, Lieutenant and Captain should be added to the State Unit #6 bargaining unit. It further alleged that a change in circumstances regarding the job duties of these positions made their inclusion in the bargaining unit appropriate, in that they no longer functioned as "supervisory employees" under section 3522.1 of the State Employer-Employee Relations Act (SEERA). Finally, the petition alleged that this modification in the unit would add

approximately 2000 employees to a unit currently consisting of about 9000 employees.

On February 7. 1986. the undersigned informed CCPOA in writing that the petition raised a question concerning representation which required the filing of proof of support under section 32781(a)(1) and (f) of the Regulations of the Public Employment Relations Board. My letter also indicted that those rules required proof of majority support in the classifications petitioned for. Finally, my letter requested that such proof of support be filed with PERB not later than March 3. 1986.

Thereafter, the undersigned granted two CCPOA requests for extensions of time for the filing of the required proof of support. In the final extension of time to May 1, 1986. my letter informed the parties that failure to meet the May 1 proof of support deadline would result in dismissal of CCPOA's petition without prejudice under Board Regulations.

On April 30. the undersigned was informed by letter that CCPOA would not be submitting proof of support by May 1. Rather, CCPOA intended to challenge the applicability of PERB Regulation 32781(f) which required such majority support. Thus. CCPOA indicated an intention to appeal the dismissal of the petition referred to above.

DISCUSSION

The issue here is whether the requirement of proof of majority support is inappropriate in situations such as that

described above. CCPOA contends that the undersignee's request for the filing of proof of support is inappropriate because PERB Regulation 32781(f) is "both illogical and contrary to the provisions of the Act."

Section 32781 of the Board's regulation concerns petitions for unit modification. That section provides, in relevant part:

32781. Petition

Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(a) A recognized or certified employee organization may file with the regional office a petition for unit modification:

(1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit.

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(f) If the petition requests the addition of classifications or positions to an established unit pursuant to section (a)(1) or (c) above, the Board may require proof of majority support of persons employed in the classifications or positions to be added. Proof of support is defined in section 32700 of these regulations.

Section 32786(f) of the Board's Regulation provides:

The Board shall dismiss a petition if it is found to be improperly or not timely filed, or if proof of support submitted falls short of the required majority support.

The Board itself has not previously addressed the circumstances for which proof of support may be required under

its present Regulation 32781(f). However. Board regulations in effect previous to the current regulations mandated the filing of proof of support in unit modifications which "accreted established positions into the bargaining unit."¹ In situations where a unit modification petition seeks to add a substantial number of employees to an established bargaining unit, the Board has required proof of majority support as a matter of practice since adoption of the current unit modification regulations. In like manner, the National Labor Relations Board (NLRB) finds that requests similar to that herein raise a "question concerning representation."

Based upon the above, it is my judgment that a petition to add approximately 2.000 employees to the bargaining unit, thereby increasing the unit size by more than 22%. is precisely the type of situation envisioned by the Board in the discretionary language of current Board Regulation 327681(f). Any subsequent addition to the bargaining unit of such classifications previously excluded from the unit would constitute a substantial change in the structure of that unit.

¹La Mesa-Spring Valley School District. PERB Case No. 316 (May 31. 1983). at page 5.

2Union Electric Co.. 217 NLRB 666. 667 (1975); Boston Cutting Die Company. 258 NLRB 771 (1981); Gas Service Company 52 LRRM 1037 (1963).

Under the above circumstances, therefore, a question concerning representation necessitating the filing of majority support is raised under Regulation 32781(f). Board practice and NLRB case law.

CCPOA argues that application of the proof of majority support requirement of Regulation 32781(f) is "both illogical and contrary to other provisions of the Act." This assertion, supported neither by case cites nor by any further delineation, must be rejected. The language of the regulation itself must govern this situation, and it is my function to determine the proper circumstances under which the discretionary "may require" language of the regulation should be implemented. As I have indicated, based upon Board practice and NLRB caselaw, it is my view that the instant case constitutes precisely the type of situation envisioned by the Board in the language of Regulation 32781(f).

It is also clear that CCPOA has not filed the required proof of majority support in a timely manner. Indeed, CCPOA had indicated it no longer intends to do so. As a result, its petition must be dismissed under the provisions of Regulation 32786(b).

Such dismissal without prejudice does not, however, prevent a future refiling of the same petition with proof of majority support at any later date. There is no statutory or regulatory provision preventing CCPOA from reinstituting its petition, so

long as that petition is accompanied by proof of majority support.

Based upon the above. IT IS HEREBY ORDERED that the unit modification petition filed by CCPOA in case No. S-UM-301-S be dismissed, without prejudice.

An appeal of this decision pursuant to PERB Regulations 32350 through 32380 may be made within 10 calendar days following the date of service of this decision by filing an original and 5 copies of a statement of the facts upon which the appeal is based with the Board itself at 1031 18th Street, Suite 200, Sacramento. California 95814. Copies of any appeal must be concurrently served upon all parties and the Sacramento Regional Office. Proof of service pursuant to Regulation 32140 is required.

Dated: June 6, 1986

Ronald Hoh
Regional Director

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