STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PART-TIME FACULTY UNITED, AFT, Charging Party, v. SANTA CLARITA COMMUNITY COLLEGE DISTRICT (COLLEGE OF THE CANYONS), Respondent.	Case No. LA-CE-4357-E PERB Decision No. 1506 January 8, 2003
LYN CHARLES "CHUCK" WHITTEN, Charging Party, v. COLLEGE OF THE CANYONS FACULTY ASSOCIATION, Respondent.	Case No. LA-CO-1092-E
BEVERLY JOANN COPE, Charging Party, v. COLLEGE OF THE CANYONS FACULTY ASSOCIATION, Respondent.	Case No. LA-CO-1093-E

Appearances: Law Offices of Robert Bezemek by Robert J. Bezemek and Martin Fassler, Attorneys, for Part-Time Faculty United, AFT; Liebert Cassidy Whitmore by Mary L. Dowell, Attorney, for Santa Clarita Community College District (College of the Canyons); California Teachers Association by Michael D. Hirsch, Attorney, for Intervenor College of the Canyons Faculty Association.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Part-Time Faculty United, AFT (PFU), of a dismissal by an administrative law judge (ALJ) of the unfair practice charge in Case No. LA-CE-4357-E. The charge in that case alleged that the Santa Clarita Community College District (College of the Canyons) (District) violated the Educational Employment Relations Act (EERA) [1] by encouraging employees to join one employee organization over another by entering an agreement with the College of the Canyons Faculty Association (COCFA), the exclusive representative of the full time faculty, to modify the bargaining unit to include part-time instructors at a time when the District was on notice that PFU was attempting to organize the part-time faculty. This conduct was alleged to constitute violations of EERA section 3543.5(a), (b) and (d).[2]

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[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] EERA section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to do any the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

After reviewing the entire record in this case, including the proposed decision, PFU's exceptions, the District's response to the exceptions, COCFA's reply to the exceptions, and an informational brief filed by the California Labor Federation,[3] the Board reverses the proposed decision of the ALJ.[4]

BACKGROUND

At the time of the events at issue herein, the District employed 159 full-time faculty and 376 part-time or "adjunct" faculty. There are many differences in the terms and conditions of employment between adjunct and full-time faculty, including, but not limited to such subjects as amount of work, job security, level of pay, office space and benefits.

> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[3] After the parties completed their filings to the Board, the California Labor Federation filed a petition with the Board for permission to submit an amicus letter addressing issues presented herein. Pursuant to PERB Regulation 32210 (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.), the Board grants the petition and accepts the amicus letter as an informational brief. The arguments contained therein are consistent with those presented by PFU and do not alter the Board's analysis of this case.

[4] This case was consolidated by the ALJ for hearing and decision with Case Nos. LA-CO-1092-E and LA-CO-1093-E. In those cases, two individuals, Charles Whitten (Whitten) and Beverly Cope (Cope), alleged that COCFA interfered with their rights to participate in the activities of PFU, in violation of EERA section 3543.6(b). At the time of consolidation, it was determined that evidence presented on behalf of any charging party would be presented on behalf of them all. As no exceptions were filed by or on behalf of Whitten or Cope, the ALJ's dismissal of Case Nos. LA-CO-1092-E and LA-CO-1093-E is final. Thus, only Case No. LA-CE-4357-E is before the Board herein.

On February 24, 1977, the Board of Trustees of the District voluntarily granted recognition to COCFA as the exclusive representative of a bargaining unit composed entirely of full-time faculty. On March 1, 1977, the District notified PERB[5] that the parties had been able to agree upon an appropriate bargaining unit composed of full-time faculty.

Hourly paid instructors, known as "adjunct instructors," have never been represented by an employee organization.

Michelle Harris (Harris) was an adjunct faculty member and representative on the curriculum committee of the Academic Senate. In 1998, she approached former PFU President Brad Reynolds (Reynolds), California Teachers Association (COCFA's statewide affiliate organization) Representative Ray Barney (Barney), and current PFU President Lea Templer (Templer), requesting that COCFA organize the adjunct faculty. They were not receptive to her requests. Barney told Harris that their position could change if she obtained signatures or ballots. She obtained over 100 cards showing interest in representation and left Barney messages to that effect, but Barney never returned her calls.

Marcy Bregman (Bregman), another part-time faculty member, spoke with Templer during the 2001-2002 school year and made the same request. Templer advised Bregman that the full-time faculty were not interested in bringing the adjunct faculty into the bargaining unit. At a COCFA meeting in January 2002 attended by adjunct faculty, a full-time faculty member expressed the opinion that addition of part-time faculty to the full-time unit would "dilute the vote" of the full-time members.

[5] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

PFU began efforts to organize the adjunct faculty in September 2001. Four American Federation of Teachers (AFT) members visited the college campus repeatedly during the fall and spring semesters, distributing literature about AFT and answering questions about PFU. They regularly set up a table, bearing the AFT logo, inside the campus administration building. AFT lead organizer Linda Cushing (Cushing) and two other AFT organizers made certain the District was aware of the organizing efforts by speaking with college President Dianne Van Hook and District Assistant Superintendent/College Vice President Philip Hartley (Hartley) in October 2001.

By November 2001, PFU had secured signatures on cards from approximately 20 percent of the faculty.

Shortly after PFU began its organizing campaign, COCFA began exploring how it could bring adjunct faculty into the existing unit. On October 24, 2001, COCFA requested in writing that the District modify the recognition clause in Article 2 of the contract to include adjunct instructors in the bargaining unit represented by COCFA. Subsequently, the District received a copy of a unit modification petition filed with PERB by COCFA, absent a showing of interest, on October 30, 2001. The record contains no evidence that any notice was posted to employees regarding either the request for recognition or the unit modification petition. The District declined a request by COCFA to "sign off" on the unit modification document.

The Board agent informed COCFA by phone that, absent proof of majority support, PERB would not process the unit modification petition, and the only means by which the modification could take place was with the concurrence of the employer.

District Assistant Superintendent Hartley reported that the District then received a verbal communication from COCFA, stating that they had been informed by PERB that the appropriate method was to demand to bargain a change in the agreement. Hartley stated that he called the Board agent, on November 2, 2001, to verify the communication from COCFA and to solicit advice. Hartley further stated that the Board agent indicated that this was a matter that could be negotiated and the District would have to respond, but that AFT would likely file an unfair labor practice charge.

Hartley (and the District) also came to believe that if the District refused to bargain with COCFA over its proposal, it would be subject to an unfair practice charge from COCFA.

The distinction between mandatory versus permissive subjects of bargaining did not come up in Hartley's conversation with the Board agent. The record does not indicate whether Hartley obtained other advice that would have apprised him of the fact that such a proposal was not a mandatory subject of bargaining.[6]

The District held a regularly scheduled open meeting on November 14 at which COCFA presented its unit modification proposal. The District's governing board president called AFT organizer Cushing prior to the meeting to inform her that she had suddenly become aware of a pending agreement between the District and COCFA to accrete the part-time faculty, and to draw Cushing's attention to it, in case she wanted to speak to the board. Two AFT organizers appeared at the meeting and spoke in opposition to the pending agreement, arguing that it would violate employees' right to vote on their own representative. The board took no action at that meeting.

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[6] See Lake Elsinore School District (1986) PERB Decision No. 603 (responding party to a bargaining proposal is not required to waive a statutory right).

The next day, November 15, 2001, a District representative signed a tentative agreement to modify the recognition clause of the agreement between the District and COCFA to grant COCFA the right to represent the adjunct faculty. The same day, COCFA wrote to the Board agent requesting that the unit modification petition be withdrawn. The Board agent notified the District and COCFA by letter dated November 21, 2001, that PERB's records would be adjusted to reflect the unit modification agreement. The District's governing board approved the tentative agreement on December 5, 2001. The agreement also contained several provisions regarding the terms and conditions of adjunct faculty employment, including a provision that part-time faculty would not be required to pay an agency fee.

PFU support declined drastically after formation of the agreement between COCFA and the District. On April 27, 2002, PFU filed a representation petition with PERB seeking to represent a unit of the adjunct faculty.[7] That petition was accompanied by proof of majority support within the proposed unit.

ALJ'S PROPOSED DECISION

The ALJ identified the issue relevant to this discussion as: "whether the District unlawfully encouraged employees to join COCFA in preference to PFU or otherwise violated EERA section 3543.5(a), (b) or (d) by entering into the unit modification agreement."

The District argued that the agreement was specifically permitted by PERB Regulation 32781, which provides, in relevant part:

> Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit

[7] The proposed decision erroneously indicated that PFU's petition was filed on May 8, 2002. Based on its own records, the Board hereby takes administrative notice that PFU's representation petition was filed with the District on April 26, 2002, and with PERB on April 27, 2002.

> modification in accordance with this section. 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 modification of its units:
>
> (1) To add to the unit unrepresented classifications or positions. (Emphasis added.)

The District argued that the regulatory language, emphasized above, demonstrates that the parties are permitted to modify a bargaining unit by agreement and that there is no contrary Board precedent. The District further contended that, where, as here, there was no pending question concerning representation based on a showing of sufficient support to secure intervenor status for a competing organization or a pending petition for representation with PERB or recognition with the District, the District could lawfully enter into a unit modification agreement with COCFA. The ALJ found this to be an issue of first impression and that there was "no decision directly on point, or even closely on point."

The ALJ began by looking at Hartnell Community College District (1978) PERB Decision No. 54 (Hartnell). In Hartnell, an employer granted voluntary recognition to a California School Employees Association (CSEA) affiliate for a wall-to-wall unit of classified employees. The school district initially had objected to the union's request for recognition and requested that PERB decide the appropriateness of the unit as well as hold a representation election. A competing employee organization, Stationary Engineers, began organizing a subset of operations employees, but failed to garner proof of support for its own representation petition. The district was aware of the organizing activity. PERB rejected the Stationary Engineers' objection to being denied intervenor status in the representation proceedings for the purpose of carving out an operations unit on grounds that the Stationary Engineers failed to

create a question-concerning-representation because it did not timely file a valid petition for recognition. However, PERB reversed the general counsel's dismissal of an unfair practice allegation under Section 3543.5(d) on grounds that the district may have been unlawfully motivated to grant CSEA recognition because of a preference for that entity.

The ALJ next looked to Santa Monica Community College District (1979) PERB Decision No. 103 (Santa Monica). In that case, an employee organization had filed a petition for recognition. Thereafter, the employer unlawfully met and conferred exclusively with the faculty senate over matters within the scope of representation, provided the senate financial assistance and support (typing and distribution of minutes, stationary and released time), and made express statements favoring the senate, in violation of Section 3543.5(d). PERB rejected the employer's argument that the employee organization failed to support its claim with a showing of unlawful employer intent, and held instead that the employer owes a duty of strict neutrality between competing employee organizations. Under PERB's objective test, any conduct that tends to influence the choice between competing organizations or provides stimulus in one direction or another meets the threshold requirement for a violation, said the ALJ. The ALJ also viewed the Board's ruling as limited to situations in which there is a pending question concerning representation.

The ALJ noted that "Santa Monica has become an oft-cited case for the proposition that an employer under PERB's jurisdiction owes a duty of strict neutrality vis-a-vis competing employee organizations." However, he noted, "some of these cases adopt this test as though it applies only in the context of a question-concerning-representation." (Citing Sacramento City Unified School District (1982) PERB Decision No. 214 (Sacramento City); Pittsburg Unified School District (1983) PERB Decision No. 318 (Pittsburg); Clovis Unified School District

(1984) PERB Decision No. 389; Office of Kern County Superintendent of Schools (1985) PERB Decision No. 533.) However, he acknowledged, at least one case applied the strict neutrality requirement even in the absence of a question concerning representation. (Citing Long Beach Community College District (1998) PERB Decision No. 1278 (Long Beach). The ALJ asserted that "The existence of a question-concerning-representation is assumed but never explicated." He found PERB precedent insufficient to resolve the instant case, saying, "None of these cases addresses the question whether granting 'recognition' to one of two competing employee organizations by virtue of exercising the procedure under PERB's unit modification regulation constitutes an unlawful expression of preference or otherwise violates section 3543.5(d)."

For guidance, the ALJ turned to case law from the National Labor Relations Board (NLRB) and federal courts. He opined that, in the context of initial election campaigns involving rival organizations, the current private sector rule is that strict employer neutrality is required only when a representation petition has been filed with the NLRB. (Citing Bruckner Nursing Home (1982) 262 NLRB 955, 956 [110 LRRM 1374] (Bruckner).)

The ALJ also examined private sector case law addressing an employer's duty to bargain with an incumbent union being challenged by a rival organization through a decertification campaign. In RCA del Caribe (1982) 262 NLRB 963 [110 LRRM 1369]) (RCA), the NLRB held that an employer is not relieved of its duty to bargain with an incumbent merely because a rival organization has filed a decertification petition, unless the employer has a good faith doubt regarding the incumbent's majority status. The ALJ noted that RCA was cited approvingly in Pittsburg.

In light of that case law, the ALJ said,

> My reading of the foregoing authorities leads me to conclude that a public school employer that agrees with an exclusive representative to modify a unit so as to cover previously unrepresented employees does not violate section 3543.5(d) unless the rival employee organization has on file with PERB a representation petition (with proof of support) and the public school employer has been notified of such. Once on notice, the public school employer owes a duty of strict neutrality and may not grant the unit modification.
> (Proposed dec. at pp.15-16; fn. omitted.)

The ALJ offered a "three-part rationale" for that conclusion.

First, the ALJ found that a public school employer's granting of a unit modification petition under PERB Regulation 32871 "shares similarities" with the situation presented in the NLRB's Bruckner decision. According to the ALJ's understanding of Bruckner, the NLRB approves an employer's voluntary recognition of one competing employee organization over another in the absence of a petition for representation because (1) doing so serves the neutral purpose of effectuating employees' statutory rights to engage in collective bargaining, and (2) the importance of that purpose outweighs any resulting infringement on employees' right to freely choose their representative.

The ALJ acknowledged that Bruckner could be distinguished on grounds that, in the situation at issue in the instant case, the ALJ's proposed rule would preclude inquiry into whether the favored union enjoyed majority support "within the subset of unrepresented employees."

Second, the ALJ focused on differences between the National Labor Relations Act (NLRA) and EERA. The ALJ accepted the view "that section 3543.5(d), like [LMRA] section 8(a)(2), involves the balancing of employee free choice and a countervailing neutral

purpose of the EERA." However, reasoned the ALJ, "PERB has noted in the context of representation issues under the EERA, that the Legislature was less concerned with free choice than was Congress." (Citing Los Angeles Unified School District (1998) PERB Decision No. 1267 (Los Angeles).)

In Los Angeles, a rival union attempted to sever a group of bus drivers from a larger operations-support unit. The Board rejected the union's argument that severance was mandated because employee free choice was of "paramount concern." Language differences between EERA and the NLRA and Board precedent indicate a preference for large bargaining units with strong shared community of interests over proliferation of small units, according to the ALJ's interpretation of Los Angeles. As an example, the ALJ cited EERA section 3545(b)(1), which states:

> (b) In all cases:
>
> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

In light of the foregoing, the ALJ found that PFU's free-choice argument "weighs less convincingly on the side of a section 3543.5(d) violation." The ALJ also said, "Moreover, the less convincing argument for employee free choice here sufficiently offsets the absence of any requirement that the incumbent demonstrate majority support within the classifications it seeks to accrete." This sentence appears to mean that attenuation of free choice rights under EERA offsets or negates problems posed by the fact that allowing the unit modification by agreement absolves the favored union from proving it enjoys majority support within the group it seeks to

add to the unit. The ALJ added, "Especially where the challenging rival has not yet established proof of support (either majority, or even 30 percent), there appears to be no presumptive risk that the employer is 'recognizing' a union with only minority support, understanding, of course, the fluid nature of employee support."

The ALJ acknowledged that "COCFA may have been able to accomplish through agreement what it might not have been able to achieve otherwise by organizing support among the part-timers. And PERB does have the authority to require a proof of majority support for a unit modification petition where the number of positions sought to be added is substantial, as it is here. (PERB Reg. 32781(e).)[8] Nonetheless, the ALJ found that "Regulation 32781 evinces no intent that such a requirement is a condition of the employer agreeing to a proposal to accrete positions to an already recognized unit." Further, the ALJ found "there is nothing in PERB's regulation qualifying the right to agree to a unit modification by reference to section 3543.5(d) or similar language." The ALJ concluded "it is logical to infer that through its regulation, PERB has expressed its intent that the issue of majority support in unit modifications achieved through agreement is one ceded to the discretion of the employer."

The ALJ's third rationale was "borrowed" from his interpretation of Bruckner: requiring "'strict neutrality' by a public school employer that has knowledge of organizing activity by a rival employee organization, but is unaware of the rival's qualifying proof of support, would lead to lengthy, if not futile, efforts by the employer to respect employee free choice. It would also invite abuse by disingenuous rivals."

[8] An employee organization seeking to represent a separate unit of unrepresented employees would need proof of majority support. (PERB Reg. 33050.)

The ALJ acknowledged that "Long Beach (No. 1278) perhaps implies that the duty of strict neutrality applies regardless of the existence of a question-concerning-representation, although that issue was not actually presented." In Long Beach (No. 1278), the employer allowed an informational presentation by an employee organization seeking to decertify the incumbent by way of a severance petition. PERB found that allowing the presentation, although not on official work time, constituted an unlawful grant of support to the challenging union because the meeting took place during a week-long in-service training, was listed on the employer's official schedule, immediately followed a mandatory training session, and occurred one day before the incumbent became vulnerable to decertification.

The ALJ said "Long Beach is distinguishable because it is a case involving the provision of unlawful assistance. It would be a rare case where the discriminatory provision of such assistance (typically financial, or in-kind services) could be construed as furthering a competing neutral purpose of the Act."

The ALJ concluded that, because PFU had not yet filed a representation petition with PERB at the time the District and COCFA entered into the unit modification agreement, the District did not violate EERA section 3543.5(d), and recommended dismissal of that charge. He also recommended dismissal of the 3543.5(a) and (b) charges because they were based on the same conduct, which the ALJ found was lawful.

PFU'S EXCEPTIONS

In its exceptions, PFU asserts that the ALJ improperly failed to make numerous factual findings that were supported by the record. Among those allegedly omitted findings were that that COCFA lacked support, and the District lacked a good faith belief that COCFA had the support, of an uncoerced, unassisted majority, any majority, or a single member of the adjunct

faculty during the relevant time periods. PFU also excepted on grounds that the ALJ failed to legally conclude that the agreement between the District and COCFA deprived employees of their rights to freely choose their representative or to choose not to be represented. PFU further asserts that the ALJ erred by failing to conclude that the District violated EERA when it agreed to the modification without determining whether COCFA enjoyed majority support among the adjunct faculty, and where COCFA was not demonstrated to have majority support. PFU excepts to much of the ALJ's legal analysis, finding his interpretation of PERB and NLRB precedent inaccurate and challenging his determination that PERB precedent is inadequate to resolve this case. The remainder of PFU's exceptions relate to community of interest and appropriateness of COCFA's proposed bargaining unit.

PFU's brief in support of its exceptions emphasized the differences in terms and conditions of employment between full-time and adjunct faculty. PFU argued that EERA requires strict neutrality between competing organizations, more strongly protects employee free choice than the NLRA, and that the ALJ's authorization of the unit modification agreement under PERB Regulation 32781 violates EERA section 3543.5(d). PFU also contended that the ALJ erred by "rejecting" the Board's earlier decisions in Hartnell, Sacramento City and Long Beach (No. 1278).

PFU also argued that the District's voluntary recognition of COCFA had the "natural and inevitable effect" of encouraging part-time faculty to participate in COCFA and to discourage them from participating in PFU. Moreover, argued PFU, under NLRB case law, the unit modification agreement in the instant case would be found unlawful because the District had no evidence that COCFA enjoyed majority support among adjunct faculty.

Finally, COCFA argued that the District violated EERA section 3543.5(d) by insisting that COCFA place an adjunct faculty employee on the COCFA bargaining team.

DISTRICT'S RESPONSE TO EXCEPTIONS

The District argues in its response to PFU's exceptions that the ALJ's decision was well reasoned and founded on solid precedent and should be upheld. The District argues that the ALJ correctly determined that entering the unit modification agreement did not violate EERA section 3534.5(d). The District contends that its statutory duty to bargain in good faith with the exclusive representative, COCFA, justified its actions in this case. Nothing in the language of EERA suggests that it is "more protective" than the NLRA, contends the District.

The District argued that, in cases requiring employer neutrality, PERB has either held or assumed there was evidence of support for a rival organization. In this case, such evidence was lacking, contends the District. Moreover, the District faced the countervailing duty to bargain with COCFA.

The District relies on the prefatory language in PERB Regulation 32781 that "Absent agreement of the parties to modify a unit," a party must file a petition. That language and PERB precedent make clear the parties can agree to modify a unit, argues the District.

The District also contends that Regulation 32781, as applied by the ALJ, "furthers the EERA's twin purposes of fostering employer and union agreements and of encouraging the most efficient and encompassing of units possible." EERA "unquestionably has these goals as part of its legislative history, argued the District. (Citing Los Angeles.)

The District also emphasized that "PERB precedent makes it clear that a bargaining unit consisting of both full-time and part-time faculty members is the presumptively

appropriate unit." (Citing Los Rios Community College District (1977) EERB Decision No. 18-E; Hartnell.) Only under "limited circumstances" will the Board allow exceptions to that presumption, argued the District. In Long Beach Community College District (1989) PERB Decision No. 765 (Long Beach), the union "refused to represent the part-time faculty members," noted the District. (Emphasis in original.) The District argued that Long Beach (No. 765) is distinguishable:

> ... Long Beach does not say, and has never been held to say, that a union representing full-time faculty members that has historically declined to represent part-time faculty members, but which changes its mind, can never represent the presumptively appropriate unit. Here, it is clear from the record that the COCFA is now willing and interested in representing the part-time faculty members.

Regarding private sector precedent, the District focused on NLRB cases addressing accretion of employees into an existing unit and argued that the determining factor is whether the employees in the unit and those to be added share a community of interests.

COCFA'S OPPOSITION TO EXCEPTIONS

In its opposition to PFU's exceptions, COCFA asserts that the ALJ's three-part rationale for the rule he articulated was grounded in labor law and furthers public policy. COCFA also asserts that the ALJ properly found no duty of strict neutrality arose in this case because employee rights are balanced against employer rights under EERA. COCFA further asserts that there was no violation of EERA section 3543.5(d) because "the proposed decision carefully considered when the duty of employer neutrality is triggered under PERB and NLRA precedent and determined that it was not unlawful for COCFA to agree to modify the bargaining unit because no representation petition had yet been filed by PFU." Finally,

COCFA's opposition asserts that the ALJ properly construed Sacramento City and Long Beach (No. 1278).

COCFA further asserts that, because the ALJ's decision relied on COCFA's "question of representation" argument, the proposed decision did not address other defenses COCFA raised through closing arguments. COCFA incorporates those arguments by reference in it its exceptions and has submitted them to the Board as an attachment to the exceptions.

In the incorporated closing argument, COCFA argues that finding the unit modification agreement to be unlawful would amount to "rule making" by PERB without compliance with procedural requirements of the Administrative Procedures Act. COCFA states, "Through the issuance of the complaints at issue in this case, and to make findings of a violation thereon, PERB is clearly rewriting the express language of PERB Regulation 32781 (providing for agreements to modify units) so as to limit its applicability or eviscerate it entirely."

COCFA also argues that PERB is estopped from finding either the District or COCFA committed unfair practices because they proceeded based on statements and alleged predictions they received from an agent of the Board. COCFA contends:

> The record shows that both COCFA and the College pursued the agreement to modify the bargaining unit only after extensive consultation with a PERB Labor Relations Specialist. Even though the Specialist mentioned to the College's Vice-President that AFT might challenge the agreement, it was her advice that such a charge would not be sustained.

COCFA urges that the parties could not have reasonably anticipated that the Board might find the actions the parties chose based on conversations with a Board agent to be unlawful. Thus, claims COCFA, the Board is estopped from finding a violation on review of the ALJ's proposed decision.

COCFA further submits that PERB lacks statutory authority to approve a bargaining unit composed of less than all of the classroom teachers employed by the District. (Citing EERA sec. 3545(b)(1), discussed supra.) COCFA distinguishes Long Beach (No. 765) on grounds that, there, the full time faculty representative was unwilling to represent part-time faculty. Here, COCFA disputes the ALJ's factual determinations and contends that California Teachers Association (CTA) and COCFA representatives made efforts to assist the adjunct faculty in obtaining representation.

EERA section 3545(b)(1) expressly prohibits PERB from approving a bargaining unit with less than the full compliment of classroom teachers, argues COCFA. Alternatively, COCFA argues that, even if the standards justifying split units in Long Beach (No. 765) are valid and are applied, this case does not merit the same result because COCFA is willing to represent the part-time faculty. COCFA also posits that this case can arguably be viewed as a longstanding violation of COCFA's duty of fair representation.

Finally, COCFA argues that the charging parties have not shown that a part-time faculty unit is appropriate.

DISCUSSION

Contrary to the analysis of the ALJ, the Board finds that this case can be resolved in a straightforward manner under clear statutory language and settled PERB precedent.

Two statutory provisions are implicated in this case:

EERA section 3543 provides, in relevant part:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. [Emphasis added.]

EERA section 3543.5 provides, in part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. [Emphasis added.]

To show a violation of EERA section 3543.5(d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice by employees between employee organizations. (Santa Monica; Redwoods Community College District (1987) PERB Decision No. 650 (Redwoods).) Proof that an employer intended to unlawfully dominate, assist or influence employees' free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (Santa Monica; Redwoods.) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (Santa Monica, p. 22.) The test of whether an employer has violated EERA section 3543.5(d) is based on the totality of the circumstances. (Redwoods.)

The crux of the District's argument and the ALJ's analysis is that the unit modification agreement in this case was authorized by the prefatory language in PERB Regulation 32781 stating, "Absent agreement of the parties to modify a unit," a petition to the Board is required. The inference is that, in the presence of such an agreement, no petition to the Board is required. On the facts of this case, such a result violates basic provisions of EERA itself, which prevail over interpretations of regulations enacted under the Board's jurisdiction pursuant to that statute.

The ALJ noted that "there is nothing in PERB's regulation qualifying the right to agree to a unit modification by reference to section 3543.5(d) or similar language." Based on that observation, the ALJ reasoned that "it is logical to infer that through [PERB Regulation 32781], PERB has expressed its intent that the issue of majority support in unit modifications achieved through agreement is one ceded to the discretion of the employer."

The ALJ's analysis is erroneous because PERB's regulations are enacted pursuant to and in conformity with authority granted by the Legislature through the statutes creating PERB's jurisdiction, in this case EERA. EERA section 3541.3(g) provides, in relevant part,

> The Board shall have all the following powers and duties:
> ...
> (g) To adopt pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter. [Emphasis added.]

By operation of the very language empowering PERB to make rules, the regulations must be enacted and construed in conformity with the provisions, purposes and policies of EERA. Thus, it is not necessary that PERB Regulation 32781 refer to EERA section 3543.5(d) in order for section 3543.5(d) to circumscribe the regulation. More generally, administrative regulations must be enacted in harmony with the statutes that create and empower the agency issuing the regulations.[9]

[9] For example, the Administrative Procedures Act (APA) mandates that proposed regulations first be reviewed by the Office of Administrative Law for, inter alia, "consistency" with existing law. (Gov. Code sec. 11349.1) Government Code section 11349(d) provides: '"Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." Regulations later alleged not to meet that requirement (or other requirements imposed by the APA) are subject to further review by the Office of Administrative Law. (See Gov. Code sec. 11349.7.)

The Supreme Court has advised,

> Administrative regulations promulgated under the aegis of a general statutory schedule are only valid insofar as they are authorized by and consistent with the controlling statutes. Administrative statutes [regulations] that alter or amend the statute or enlarge or impair its scope are void...
> (Cooper v. Swoap (1974) 11 Cal.3d 856 [115 Cal.Rptr 1].)

EERA section 3543.5(d) and section 3543 state fundamental rights statutorily conferred by the Legislature. PERB has no authority to expand or reduce those rights. PERB's regulations must be enacted and applied in conformity with the legislative grant of jurisdiction under which they were promulgated.

Section 3543.5(d) prohibits an employer from providing "support" to an employee organization, "or in any way encourag[ing] employees to join any organization in preference to another." In Hartnell, the Board applied that language and reversed dismissal of a charge factually similar to the instant case, finding merit in the rival union's argument that a district violates Section 3543.5(d) when it grants recognition for a wall-to-wall unit it previously rejected, after discovering that a rival union is seeking to represent a subpart of that unit.

When Section 3543 (employees have right to representation by "organizations of their own choosing") and 3543.5(d) (employer shall not "contribute ... support" to an employee organization, "or in any way encourage employees to join any organization in preference to another") are considered together, it becomes clear that the statutory goal enforced by the Board in Hartnell was to ensure that employees are not forced into being represented by an employer-favored union in the face of organizing efforts by another employee organization of which the employer is on notice.

Contrary to the rationale of the ALJ and arguments of the District and COCFA, the Board has not ruled that there must be a representation petition pending in order for the mandate of Section 3543.5(d) to come into play. The Board in Santa Monica stated:

> [Section 3543.5(d)] imposes on employers an unqualified requirement of strict neutrality. There is no indication in the statutory language that the Legislature meant to prohibit only those acts which were intended to impact on the employees' free choice. The simple threshold test of section 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other. [Emphasis in original and supplied.]

In Long Beach (No. 1278), a school district allowed a rival organization to make a presentation to employees regarding a campaign to sever a portion of an existing unit. There was no petition pending, yet the Board found that the district's actions constituted encouragement of membership in the rival organization, in violation of Section 3543.5(d).

The Board in Long Beach (No. 1278) summarized PERB's case law interpreting Section 3543.5(d) as follows:

> It is well established that a public school employer may not encourage employees to join one employee organization over another. (EERA sec. 3543.5(d).) The Board has found that Section 3543.5(d) imposes on the employer an unqualified requirement of strict neutrality with respect to employee choice of representation. (Sacramento City Unified School District (1982) PERB Decision No. 214 at p. 3, citing Santa Monica.) Where the natural consequence of an employer's conduct is to encourage or discourage membership in a labor organization, the Board presumes that the employer intended that result. [Citation omitted.]

By allowing the rival organization to make its presentation at the end of an in-service training session, the District "gave the impression that the District supported the [rival organization's] presentation." The Board in Long Beach (No. 1278) found that "this is

precisely the kind of conduct that would lead a reasonable person to conclude that the District favored [the rival over the incumbent.]

Here, the ALJ found and the District and COCFA argue that Long Beach (No. 1278) is distinguishable because, in the words of the ALJ, "it is a case involving the provision of unlawful assistance. It would be a rare case where the discriminatory provision of such assistance (typically financial, or in-kind services) could be construed as furthering a compelling neutral purpose of the Act."

The Board finds the distinction unpersuasive. Here, the District went beyond providing assistance to COCFA. It participated with COCFA in the formation of an agreement that it claims required part-time faculty to accept COCFA representation at a time when all parties were on notice that PFU was organizing the part-time faculty. The District used its governing board session to entertain COCFA's motion, and used District personnel and time to discuss its terms and to ratify it. The Board finds this case consistent with the analysis in Long Beach (No. 1278). The District's conduct could not be viewed in a manner other than as indicating the District favored COCFA over PFU. The natural consequence of the District's actions would be interference with employee selection of a representative. Such conduct tends to influence the choice by employees between employee organizations. (Santa Monica.)

This approach is consistent with private sector precedent. Under NLRB case law, an employer that recognizes a union which enjoys only minority support commits an unfair practice. (Ladies Garment Workers v. NLRB (1961) 366 U.S. 731 [48 LRRM 2251].) That holding from Ladies Garmant Workers was reaffirmed in Bruckner, the case heavily relied upon by the ALJ in the proposed decision in the instant case. (Bruckner at p. 957, fn. 13.)

Additionally, in the private sector, to recognize one of two competing unions while the employees' choice between them is demonstrably in doubt is an unfair practice under the NLRB's doctrine of strict neutrality. (NLRB v. Signal Oil & Gas Co., (1962) 303 F.2d 785 [50 LRRM 2505].) A significant application of this neutrality requirement is contained in Midwest Piping and Supply, Inc. (1945) 63 NLRB 1060, and more fully discussed in Playskool v. NLRB (1973) 477 F.2d 66 [83 LRRM 2544] (Playskool).

In Playskool, the employer voluntarily recognized the Retail and Department Store Union (Retail Union) when another union, the United Furniture Workers (United) was also seeking representation of the same unit of employees. Although United had lost at least one representation election and the Retail Union had obtained authorization cards from at least 300 of the 500 company employees, the Board found that recognition of the Retail Union by the employer amounted to a breach in its duty of neutrality. In summarizing the Board's neutrality doctrine, the Court of Appeal stated:

> The [NLRB] has held that this doctrine precludes recognition of any union upon the basis of a card showing when another union has raised a "question concerning representation." The Board has not precisely defined the minimum amount of support a union must show to raise such a question, but has held that an election between two competing unions must be held if the claim of the rival union is "not clearly unsupportable and lacking in substance." Nor is it necessary for the rival union to present any claim to the employer that it currently has majority support, for the employer's knowledge of organizing activity is apparently sufficient to raise the question. (Id. at 69-70.)

Although the Court ultimately found that the Retail Union had demonstrated a majority showing and thus refused to enforce the NLRB's order, the NLRB's standard for determining when a question concerning representation exists survives the Court's refusal to enforce.

The Board finds that the NLRB's cases on "accretion" of unrepresented employees into an existing unit are in accord with the ruling herein. (See, e.g., Safeway Stores, Inc. (1981) 256 NLRB 918 [107 LRRM 1338] (voluntary extension of exclusive representative status to unrepresented employees requires evidence that unrepresented employees support such representation). The Board further notes that the cases regarding decertification efforts, such as RCA and Pittsburg, cited by the ALJ are distinguishable. In those cases, the employer owed an ongoing duty to bargain with the incumbent exclusive representative of the existing unit and could lawfully refuse to negotiate with a rival union. Here, the part-time faculty have no exclusive representative. This case did not involve, as did RCA and Pittsburg, an effort to force an employer to bargain with a rival organization regarding employees represented by a recognized employee organization enjoying a presumption of majority support.

In fact, based on the record evidence, there can be no presumption of majority support for COCFA in the combined unit it sought to represent, much less among the part-time faculty. The District negotiated an agreement with COCFA to more than triple the size of COCFA's bargaining unit by adding 376 part-time faculty to the existing unit of 159 full-time faculty. While nearly 20 percent of the part-time faculty signed authorization cards in favor of PFU representation, COCFA failed to provide any evidence that even one part-time faculty employee signed an authorization card in its favor. The District was on notice of PFU's efforts to organize the part-time faculty when it chose to enter into the unit modification with COCFA. In so doing, the District demonstrated support for COCFA, conduct that unlawfully tends to influence employee selection, in violation of EERA section 3543.5(d).[10]

[10] Resolution of this case does not require a determination regarding what would constitute an appropriate unit. Thus, arguments regarding whether PFU proposed an appropriate unit need not be resolved here.

No exceptions having been filed regarding allegations based on EERA section 3543.5 (a) or (b), the Board does not disturb their dismissal by the ALJ.

COCFA's Other Arguments

Contrary to COCFA's assertion, the Board is not engaging in "rule making" when it finds that the unit modification agreement formed between the District and COCFA in this case violates EERA section 3543.5(d). To the contrary, the Board is reasonably applying an existing regulation to the specific facts of this case and the parties thereto, in light of the statutory authority under which the regulation was enacted. That is an adjudicatory, not a rulemaking function. Neither PERB nor any other agency or court has the authority to interpret PERB regulations in a manner that conflicts with the statutes under which they were enacted. (See Cooper v. Swoap; also, Gov. Code secs. 11349(d), 11349.1, 11349.7, discussed supra.) To construe Regulation 32781 as endorsing the District's violation of EERA section 3543.5(d) would amount to legislative activity, which is vested with the Legislature.

Nor is PERB "estopped" from finding that the District violated EERA section 3543.5(d) when it entered into the unit modification agreement with COCFA at a time when all parties were on notice that PFU was attempting to organize the part-time faculty. The assertions regarding alleged statements by PERB's agent regarding the District's duty to bargain and AFT's potential prospects on an unfair practice challenge to a unit modification agreement between the District and PFU do not divest this Board of its duty and authority to remedy unfair practices. (See American Can Company v. National Labor Relations Board (2nd Cir. 1976) 535 F.2d 180, 187 [92 LRRM 2251] (conduct by official in regional office does not justify perpetuation of unfair practice and does not bind Board).) PERB does not issue

"advisory opinions" or generalized declarations of law. (See, e.g., Thorpe v. Long Beach Community College District (2002) PERB Dec. No. 1475, and cases cited therein; Lemoore Union High School District (1978) PERB Order No. Ad-47.) PERB's binding precedent is articulated only through adjudication of issues presented through appeal of Board agent dismissals of charges or exceptions from decisions of an ALJ. The Board's rulings bind its agents; its agents' alleged speculations do not bind the Board.[11]

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Santa Clarita Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(d) by contributing support to an employee organization and encouraging employees to join one organization in preference to another when it entered into a unit modification agreement with the College of the Canyons Faculty Association, CTA/NEA (COCFA), to expand the full-time faculty unit represented by COCFA to include unrepresented part-time faculty at a time when the District was on notice that part-time faculty were being organized and were seeking representation by Part-Time Faculty United, AFT.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Contributing support to an employee organization;

[11] Moreover, the Board agent was not serving as the attorney for either the District or COCFA when the conversations allegedly took place. Thus, contrary to COCFA's assertion, it would not be reasonable for either party to rely exclusively on the Board agent's initial assessment of a case as the only basis for deciding how to proceed.

2. Encouraging employees to join one organization in preference to another;

3. Entering into or enforcing a unit modification agreement with the College of the Canyons Faculty Association, CTA/NEA (COCFA), to expand the full-time faculty unit represented by COCFA to include unrepresented part-time faculty when the District is on notice that part-time faculty are being organized and are seeking representation by another employee organization;

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

2. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board (PERB) in accordance with the director's instructions. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Part-Time Faculty United, AFT.

It is further Ordered that the proposed decision of the administrative law judge in Case No. LA-CE-4357-E is hereby REVERSED, consistent with the discussion herein.

Members Baker and Whitehead joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-4357-E, Part Time Faculty United, AFT v. Santa Clarita Community College District, in which all parties had the right to participate, it has been found that the Santa Clarita Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(d) by contributing support to an employee organization and encouraging employees to join one organization in preference to another when it entered into a unit modification agreement with the College of the Canyons Faculty Association, CTA/NEA (COCFA), to expand the full-time faculty unit represented by COCFA to include unrepresented part-time faculty at a time when the District was on notice that part-time faculty were being organized and were seeking representation by Part-Time Faculty United, AFT.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Contributing support to an employee organization;

2. Encouraging employees to join one organization in preference to another;

3. Entering into or enforcing a unit modification agreement with the College of the Canyons Faculty Association, CTA/NEA (COCFA), to expand the full-time faculty unit represented by COCFA to include unrepresented part-time faculty when the District is on notice that part-time faculty are being organized and are seeking representation by another employee organization.

Dated: _____

SANTA CLARITA COMMUNITY COLLEGE DISTRICT (COLLEGE OF THE CANYONS)

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.