STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ENGINEERS & ARCHITECTS ASSOCIATION, Charging Party, v. PUBLIC TRANSPORTATION SERVICES CORPORATION, Respondent.	Case No. LA-CE-12-M PERB Decision No. 1637-M June 7, 2004

Appearances: Levy, Stern & Ford by David P. Myers, Attorney, for Engineers & Architects Association; Liebert Cassidy Whitmore by Bruce A. Barsook and Lucy Siraco, Attorneys, for Public Transportation Services Corporation.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Public Transportation Services Corporation (PTSC) to a proposed decision (attached) of the administrative law judge (ALJ). The proposed decision found that the PTSC is a public agency within the meaning of the Meyers-Milias-Brown Act (MMBA)[1] and therefore subject to its provisions. In its exceptions, PTSC argues that since it is an organizational unit of the Metropolitan Transportation Authority (MTA), it is subject to the labor relations provisions set forth in the Public Utilities Code (PUC) rather than the provisions of the MMBA.

The Board has reviewed the entire record in this matter, including the proposed decision, PTSC's exceptions, and the response of the Engineers and Architects Association.

[1]The MMBA is codified at Government Code section 3500, et seq.

The Board finds the ALJ's findings of fact to be free of prejudicial error and adopts them as the findings of the Board itself. The Board declines to adopt the ALJ's conclusions of law. Instead, as explained below, the Board finds that the PTSC is not a public agency subject to the MMBA. As a result, the complaint is dismissed.

DISCUSSION

Jurisdictional Scope of the MMBA

In 1961, the Legislature enacted the George M. Brown Act (Brown Act) which gave a broad spectrum of public employees the right to meet and confer with their employers regarding terms and conditions of employment. (See California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal.App.2d 514, 522 [77 Cal.Rptr. 497].) In 1968, the Brown Act was amended by enactment of the MMBA. As currently written, the MMBA is the collective bargaining statute covering most local public agencies.[2]

As a jurisdictional matter, the MMBA covers employers who meet the definition of "public agency." As defined in the text of the statute, a "public agency" includes:

> . . . every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California. [MMBA sec. 3501(c).]

On its face, the MMBA's definition of "public agency" is a broad one. If all entities which met this literal definition came under the MMBA's jurisdiction, there would be little doubt that

[2]In 2001, the MMBA was added to PERB's jurisdiction.

the PTSC, and indeed, even the MTA itself, would fall under the MMBA's coverage. However, MMBA section 3501(c) cannot be read in isolation when determining whether a particular entity falls under the jurisdiction of the MMBA. As explained below, this is because the Legislature has repeatedly carved out exceptions to what would seem to be the MMBA's extensive jurisdiction.

When it enacted the Brown Act, the Legislature knew that certain public employees were already covered by labor relations statutes. (See Rae v. Bay Area Rapid Transit Supervisory Etc. Assn. (1980) 114 Cal.App.3d 147, 150 [170 Cal Rptr. 448] (Rae).) Chief among these employees were those of various transit districts, for example, employees of the Bay Area Rapid Transit (Stats. 1957, ch. 1056, sec. 3, p. 2291). As for these employees, the Legislature declared in the MMBA that:

> Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. [MMBA sec. 3500(a).]

Based on this express language, the courts have held that the MMBA was never intended to include in its coverage transit districts with their own statutory framework for administering labor relations. (See Rae, at pp. 150-151.)

Los Angeles Metropolitan Transportation Authority

The MTA was created in 1992 as the single successor agency to the merger of the Southern California Rapid Transit District (RTD) and the Los Angeles County Transportation Commission (LACTC). (PUC sec. 130050.2.) As the successor agency, the MTA assumed all

the powers, duties and obligations of the former RTD and LACTC. (PUC sec. 130051.13.) Neither party disputes that among MTA's obligations are those involving labor relations under PUC section 30750, et seq.

As MTA's labor relations are governing by PUC Section 30750, it is undisputed that the MTA is not subject to the MMBA. This is true even though the MTA would presumably constitute a "public agency" under MMBA section 3501(c). It is further undisputed that the PTSC was created by the MTA and in many respects, is financially dependent upon the MTA. Given these facts, the issue before the Board is not whether the PTSC meets the definition of a "public agency" under MMBA section 3501(c). It clearly does. Rather, the issue is whether the PTSC is sufficiently linked to the MTA such that it is subject to the PUC.

Silver v. Los Angeles County Metropolitan Transportation Authority

Relying on Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal.App.4th 338 [94 Cal.Rptr.2d 287] (Silver), the ALJ concluded that the PTSC must be treated as an independent entity. In Silver, several unions representing MTA employees challenged the fact that PTSC employees did not participate in social security. These unions alleged that the MTA created the PTSC for the specific purpose of evading its obligations under social security. According to the employee unions, PTSC was a "sham" corporation with only the illusion of being an independent entity. In defense, the MTA argued that the PTSC was an independent and autonomous public agency.[3]

In its decision, the court recognized that the primary reason the MTA created the PTSC was to allow employees to continue their participation in the Public Employees Retirement System (PERS). The court commented that such a purpose was appropriate since the

[3]Ironically, the parties' positions in Silver are the exact opposite from their positions in this matter.

Legislature intended that no employee of RTD or LACTC should be made worse off by the creation of the MTA. (Silver, at pp. 353-354; PUC sec. 30753.) Had the MTA not created the PTSC, former employees of the LACTC, who were participants of PERS, would have suffered a reduction in salary. (Silver, at p. 354.)

In the end, the Silver court concluded that the PTSC was a "public agency" for purposes of PERS. However, the fact that the PTSC is a "public agency" for purposes of PERS is not determinative of whether it is subject to the MMBA. Indeed, the former LACTC was also a "public agency" for purposes of PERS yet it was not subject to the MMBA. Accordingly, the Board finds that Silver is not controlling on the issues before PERB.

The Evidence Supports Finding the PTSC to be An Organizational Unit of the MTA

The statutes creating the MTA give it the express authority to establish "departments, divisions, subsidiary units, or similar entities" which are referred to as "organizational units." (PUC sec. 130051.11 (emphasis added).) As discussed below, the Board finds that the PTSC is a "subsidiary unit" or "similar entity" for purposes of determining which labor relations statute, PUC or MMBA, it is subject to. Based on this finding, the Board concludes that the PTSC is subject to the PUC and not the MMBA.

The Board basis its conclusion on several undisputed facts. First, it is undisputed that the PTSC was created primarily to provide the MTA a vehicle to offer its employees PERS benefits. The facts establish that the PTSC was initially staffed by the transfer of approximately 2000 employees from the MTA. Other than its staff, the PTSC has no assets.

Further, the PTSC does not adopt a separate budget. Instead, MTA adopts an aggregate budget, which includes a budget for PTSC. As part of the budget process, the MTA typically controls salaries, which are forwarded to the PTSC for consideration.

The management structure of the PTSC is also integrally intertwined with that of the MTA. For example, three individuals currently comprise the board of directors for the PTSC. As these, one is chief executive officer of the PTSC and also chief of staff for the MTA. Another is secretary to both the PTSC board and the MTA board. The last is chief financial officer of the PTSC and the executive officer of finance and treasurer of MTA. Finally, both MTA and PTSC are served by the same labor relations staff.

Certainly, the ALJ made factual findings which could support a conclusion that the PTSC is not a "subsidiary" or "similar" entity of the MTA. However, the Board finds that the weight of the evidence supports the opposite conclusion. As a result, the Board finds that the PTSC is subject to the labor relations provisions of PUC section 30750 rather than the MMBA.

Public Policy

In addition to being supported by the evidence, the Board's finding that the PTSC is subject to PUC section 30750 is supported by public policy. In considering public policy, the Board notes that similar rights are conferred by both PUC section 30750 and the MMBA. Thus, under any holding, the employees of PTSC will be able to organize and seek recognition.

As the rights of employees are not substantially affected by the Board's decision, the public policy goals of PERB are best achieved by promoting the most efficient labor relations system possible. Given that the PTSC is an organizational unit of the MTA, it would be most efficient to have MTA and PTSC employees under the same labor relations system. Absent clear legislative intent, the Board sees little benefit to placing two groups of employees, who are integrally linked, under separate labor relations systems.

Transit Employer-Employee Relations

Further supporting the Board's finding is the structure of the newly enacted Transit Employer-Employee Relations Act (TEERA) in 2003.[4] The TEERA, which is under PERB's jurisdiction, is a collective bargaining statute covering only the supervisory employees of the MTA. Since TEERA was enacted recently, the ALJ did not have the benefit of this statute in drafting his proposed decision.

In enacting the TEERA, the Legislature noted that public transit employees are not subject to a statewide statutory scheme governing labor relations. (TEERA sec. 99560(b).) This is in contrast to non-transit public employees whom the Legislature noted were subject to statewide schemes, such as the MMBA. (TEERA sec. 99560(c).)

According to the Legislature, the purpose of the TEERA is to:

> . . . provide the means by which relations between the Los Angeles County Metropolitan Transportation Authority and their supervisory employees may assure that the responsibilities and authorities granted to each transit district by statute are carried out in an atmosphere that permits the fullest participation by employees in the determination of conditions of employment which affect them. [TEERA sec. 99560(e), emphasis added.]

In the text of TEERA, MTA is referred to as the "transit district employer." Significantly, the TEERA states that:

> 'Employer' or 'transit district employer' shall also include the Public Transportation Services Corporation established by the Los Angeles County Metropolitan Transportation Authority, including any person acting as an agent of the employer. [TEERA sec. 99560.1(g)(2).]

The Legislature's definition of public transit employer to include the PTSC is significant. The issue in this matter has essentially been one of legislative intent. Specifically,

[4]TEERA is codified at PUC section 99560, et seq. This legislation was enacted after issuance of the ALJ's proposed decision.

did the Legislature intend that subsidiary entities created by MTA would also be subject to the labor relations provisions of PUC section 30750? At least with respect to TEERA, it is clear that the Legislature's intent was to treat the MTA and PTSC together as the "employer" for purposes of that statute.

Admittedly, the fact that the PTSC is considered part of the MTA for purposes of TEERA does not mandate the same conclusion here. However, the TEERA is certainly an indicator of the Legislature's view in regards to the existing status of MTA and PTSC employees. Thus, the language of TEERA supports the Board's finding that the PTSC is subject to PUC section 30750, and not the MMBA.

As the Board finds that the non-supervisory employees of the PTSC continue to be subject to PUC section 30750, and not the MMBA, there is no need to address the other issues raised in the proposed decision. Instead, the complaint must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-12-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ENGINEERS & ARCHITECTS ASSOCIATION, Charging Party, v. PUBLIC TRANSPORTATION SERVICES CORPORATION, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-12-M PROPOSED DECISION (10/29/02)

Appearances: Levy, Stern and Ford by Lewis Levy and Adam Stern, Attorneys, for Engineers and Architects Association; Liebert, Cassidy and Whitmore by Bruce Barsook and Lucy Siroco, Attorneys, for Public Transportation Services Corporation.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This action was initiated on September 5, 2001, when the Engineers and Architects Association (EAA) filed this unfair practice charge against the Public Transportation Services Corporation (PTSC). After an investigation, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that PTSC refused to voluntarily recognize EAA as the exclusive representative of a unit of employees in PTSC's planning and development department, or, alternatively, adopt reasonable rules and regulations regarding the recognition of employee organizations. By this conduct, the complaint alleges, PTSC unlawfully withheld recognition of EAA in violation of the Meyers-Milias-Brown Act (MMBA or Act) section 3507 and PERB Regulation section 32603(g).[1] The complaint further

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code. In relevant part, section 3507 reads as follows:

alleges that PTSC interfered with the right of employees to be represented by EAA, in violation of MMBA section 3506 and PERB Regulation 32603(a).[2] By the same conduct, the

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> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).
>
> Such rules and regulations may include provisions for
>
> (a) verifying that an organization does in fact represent employees of the public agency
>
> (b) verifying the official status of employee organization officers and representatives
>
> (c) recognition of employee organizations
>
> (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502
>
> No public agency shall unreasonably withhold recognition of employee organizations.

In relevant part, PERB Regulation 32603(g) reads as follows (PERB regulations are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq.):

> It shall be an unfair practice for a public agency to do any of the following:
>
> (g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

[2] Section 3506 reads as follows:

> Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

In relevant part, section 3502 gives employees "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."

complaint also alleges, PTSC denied EAA the right to represent employees in violation of MMBA section 3503 and PERB Regulation 32603(b).[3]

PTSC answered the complaint on November 5, 2001, denying all allegations and asserting a number of affirmative defenses. Among other things, PTSC asserted that it is not subject to MMBA jurisdiction, and even if the MMBA applies here, it had no obligation to adopt reasonable rules and regulations under section 3507. Denials and defenses will be addressed below, as necessary.

A PERB agent held a settlement conference on November 7, 2001, but the matter was not resolved. The undersigned conducted a formal hearing on April 16-17, 2002, in Los Angeles. With the receipt of the final brief on June 26, 2002, the matter was submitted for proposed decision.

PERB Regulation 32603(a) reads as follows:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

[3] In relevant part, section 3503 reads as follows:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies.

PERB Regulation 32603(b) reads as follows:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3508(c) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

FINDINGS OF FACT

Formation of PTSC

In approximately 1992, the California Legislature merged the Los Angeles County Transportation Commission (LACTC) with the Southern California Rapid Transit District (RTD) to create the Los Angeles County Metropolitan Transportation Authority (MTA). The MTA is responsible for planning, funding, constructing and operating surface transportation in Los Angeles County, including bus transit, paratransit, urban rail, commuter rail, subways, and freeways. MTA has approximately 7,000 employees and is located at One Gateway plaza in Los Angeles.

The merger created an issue regarding retirement benefits that eventually led to the creation of PTSC. Before the merger, union and nonunion employees of RTD participated in RTD-sponsored retirement plans and in the federal Social Security program. In contrast, LACTC's employees did not participate in the Social Security program. Instead, their retirement benefits were provided through the California Public Employees Retirement System (PERS), with the entire cost being borne by the LACTC and without employee participation.

From its inception, MTA unsuccessfully sought to provide a unified and cost-effective retirement plan for its employees. The details of this attempt need not be here. At some point, PERS advised MTA that the former LACTC employees would not be permitted to remain in PERS permanently unless substantially all of MTA's employees were also eligible to participate in PERS. The MTA then decided to create a new entity, the PTSC, to contract with PERS. The new arrangement would provide uninterrupted coverage to employees who participated in PERS, as well as to provide other employees with the opportunity to obtain PERS retirement benefits.

In August 1997, PTSC became operative as a public corporation under articles of incorporation, bylaws and an acquisition agreement with MTA that set forth in detail the extent of PTSC's authority as a corporation.[4] Approximately 2,000 MTA employees voluntarily transferred to PTSC. They had no break in service, their terms and conditions of employment remain the same, and they perform essentially the same duties in the same location. PTSC is also located at One Gateway Plaza in Los Angeles. PTSC then negotiated a contract with PERS to provide retirement benefits to its employees who had transferred from MTA.

PTSC's main function is to provide MTA with staff for planning, programming, construction and management of transit operations, which include the bus and rail systems. Apart from its staff, PTSC has no assets. It does not own bus lines or busses, nor does it own other assets associated with mass transit operations.

PTSC is governed by a three-member board of directors appointed by the mayor of Los Angeles, the chairperson of the Los Angeles County Board of Supervisors, and the League of Cities City Selection Committee. Maria Guerra (Guerra), Michelle Jackson (Jackson), and Terry Matsumoto (Matsumoto) make up the current PTSC board. The PTSC board meets quarterly. The MTA board, on the other hand, is made up of five Los Angeles County supervisors, the mayor of Los Angeles, three appointees of the mayor, and four members selected by the League of Cities City Selection Committee.

Several individuals hold positions in PTSC and MTA. For example, Guerra is the chief executive officer (CEO) of PTSC and chief of staff for MTA. She reports to Roger Snoble (Snoble), the CEO of MTA. Snoble is a PTSC employee. Jackson is secretary of both the

[4] On December 19, 1997, PTSC amended its articles of incorporation, bylaws and acquisition agreement to clarify that it was formed as a public entity under Government Code section 811.2. These documents and relevant Government Code sections are more fully addressed below.

PTSC board and the MTA board. Matsumoto is the chief financial officer (CFO) of PTSC and the executive officer of finance and treasurer of MTA. He reports to Richard Brumbaugh (Brumbaugh), the CFO of MTA. Matsumoto also is on the board of the PTSC/MTA Risk Management Association (PRIMA) and the MTA pension board. PRIMA is a joint powers authority established for the purchase of workers compensation insurance and other liability programs. PTSC has a contract with PRIMA for workers compensation benefits. Despite these connections, members of the PTSC board have a fiduciary obligation to the PTSC as a corporation that is independent from any duties they may have as MTA employees.

In addition, Brenda Diederichs (Diederichs) is the chief of labor relations for MTA. She also provides labor relations services for PTSC. Diederichs reports to CEO Snoble; previously, she reported to Guerra. A general counsel, who is not an employee, serves both MTA and PTSC.

The MTA adopts an aggregate budget, which includes the PTSC budget. PTSC does not adopt a separate budget. Ninety-nine percent of PTSC's budget comes from MTA; the remaining part comes from services rendered by PTSC to the Southern California Regional Rail Authority (SCRRA) based on a contract between PTSC and SCRRA. PTSC derives its budgetary goals based on the projected work program for the year. Specifically, the goals are based on the cost of providing services and generally doing business with MTA, including salaries, benefits, staff and incidental expenses.

PTSC maintains is own bank accounts, subject to the control of PTSC officers. PTSC and MTA invest their funds jointly from money in a pooled account. Returns on investments are allocated by percentage of money invested, and the PTSC board must approve all investments of PTSC funds. On at least one occasion Matsumoto recommended the PTSC board adopt a resolution authorizing up to a $30 million investment in the Local Agency

Investment Fund. The amount of interest, Matsumoto wrote in the recommendation, would reduce operational funding from PTSC's primary funding source, MTA, by an equal amount. PTSC has the authority to borrow money and to enter into contracts.

PTSC is referenced in MTA's comprehensive annual financial report as a "component unit," a term with legal significance that is more fully discussed below. Matsumoto described a component unit as one that is blended into the financial statements of a parent corporation, similar to a subsidiary. PTSC and MTA maintain separate books and records and they are audited by an independent auditor, Price Waterhouse Coopers. There is no legal requirement that MTA and PTSC books and records be blended; they are treated as such based on generally accepted principles of accounting.

The PTSC payroll system is integrated with the MTA system; that is, both entities use the same processing service and software. Probusiness is a company that provides paychecks, handles direct deposits and makes payroll tax deposits for PTSC and MTA. The Probusiness contract is with MTA, although PTSC pays for its share of services. PTSC retains the right to contract with another service provider. Funding for the PTSC payroll comes from PTSC accounts, not from MTA accounts.

PTSC sponsors PERS benefits for its employees, and has the authority to approve increases to the contribution base required by PERS. PTSC and MTA jointly sponsor other fringe benefits. PTSC's share of the costs for employee benefits is paid for with money from PTSC accounts, subject to approval by the PTSC board.

When PTSC was first incorporated, its board adopted various MTA policies for use. Among others, these included policies covering procurement, employment and personnel, equal employment opportunity, employee relations, drug and alcohol use, finance and budget. The PTSC resolution which adopted the policies noted that the adoption would permit

employees to perform their functions immediately under familiar practices until such time as the need for specific separate policies is identified. PTSC has the authority to rescind these policies and adopt new ones.

Matsumoto testified that PTSC has the authority to set terms and conditions of employment for its employees. Regarding salaries, he said the MTA budget structure typically controls salaries, even those that are forwarded to PTSC for consideration. However, nothing prohibits PTSC from recommending a different salary structure than that proposed by MTA. In such a circumstance, the matter would be a subject of negotiation between the PTSC and MTA boards, according to Matsumoto.

PTSC and MTA have separate employment applications, and they advertise separately in filling vacancies. MTA maintains an internet website that includes announcements for PTSC and MTA vacancies, but there are separate pages on the website devoted to PTSC and MTA vacancies. The webpage has a link to PTSC benefits, but there is no such link to MTA benefits. MTA also maintains an intranet which includes information about MTA and PTSC.

MTA new hires and PTSC new hires have separate orientation sessions. The primary reason for the different orientation sessions is that unions represent MTA employees and different information is communicated to them as a result of the representation. Another reason is that some MTA new hires are temporary employees who are treated differently. MTA employees wear badges that indicate "MTA" and PTSC employees wear badges that indicate "MTA" and "PTSC."

The MTA human resources department provides many services. It is responsible for recruitment and selection. It contains a personnel support component, which includes an information system and personnel records database. It has a special services component which administers legal compliance, alcohol and drug testing, leave programs, and light duty

programs. A compensation unit handles salary and reclassification matters, as well as salary surveys. The department also contains an employee center which handles miscellaneous matters such as discount tickets for movies and amusement parks. The MTA human resources department also serves PTSC. There is no separate human resources department in PTSC.

Kathi Harper (Harper) is a PTSC employee who is a human resources manager for MTA. She reports to Ida Lagrimas (Lagrimas), executive officer of administration for MTA and PTSC. Lagrimas reports to Carolyn Flores (Flores), the PTSC executive officer for administration who oversees administration for PTSC and MTA.

Harper is responsible for recruitment and selection of MTA and PTSC employees. She administers MTA Policy HR 3-1 (Recruitment and Selection) in carrying out her duties in this regard.[5] She said an employee processing packet is used for MTA and PTSC hires. Information from the packet is entered into a database that identifies MTA and PTSC employees by agency.

Harper also testified that a transfer policy applies to employer-initiated transfers and employee-initiated transfers. Under the policy, an MTA employee may transfer to a PTSC position in the same salary grade and vice versa with no impact on benefits, except retirement benefits.

The employee appraisal policy, MTA Policy HR 3-15, applies to MTA and PTSC employees. Among other things, the policy covers how and when employees are to be evaluated, standards of measuring employee performance, and a process to appeal an evaluation. The policy is administered by Harper's office.

[5] The process for modification of existing MTA policies typically begins with a recommended revision and travels up the MTA chain of command to final approval or rejection by the CEO. Adoption of new MTA policies follows the same route, except that they are subject to review by the policy and procedure task force. The task force is a committee made up of representatives from various departments in MTA and PTSC.

The compensation and classification section establishes starting salaries, conducts salary surveys, and deals with classification issues. In responding to a salary survey, for example, the human resources staff presents the survey up the MTA chain of command to the CEO. If the CEO approves, the survey is presented to the MTA board for final approval before implementation. Harper said no distinction is made between MTA positions and PTSC positions in this process.

The MTA human resources department administers a leave policy that covers a number of specific leaves; among others, these include family medical, sick, military, personal, and vacation leave. The leave policies are the same for MTA and PTSC employees. However, pay for leave is made from an MTA account or a PTSC account, depending on whether the individual who used the leave is an MTA or a PTSC employee.

Discipline is covered by MTA Policy HR 3-10 and is administered jointly by the MTA human resources department and the MTA labor relations department. The policy applies to MTA employees and PTSC employees. It covers all aspects of discipline, including types of discipline and appeal procedures. There is no separate discipline policy for PTSC employees.

MTA Labor Relations Chief Diederichs said there are five unions that currently represent employees at MTA and PTSC. The Transportation Communications Union (TCU) represents MTA clerical and custodial employees. The Amalgamated Transit Union (ATU) represents MTA mechanics. The United Transportation Union represents MTA bus/train operators and schedulers. The Teamsters represent PTSC security guards. And the American Federation of State, County and Municipal Employees (AFSCME) represents two units, a unit of supervisors and a unit of senior supervisors. According to Diederichs, some of the employees represented by AFSCME are MTA employees and some are PTSC employees. The

recognition clause in one of the AFSCME agreements refers to MTA and PTSC "collectively" as the "Authority."

In negotiating the Teamster agreement covering PTSC security employees, Diederichs met with the MTA board to receive her parameters. She did not meet with or receive direction from the PTSC board. The agreement is signed by then MTA CEO Julian Burke (Burke). The collective bargaining relationship with the Teamsters predated the formation of PTSC, and it has continued. Diederichs followed the same line of authority in receiving parameters for the negotiations with AFSCME.

EAA Request for Recognition

EAA first sought to represent an MTA bargaining unit. In a February 2001 letter, EAA Executive Director Robert Aquino (Aquino) demanded recognition for a bargaining unit of professional and administrative employees in the MTA planning and development department. The demand was made under the California Public Utilities Code (PUC), which governs collective bargaining rights of certain transit employees. In the event MTA doubted majority support of employees in the unit, Aquino wrote, EAA would be willing to submit to a card check under the auspices of the California State Mediation and Conciliation Service (SMCS). Also in February 2001, EAA filed a formal petition for certification with SMCS pursuant to PUC sections 30750 and 30751.

On March 8, 2001, Ronald Stamm (Stamm), senior deputy county counsel, responded in a letter to SMCS setting forth several arguments in opposition to the petition. First, Stamm questioned the appropriateness of a departmental unit composed of professional and administrative employees -- including managers, supervisors, and their subordinates -- in job classifications that cross departmental lines. It makes little sense, Stamm wrote, to offer union representation to classes of employees in one department when the same classifications exist

throughout MTA. Stamm also stated that the employees identified in EAA's petition lack a community of interest that sets them apart from other professional and administrative employees of MTA. Stamm next pointed out that PUC section 30751 makes federal labor law applicable to questions of representation at MTA, and the federal law applies only to employees. It does not apply to supervisors or managers who are not considered employees and thus have no collective bargaining rights.

EAA modified its position in a June 27, 2001, letter from Aquino to CEO Burke. Aquino pointed out that independent research had revealed that PTSC, not MTA, is the employer of the employees covered by the petition; and the MMBA, not the PUC, governs EAA's demand for recognition. In relevant part, Aquino's letter states:

> The ramifications of PTSC – and not MTA – as the actual employer require a legal analysis completely separate from the previous position taken by your office in your position letter of March 8, 2001. PTSC's employees are not subject to the labor provisions in the Public Utilities Code because they are not employees of MTA. Indeed, in Silver v. Los Angeles County Metropolitan Authority ("Silver") (79 Cal.App.4th 338; 94 Cal.Rptr.2d 287) your agency successfully argued this point. To quote from the Silver holding: PTSC "was created for a proper purpose; it is a discrete entity, and [the] attempt to characterize PTSC's employees as MTA personnel is unpersuasive." (Silver 79 Cal.App.4th at 354.) The statutory scheme that provided for the creation of PTSC (or any other governmental nonprofit benefit corporation) is simply not governed by the Public Utilities Code, as was the holding in the Silver action.
>
> According to PTSC's corporate bylaws, the certificate of incorporation, the separation agreement with MTA and the holding in Silver, amongst other documents, [PTSC] is a separate and distinct entity with its own obligations. Your office successfully argued this exact point on PTSC's behalf in Silver, where the Court held that PTSC is not a sham corporation. The holding turned on a finding that PTSC is not an empty shell, but an entity staffed by employees transferred from MTA to PTSC. After the transfer, PTSC became the employer. As you surely agree, PTSC cannot be an employer for pay and pension purposes only and otherwise jettison its legal obligations.

Aquino asserted that the supervisory, managerial and other unit issues raised in Stamm's March 8 letter are moot because the MMBA grants rights to such employees. In conclusion, Aquino demanded recognition and indicated that EAA would submit to a card check under supervision of SMCS if PTSC doubted EAA had majority support.

On July 12, 2001, EAA counsel Lewis Levy (Levy), wrote to Stamm reiterating EAA's position that PTSC, not MTA, is the employer of the employees covered by the demand for recognition, and, therefore, the PUC is inapplicable. Rather, Levy contended in the letter, the MMBA covers employees of PTSC and EAA's demand for recognition. Levy demanded (1) a copy of the recognition/certification ordinance adopted by PTSC, or (2) a statement that PTSC has no such ordinance and has adopted no procedures with respect to recognition/certification demands by labor organizations.

On July 30, 2001, Diederichs responded to EAA. She noted that the concerns expressed in PTSC's March 8 letter were still valid, and she disagreed with EAA's contention that the MMBA applies to EAA's request for recognition. She took the position that the PUC is the governing labor relations law. She stated that the PUC permits MTA to establish subsidiary units or similar entities, and PTSC is such a "subsidiary or similar entity." Diederichs concluded:

> Every day, PTSC employees work side-by-side with MTA employees on the same transit projects. Since PTSC is a creation of the MTA and performs similar functions as the MTA, it makes sense that the same statutory labor provisions apply to the two entities. In part, the PTSC functions as a transit district by providing administrative support services for the operation of MTA's bus and rail system. For these reasons, we believe that questions of union representation at PTSC are governed by the same federal law that applies to such issues at the MTA in accordance with PUC § 30751.

Diederichs concluded, "if you wish to discuss these issues in greater detail, please do not hesitate to contact me."

On August 1, 2001, EAA formally withdrew the request for recognition previously submitted to SMCS. In an August 6, 2001, letter to Levy, Stamm reiterated PTSC's position as set forth in his March 8 letter. There was no further communication between the parties before EAA filed this unfair practice charge on September 5, 2001.

After a complaint issued, EAA and PTSC met on three occasions, including the informal conference. During these meetings, PTSC again explained why it believed the unit proposed by EAA was not appropriate and provided lists of employee classifications. At no time did PTSC propose an alternate unit or modification of the unit proposed by EAA. Stamm and Diederichs testified that they didn't believe it was PTSC's obligation to do so. The parties also discussed formation of the AFSCME unit. Diederichs informed EAA representatives that the MTA board recognized the AFSCME unit for "political" reasons, the board had "buyer's remorse," and was "not happy with supervisors being organized." That really "came home to roost," Diederichs said, "when we were on strike and half of our supervisors crossed the picket line and the other half did not." According to Diederichs, the MTA board is "not interested in having another supervisory unit."

ISSUES

1. Is PTSC a public agency under MMBA section 3501(c) and therefore subject to PERB jurisdiction?

2. Did PTSC refuse to voluntarily recognize EAA as the exclusive representative of a unit of employees in the PTSC planning and development department, or, alternatively, adopt reasonable rules and regulations regarding recognition of employee organizations?[6]

[6] Throughout this proceeding, PTSC has disputed the appropriateness of the unit requested by EAA. The issues here concern PERB jurisdiction and the underlying allegations of unfair practices. The unit matter was not litigated and is not considered in this proceeding. (Reporter's Transcript, Vol. I, pp. 12, 84.)

CONCLUSIONS OF LAW

Public Agency Status Under the MMBA

EAA argues that it qualifies as an "employee organization" under section 3501(a), employees of PTSC are "public employees" under section 3501(d), and PTSC is a "public agency" under section 3501(c). In support of its argument, PTSC contends that the issue of MMBA jurisdiction is controlled largely by a court of appeal decision holding that PTSC is a public corporation. Therefore, PTSC and its employees are governed by the MMBA for labor relations purposes and PERB has jurisdiction over this dispute.

In addition, EAA contends that the evidence here supports a finding that PTSC is a joint employer with MTA and under relevant National Labor Relations Board (NLRB) precedent PTSC has a duty to bargain under the MMBA to the extent of its authority. In a related argument, EAA asserts that PTSC and MTA do not constitute a single employer under relevant case law, and PTSC's argument under a single employer theory should be rejected.

PTSC, in response, contends that the PUC section 30751 requires questions of union representation concerning transit district employees or public utility employees to be determined in accordance with the National Labor Relations Act (NLRA),[7] as administered by the SMCS.[8] According to PTSC, it is an "organizational unit" of MTA and, as such,

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[7] The NLRA is codified at 29 U.S.C. section 141 et seq.

[8] PUC section 30751 provides as follows.

> Any question which may arise with respect to whether a majority of the employees in an appropriate unit desire to be represented by a labor organization shall be submitted to the Director of the Department of Industrial Relations. In resolving such questions of representation including the determination of the appropriate unit or units, petitions, the conduct of hearings and elections, the director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended, and for this purpose shall adopt appropriate

representation and organization of its employees must be governed by federal law under the PUC. Therefore, PTSC argues, PERB lacks jurisdiction over this matter.

In addition, PTSC would reject the EAA argument favoring a finding of joint employer status. Rather, it is MTA's contention that PTSC and MTA are so interrelated that they constitute a single employer under relevant NLRB precedent.

MMBA section 3501(c) covers public agencies and defines such an agency as follows:

> Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

PTSC's articles of incorporation provide that "this corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for public purposes and is a public entity within the meaning of Government Code Section 811.2."[9] In fact, several months after its incorporation, PTSC amended the articles of incorporation to clarify that it is a public corporation under the Government Code. In addition, PTSC's bylaws and the acquisition agreement between PTSC and MTA define PTSC's authority and reiterate its status as a public

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> rules and regulations. Said rules and regulations shall be administered by the State Conciliation Service and shall provide for a prompt public hearing and a secret ballot election to determine the question of representation.

[9] Government Code section 811.2 provides that a "public entity" includes the "State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State."

corporation. When these documents are read against the clear language in section 3501(c) that a "public agency" means any "public and quasi-public corporation" or "public service corporation," it must be concluded that PTSC is a public agency.

The conclusion finds strong support in a related case. As EAA points out, a court of appeal in 2000 determined PTSC's status as an independent public corporation. In Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal.App.4th 338 [94 Cal.Rptr.2d 287] (Silver), several unions representing MTA employees alleged, among other things, that "the MTA was required by state statute to obtain Social Security coverage for its employees and that the MTA had evaded its statutory obligation by creating a sham corporation, i.e., the PTSC, in order to give the illusion of legitimacy to its withdrawal of its nonrepresented employees from Social Security." The unions also alleged this was accomplished "by the MTA's putatively transferring the nonrepresented employees, as well as employees in two bargaining units, Teamsters and transit police officers, to the PTSC." (Silver at p. 345.) Ironically, MTA took the opposite position in Silver, contending that PTSC is an independent corporation.

Some of the evidence presented to the trial court in Silver is similar to that presented here. For example, in support of the contention that PTSC is a sham corporation, the unions argued in Silver that PTSC's entire 1998 budget of $140 million came from MTA and was for employee salaries and benefits, with few exceptions. The unions further asserted in Silver that PTSC had no budgeted item for expenses such as rent, liability or property insurance, or depreciation and all costs were billed to the MTA or its client SCRRA. The unions contended that PTSC has no function other than to issue payroll checks and administer employees' salary and benefits.

The appellate court upheld the lower court's conclusion that PTSC is not a sham corporation and is a "lawfully created non-profit public benefit corporation in good standing, whose business has been conducted in accordance with its articles of incorporation and bylaws." The court concluded, moreover, "the PTSC was formed for the proper purpose of making PERS retirement benefits available to its employees and for other proper business purposes, including providing transportation and planning services to other governmental agencies." (Silver at pp. 352-353.)

PTSC argues that Silver is not controlling here because the decision in that case was limited to determining whether the PTSC was an independent public corporation for the purpose of providing PERS benefits, not coverage under a labor relations statute. In addition, PTSC argues, it is an "organizational unit" or a "similar entity" of the MTA and thus is covered by the PUC. I find these arguments unpersuasive.

The plain language of section 3501(c) cannot be ignored. Section 3501(c) makes no distinction based on the purpose for which a public agency is created. It provides that "*every* public and quasi-public corporation" and "*every* public service corporation" is a "public agency" for MMBA purposes. And the court's opinion was not limited to a finding that PTSC is a public corporation only for PERS coverage. The court found that PTSC was formed to provide PERS coverage to its employees "and for other purposes, including providing transportation and planning services, to other governmental agencies." (Silver at p. 354.) A contrary finding would, in essence, create an exception to section 3501(c) that is not present in the language.

MTA has advanced several arguments that PTSC is an organizational unit of MTA and therefore not covered by the MMBA. PUC section 130051.11 provides in relevant part:

> 130051.11. (a) The Los Angeles County Metropolitan Transportation Authority may determine its organizational

> structure, which may include, but is not limited to, the establishment of departments, divisions, subsidiary units, or similar entities. Any department, division, subsidiary unit, or similar entity established by the authority shall be referred to in this chapter as an "organizational unit." The authority shall, at a minimum, establish the following organizational units: (1) A transit construction organizational unit to assume the construction responsibilities for all exclusive public mass transit guideway construction projects in Los Angeles County. (2) An operating organizational unit with the following responsibilities: (A) The operating responsibilities of the Southern California Rapid Transit District on all exclusive public mass transit guideway projects in the County of Los Angeles. (B) The operation of bus routes operated by the Southern California Rapid Transit District, and all the duties, obligations, and liabilities of the district relating to those bus routes. (3) A transportation planning and programming organizational unit with all planning responsibilities previously performed by the Southern California Rapid Transit District and the Los Angeles County Transportation Commission.

MTA first asserts PTSC is an organizational unit of MTA because it's functions and responsibilities include providing construction for public transit projects, and thus it meets the definition of a transit construction organizational unit under PUC section 130051.11(a)(1). PTSC next contends PTSC's other functions and responsibilities include planning and programming duties formerly carried out by RTD and LACTC and thus it meets the definition of a transportation planning and programming organizational unit under PUC section 130051.11(a)(3). Even if PTSC is not one of the specified organizational units required by section 130051.11(a)(1) or (3), it is a "similar entity" under section 130051.11(a), PTSC claims. In support of the latter argument, PTSC asserts that it conducts activities essential to public transportation in and around Los Angeles County, it is contractually recognized (in the contract with SCRRA) as a component unit of MTA, and it has been assigned powers granted to the MTA by the PUC.[10] Finally, PTSC contends that it does not possess duties and powers

[10] PUC section 130051.11(f) provides that the MTA may "administratively delegate to an organizational unit . . . any powers and duties it deems appropriate." The acquisition

that must be retained by MTA under the PUC, including execution of labor agreements and the adoption of an aggregate budget for all organizational units.[11]

The unions in Silver presented an argument similar to that raised by PTSC here. Specifically, the unions argued that PTSC cannot lawfully be an independent public agency because it is an organizational unit of MTA under PUC section 130051.11. MTA in Silver argued against the union position, taking precisely the opposite stance as PTSC advances here.

Deferring to a PERS finding that PTSC is an independent public corporation which is legally permitted to contract for retirement benefit purposes, the court wrote.

> . . . PERS by necessity is called upon to determine whether an entity is a public agency within the meaning of the statutory scheme. Pursuant thereto, PERS concluded that PTSC qualifies for participation. In making that determination, PERS found, inter alia: PTSC met the requirement for membership to be confined to public agencies. [Citation.] Further, PTSC had a sufficient degree of autonomy from the MTA because PTSC was created under California statute and had its own board of directors, which board had various powers, including: the power to select and remove all the officers of the corporation, to borrow money and incur indebtedness for the purpose of the corporation, to appoint committees, and to enter contracts. . . . [Silver at p. 356.]

Accordingly, the court rejected the claim that PTSC is an organizational unit of MTA under PUC section 130051.11.

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agreement between PTSC and MTA provides that PTSC has the following duties: transportation planning with Los Angeles County; programming of federal, state and local funds for transportation projects; overseeing subway and other public transportation construction projects; providing security services and administrative support for the foregoing and the MTA's bus and rail system.

[11] PUC section 130051.12(b) provides that MTA must retain the authority to adopt an aggregate budget for all organizational units and section 130051.12(e) provides that MTA must retain authority to approve labor agreements covering its employees and employees of an organizational unit.

Granted, there may be similarities between the actual duties performed by PTSC employees and the actual duties that would be performed by employees in a so-called organizational unit under the MTA. However, the PTSC articles of incorporation, the bylaws and the acquisition agreement contain no indication that PTSC was formed as an organizational unit under the PUC. These documents clearly indicate that PTSC was formed as an independent public corporation under the Government Code. And any similarities between the duties of PTSC employees and those of employees in an organizational unit are outweighed by the Silver decision and PTSC's actual authority over terms and conditions of its employees, as expressly defined in the acquisition agreement. If PTSC and MTA intended to form PTSC as an organizational unit, it seems they would have said so in the relevant documents.

In addition, it is difficult to reconcile the express terms of the acquisition agreement and PTSC's assertion that it is merely an organizational unit of MTA. The acquisition agreement supports the conclusion that PTSC is an independent public corporation, not an organizational unit under MTA. Several provisions in the agreement are consistent with the ruling in Silver and indicate that PTSC has significant control over its operations. For example, the agreement states that PTSC is "a public entity and a governmental nonprofit public benefit corporation organized for public purposes under the California Nonprofit Public Benefit Corporation law." Governed by a separate board, PTSC has sweeping authority under the agreement to "enter into contracts and to perform *any other acts* that may be necessary or expedient to further the public purpose for which it was created." The agreement provides that PTSC is "solely responsible" for conducting its business, consistent with PTSC's "own rules and regulations," applicable California and federal laws and regulations, and the "public purpose for which [PTSC] was created." The agreement provides that such rules and

regulations shall include policies related to "procurement, accounting, budgeting, financial matters, personnel matters, equal employment opportunity, drug and alcohol use, and public relations." The agreement provides that the rules "shall initially be substantially similar to those of [MTA]," but PTSC has the authority to adopt its own rules in place of the adopted rules. Thus, PTSC's overall authority over its operations and terms and conditions of employment indicates that it has the requisite control of key matters to be considered an independent public corporation, as the Silver court found.

Further, the acquisition agreement contains several labor and employment provisions that lend support to the conclusion that PTSC is an independent public corporation. For example, MTA guaranteed to PTSC that it was in compliance with all labor and employment laws; there were no outstanding unfair labor practices, grievances, or arbitrations; there was no strike or other dispute pending relating to the acquired employees; there was no employment claim pending before any government agency established to regulate labor practices; and there was no pending question concerning representation with respect to the acquired employees. The agreement gives PTSC the "power and responsibility to hire employees in addition to the Acquired Personnel, and to make all personnel decisions, including promotions, discipline, and terminations, for all employees." The MTA represented that there were no existing collective bargaining agreements or other employment contracts covering the acquired employees; the MTA was in material compliance with all applicable labor and employment laws; there has been no negotiations with any labor organization regarding the acquired employees, nor does an organization hold bargaining rights for such employees. The agreement states that "to the extent permitted by law, [PTSC] shall succeed to the rights and responsibilities of [MTA] with regard to any currently existing written employment contracts, [or] collective bargaining agreements."

These are matters that traditionally have been the responsibility of an employer, not a discrete organizational unit of an employer. If it were envisioned that MTA would remain the employer of employees who voluntarily transferred to PTSC, it seems there would have been little purpose in addressing such important topics relating to labor and employment matters in the agreement. The decision by MTA and PTSC to include such items in the acquisition agreement supports the inference that the parties intended PTSC, not MTA, would be responsible for dealing with these and related matters as the employer of the acquired employees.

I recognize that PUC section 130051.12(b) requires MTA to adopt an aggregate budget including organizational units and section 130051.12(e) prohibits MTA from delegating approval of labor agreements. However, those provisions are not controlling as far as PTSC's status as a public agency is concerned. They apply to organizational units. Subsection (b) applies to adoption of an aggregate budget "for all organizational units of [MTA]," and subsection (e) states specifically that MTA must approve labor contracts "covering employees of [MTA] and organizational units of [MTA]." As found elsewhere in this proposed decision, the employees at issue here are PTSC employees, not MTA employees, and PTSC is an independent public corporation, not an organizational unit of MTA.

I also recognize that PTSC's funding comes from MTA. But the lack of control over the source of funding is not unusual in public sector bargaining. As more fully discussed below, source of funding does not undermine PTSC's status as a public agency in any significant way, nor does it preclude meaningful negotiations. Therefore, PTSC's argument based on section 130051.12(b) and (e) is rejected.

PTSC's next argument is based on the wording of the SCRRA contract. Under the articles of incorporation, PTSC has the authority to enter into contracts to further the purpose for which it was formed. The contract with SCRRA states in relevant part:

> WHEREAS the Public Transportation Services Corporation (the "PTSC") is a public entity organized pursuant to California Public Utilities Code §§ 30253, 130051.11 and California Code § 5110 et seq. in part to provide certain support services to transportation agencies; [CP Ex. No. 6, p. 1.]

Based on the references to §§ 30253 and 130051.11, PTSC argues that the agreement is evidence that it is an organizational unit of MTA. PTSC points out that section 130051.11 grants the MTA authority to establish component units, and requires it to establish a "transit construction organizational unit" and a "transportation planning and programming organizational unit." PTSC also points out that section 30253 generally gives the RTD authority to enter into contracts, and the RTD merged with the LACTC to form the MTA. PTSC concludes, therefore, that the SCRRA contract treats PTSC as an entity "characteristic of the RTD" and therefore a part of the MTA.

Considered in the totality of the evidence here, the SCRRA contract does not compel the conclusion that PTSC is an organizational entity of MTA. The mere reference in the contract to these PUC provisions is far outweighed by the evidence pointing to the conclusion that PTSC is an independent public corporation governed by MMBA. Moreover, as a public agency under section 3501(c), PTSC cannot unilaterally opt out of MMBA jurisdiction merely by indicating in such a contract that it is acting in accord with the PUC.

Based on the foregoing, I conclude that PTSC is a public agency under MMBA section 3501(c), not a component unit of MTA under the PUC.

Joint Employer-Single Employer Issue

EAA argues that it should be immediately apparent that the Silver decision destroys any notion that PTSC is a single employer. "PTSC cannot be a single employer with MTA, if for no other reason than the Court of Appeals determined that PTSC is independent," EAA argues. Because a single employer finding requires proof that there was no arms-length transaction between the entities, EAA contends, by definition PTSC and MTA cannot be candidates for the single employer approach. EAA argues further that a finding that PTSC is a joint employer does not preclude negotiations with EAA. According to EAA, under applicable NLRB case law PTSC should be required to bargain with EAA to the extent of its authority and obligations, notwithstanding any connection with MTA. Such a bargaining obligation renders PUC competing jurisdiction moot because it focuses entirely on PTSC's obligation, EAA concludes.

PTSC argues that the MTA and PTSC are so substantially interrelated that they should be regarded as a single employer for jurisdictional purposes, and therefore covered by the same labor law. Specifically, PTSC contends that PTSC's operations are significantly interrelated with those of the MTA; management of MTA and PTSC are integrated; control of labor relations for MTA and PTSC is centralized; and there is common financial control over the MTA and PTSC.

The Board has adopted the following test to determine joint employer status: "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment -- they constitute joint employers." (United Public Employees v. Public Employment Relations Board (1989) 213 Cal.App.3d 1119, 1128 [262 Cal.Rptr. 158]; NLRB v. Browning-Ferris Industries Inc. (3rd Cir. 1982) 691 F.2d 1117, 1124

[111 LRRM 2748] (Browning-Ferris).) "[A] finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be' - - independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship." (Browning-Ferris.)

On the other hand, single employer status exists where two nominally separate entities are actually part of a single integrated enterprise so that there is in fact only a single employer. The central inquiry in determining single employer status is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise. In answering this question, courts look to four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. (Browning-Ferris at p. 1516; Turlock School District (1977) EERB[12] Order No. Ad. -18, pp. 15-16 (Turlock).) While no single factor is controlling and all need not be present (NLRB v. O'Neill (9th Cir. 1992) 965 F.2d 1522, 1529 [140 LRRM 2557]), the first three ordinarily are more critical than the fourth. (See Parklane Hosiery and Retail Store Employees Local Union 1001 (1973) 203 NLRB 597, 612 [83 LRRM 1630].)

Notwithstanding this precedent, the joint and single employer issues presented here are affected by the fact that PTSC and MTA are covered by different collective bargaining statutes, thus raising questions about PERB's jurisdiction over a joint or single employer which includes employees or an employer beyond PERB jurisdiction. Although PERB case law in this area is not well developed, the Board has on occasion dealt with situations that involved interrelated operations between an entity that fell under PERB jurisdiction and one that did not. In these cases, the Board has approached the issue from two angles. It has said it would not

[12] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

take jurisdiction over entities that are not covered by the statutes it administers, but it has also applied the legal tests to determine joint or single employer status.

In Fresno Unified School District and Abbey Transportation System, Inc. (1979) PERB Decision No. 82 (Fresno) the Board held that Abbey Transportation System, a privately held corporation which relied on the district for nearly half of its business, did not fall under the definition of an employer in the Educational Employment Relations Act (EERA) and therefore was not a public school employer under PERB jurisdiction. The Board went on, however, to determine that the district and Abbey did not constitute a single employer under the Browning-Ferris test. (Fresno at pp. 5-6.) In San Diego Community College District (1988) PERB Decision No. 662, rev. on other grounds San Diego Adult Educators v. Public Employment Relations Board (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53] (San Diego), the Board determined that the San Diego Community College District Foundation, Inc., a non-profit corporation, was not itself an EERA-covered employer. However, the Board again determined it was not a joint or single employer with the district under the Browning-Ferris test. And in The Regents of the University of California (1999) PERB Order No. Ad-293-H (Regents), the Board found that a union did not state a prima facie case that the University of California and University of California (San Francisco)/Stanford Health Care (USHC), a private nonprofit corporation, were joint or single employers. The Board reiterated that it would not exercise jurisdiction over employers that do not fall under its statutory jurisdiction. Also in Regents, PERB observed in dictum that the NLRB has held that it is unnecessary to determine joint employer status when two entities have interrelated operations and the labor board has no jurisdiction over one of the entities.

In a leading NLRB case, a private employer's operations were interrelated with those of a governmental entity exempt from NLRB jurisdiction. Declining to apply a joint employer

analysis as part of its holding that it had jurisdiction over the private employer, the NLRB stated:

> [W]e will not employ a joint employer analysis to determine jurisdiction. Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms of employment within their control. . . . [Management Training Corporation (1995) 317 NLRB 1355, 1358, fn. 16 [149 LRRM 1313]; see also NLRB v. Young Women's Christian Association of Metropolitan St. Louis (8th Cir. 1999) 192 F.3d 1111, 1116 [162 LRRM 2268].]

Under the approach adopted by the NLRB, an employer under its jurisdiction is obligated to bargain only to the extent of its authority.

> In retrospect, we think the emphasis in [prior decisions] on control of economic terms and conditions was an oversimplification of the bargaining process. While economic terms are certainly important aspects of the employment relationship, they are not the only subject sought to be negotiated at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues. [Management Training Corporation at p. 1357.]

The same reasoning applies here.

PTSC and its employees are covered by the MMBA for labor relations purposes, while MTA and its employees are covered by the PUC. It follows that PERB may exercise jurisdiction over PTSC and its employees, while it may not exercise jurisdiction over MTA and its employees. (See Fresno; San Diego; Regents.) This is true even if PTSC and MTA

operations are interrelated in certain respects. Under the reasoning of Management Training Corporation, I conclude that joint employer status is irrelevant when one of the entities is under PERB jurisdiction and the other is not. A finding that PTSC and MTA are joint employers would not alter PTSC's obligation under the MMBA. Nor would such a finding effect MTA in any way, for PERB has no jurisdiction over MTA. The same holds true, even if MTA and PTSC are interrelated in certain respects and arguably would constitute a single employer under the Browning-Ferris test. As an independent public corporation, PTSC has a duty under the MMBA to negotiate regarding matters within its control, regardless of its interrelation with MTA. Therefore, it is unnecessary to reach the joint and single employer issues here.[13]

It is noteworthy that meaningful bargaining can take place between EAA and the PTSC in the event EAA is certified as an exclusive representative in an appropriate unit. PTSC has the authority to enter into contracts to provide services, such as the agreement with SCRRA. It has control over its bank accounts. It is authorized to borrow money and make investments. It has the authority to provide retirement and other benefits. It has the authority to increase or decrease the salaries of its employees within the framework of its budget, or negotiate with MTA for different salaries. It has the authority to hire and terminate employees, and make personnel decisions that apply to its employees. And it has the authority to adopt employment-related policies covering topics such as evaluations, transfers, and leaves.

The extent to which PTSC and MTA have shared personnel does not alter the conclusion that PTSC is an independent public agency under MMBA with the authority to negotiate. The dual roles played by management officials and executives below the board

[13] With respect to PTSC's single employer argument, the Silver decision again is applicable, for it supports a finding that PTSC is an independent public corporation rather than an organizational unit of MTA. And consistent with Silver, I have found that PTSC is an independent public agency, not an organizational unit.

level may indicate that PTSC and MTA have decided to share certain personnel, but this does not detract from the independent nature of the respective boards and the authority vested in PTSC by its articles of incorporation, bylaws and acquisition agreement. Indeed, as Stamm testified, the PTSC board owes a fiduciary duty to the corporation separate from the duty owed to MTA.

Nor does Diederichs' role in negotiating contracts covering PTSC employees alter the decision reached here. Granted, in the past, she received her direction from MTA and the contracts were approved by MTA. However, it appears that this approach was one of choice by PTSC and MTA. Diederich's role in the negotiations and the ultimate approval of the agreements apparently was based on the assumption that PTSC is an organizational unit under PUC section 130051.11 and that MTA had no authority to delegate approval of the agreements under PUC section 130051.12(e). As I have found earlier, PTSC is not an organizational unit; it is a public corporation and nothing precludes it from entering into negotiations regarding topics within its authority.

Similar reasoning applies to Harper's role in administering MTA policies to PTSC employees. After its formation, PTSC adopted certain MTA policies for continuity in the workplace. The fact that Harper administered these policies is little more than another example of shared personnel. More importantly, PTSC has the authority under the acquisition agreement to rescind the policies and adopt others in their place, thus suggesting further control over employment matters.

Finally, it's true that PTSC's budget is part of the aggregate budget adopted by MTA, and 99 percent of its budget comes from MTA. However, PTSC also receives income from its contract with SCRRA and it has the authority to enter into similar contracts for additional funding. Moreover, as the NLRB has pointed out, the mere fact that an employer does not

have control over its budget is not fatal to its duty to bargain. (Management Training Corporation at p. 1357.)

Therefore, I conclude that it is unnecessary to determine if PTSC and MTA are joint or single employers. PTSC is covered by the MMBA and is obligated to negotiate with EAA to the extent of its authority if EAA becomes the exclusive representative in an appropriate unit.

MMBA Violations

EAA first argues that PTSC has unlawfully refused (1) to recognize it as the employee representative of employees in the planning and development department, and (2) to adopt reasonable rules and regulations that would establish a procedure for recognizing employee organizations. Based on these refusals, EAA contends, PTSC has violated its obligations under the MMBA and PERB regulations. EAA also asserts that PTSC acted in bad faith in the manner in which it responded to the request for recognition.

PTSC argues that, assuming the MMBA applies here, it has not violated the Act or PERB regulations. First, PTSC contends it has no statutory obligation to promulgate rules regarding recognition because section 3507 is not mandatory; it provides only that a public agency *may* adopt reasonable rules and regulations for recognition of employee organizations. Even if an obligation to promulgate rules and regulations does exist, PTSC continues, there is no evidence that EAA made an appropriate request for adoption of such rules or that PTSC refused any request. PTSC argues, moreover, that it is not required to voluntarily recognize EAA. In June 2001, PTSC points out, section 3507 provided for recognition only "pursuant to a vote" of employees in an appropriate unit, and neither the MMBA or PERB regulations

required voluntary recognition. Lastly, PTSC argues, the evidence shows that its response to EAA's request for recognition was reasonable.[17]

The first allegation in the complaint is that PTSC refused to voluntarily recognize EAA as the exclusive representative of a unit of PTSC employees. Section 3507 provides that a public agency may adopt rules and regulations after consultation with employee organizations for the administration of employer-employee relations. Section 3507(d) provides that such rules may include provisions for exclusive recognition of employee organizations "pursuant to a vote of the employees." The MMBA also provides that a "public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire representation." (Sec. 3507.1(c).) However, section 3507.1(c) is a recent amendment to the MMBA and did not become effective until January 1, 2002.[18] EAA filed its request for exclusive recognition under the MMBA in June 2001, prior to the effective date of section 3507.1(c). Therefore, PTSC had no obligation under the MMBA to recognize EAA without an election at the time of the events at issue here. The allegation that PTSC unlawfully refused to voluntarily recognize EAA is hereby dismissed.

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[17] PTSC argues that its response to EAA was reasonable in that it was based on legitimate concerns consistent with unit determinations under both the MMBA and the PUC. These concerns may be summarized as follows: (a) inclusion of managerial and/or supervisory employees in the EAA unit; (b) inclusion of classes in the unit that cross departmental lines; (c) the lack of community of interest in the unit; (d) failure to include all professional and administrative classes in the unit; and (e) inclusion of classes the unit that both MTA and PTSC employees occupy. Although some evidence was received regarding unit issues, as noted earlier, these issues were not litigated in this proceeding. Therefore, these matters will not be addressed here. For purposes of this proceeding, suffice it to say that PTSC had reasonable concerns about the unit requested by EAA.

[18] The Senate passed AB 1281, which included the voluntary recognition provision in section 3507.1(c), on September 10, 2001, and by the Assembly on September 12, 2001. The Governor signed the bill into law on October 12, 2001. The law became effective on January 1, 2002.

The remaining allegation in the complaint is that PTSC unlawfully refused to promulgate rules and regulations regarding recognition of employee organizations. PTSC argues that it has no mandatory obligation under MMBA to promulgate such rules. PTSC asserts that its only obligation was to meet and confer with EAA before making a final determination regarding the scope of an appropriate unit, it satisfied its obligation in this regard, and therefore no violation of the MMBA has occurred.

The purpose of the MMBA is to provide uniform rules which encourage communication between public agencies and employee organizations in a manner that fosters a stable system of collective bargaining.

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. [Sec. 3500(a).]

The California Supreme Court has recognized this purpose repeatedly. (See e.g., Santa Clara County Counsel Attorneys Association v. Woodside (1994) 7 Cal.4th 525, 537 [28 Cal.Rptr.2d

617]; Building Material and Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 657 [224 Cal.Rptr. 688].)

Three provisions of the MMBA are relevant here. Section 3507 provides for adoption of rules and regulations covering a number of topics. It states:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

Section 3507(d) states that such rules and regulations may include provisions for

> (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502

And section 3507 provides:

> No public agency shall unreasonably withhold recognition of employee organizations.

PTSC argues that the use of the word "may" in section 3507 renders any obligation it has to promulgate rules dealing with exclusive recognition permissive. However, the permissive language in section 3507 cannot be read in a vacuum. "The words of a statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (Dyna-Med, Inc. v. Fair Employment and Housing Commission (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67].)

I am aware of no case law that squarely addresses the failure of a public agency to adopt any rules and regulations for recognition. However, at least one commentator has observed:

> A purely permissive reading of section 3507 would produce the anomalous result that an agency could implement unreasonable

> policies without consultation so long as it did so on an ad hoc basis. Moreover, the absence of formal rules tends to frustrate the legislative policy, expressed in the 1970 amendment that employee organizations not be denied recognition unreasonably. [Citation.] In the absence of rules, an employee organization cannot know clearly what it must do in order to obtain recognition, and the courts are likely to have difficulty in measuring the agency's acts against the legislative standard. Thus, the potential for arbitrary or discriminatory action, with concomitant chilling effects upon employee organizations, would be enhanced. [Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings Law Journal 719, 737.]

Precedent in analogous situations is in accord with Grodin's view. In cases where local rules are challenged as unreasonable, courts have measured the reasonableness of the contested rules against the provisions of the MMBA itself to resolve disputes. In Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289 [101 Cal.Rptr. 78] (City of Monrovia), a municipal employee association represented city employees under a local ordinance providing that the association is the only organized group which can speak on behalf of city employees. A union sought recognition for a unit of fire fighters. Without formally recognizing the union, the city permitted it to participate in salary and wage discussions. Unsatisfied, the union filed a petition for writ of mandate seeking recognition for employees in the fire department for the purpose of meeting and conferring. Ruling in favor of the union, the court observed that the Legislature intended to set forth "reasonable, proper and necessary principles which agencies must follow in their rules and regulations for administering their employer-employee relations, including therein specific provisions for the right of public employees, as individuals and as members of employee organizations of their own choice to negotiate on equal footing." (Id. at p. 295.) The court observed that the Legislature did not intend to preempt the field of employer-employee relations

> . . . . except where public agencies do not provide reasonable "methods of administering employer-employee relations through .

> . . uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Section 3500); and that if the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, duties and obligations of the employer, the employee, and the employee organization, are supplied by appropriate provisions of the act. (Id.)

Other courts, including the California Supreme Court, have long adopted this reasoning. (See International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal.3d 191, 198 [193 Cal.Rptr. 518] (City of Gridley) and cases cited therein; Service Employees International Union v. Superior Court (2001) 89 Cal.App.4th 1390 [108 Cal.Rptr.2d 505].)

Granted, a public agency's obligation to adopt rules under section 3507 is permissive in a general sense. However, as noted above, this provision cannot be read in a vacuum. Like the adoption of rules which are unreasonable and do not meet the standards established by the Legislature, it follows that failure to adopt any rules may be unlawful when it has the effect of interfering with protected rights and thus undermines standards established by the Legislature.

It is self-evident that, absent specific rules providing a framework for exclusive recognition of employee organizations there would be no formal procedure for an employee organization to request and achieve such recognition. As Professor Grodin points out, "an employee organization cannot know clearly what it must do in order to obtain recognition, and the courts are likely to have difficulty in measuring the agency's acts against the legislative standard." Indeed, the recognition process under other PERB-administered statutes operates under a detailed set of regulations precisely to avoid the difficulty cited by Grodin.[19]

[19] See e.g., PERB Regulation 33015 et seq. (EERA); PERB Regulation 40130 et seq. (Ralph C. Dills Act); and PERB Regulation 51010 et seq. (Higher Education Employer-Employee Relations Act.)

In this case, a total absence of local rules for recognition unreasonably interfered with the representation process and is at odds with a key purpose of the MMBA, which is to provide a "uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies." (Sec. 3500.) Aquino submitted a request for recognition and asked for a card check to be administered by SMCS. Levy followed with a similar request and expressly asked for the local ordinance "for EAA to determine the appropriate methodology for proceeding before PERB." Absent a local rule, EAA could not have known clearly what it needed to do to obtain recognition. There was no provision for a card check or an election, nor was there any concrete basis for EAA to proceed.[20]

The result was foreseeable. In the midst of an organizing drive, when timing frequently is critical, the drive stalled. No basis existed to resolve disputes associated with EAA's request, frustrating the overall purpose of the MMBA. The absence of local rules, in turn, violated specific provisions of the MMBA. It interfered with the right of employee organizations to represent their members in their employment relations with public agencies. (Sec. 3503.) It interfered with the right of employees to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on

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[20] PERB adjudicates representation and recognition disputes under the MMBA by way of a petition for Board review. PERB Regulation 60000(a) states in relevant part.

> Any party to a determination by a public agency concerning unit determination, representation, recognition or elections may file a petition requesting the Board review the determination. Such a petition may only be filed within 30 days following exhaustion of administrative remedies available under the applicable local rules. A challenge to the validity of a local rule may not be filed under this section and may only be filed as an unfair practice charge pursuant to Section 32602 of these regulations.

It is not even clear if PTSC's response was a "determination" subject to PERB review.

matters of employer-employee relations. (Sec. 3502.) And it unreasonably interfered with the recognition process. (Sec. 3507.) As Professor Grodin noted, the lack of local rules opens the door to "arbitrary or discriminatory action, with concomitant chilling effects upon employee organizations." (Grodin at p. 737.) Therefore, I conclude that the absence of local rules to process EAA's request violates the Act and runs afoul of the standards established by the Legislature. (City of Monrovia; City of Gridley.)

PTSC argues that Covina-Azusa Fire Fighters Union v. City of Azusa (1978) 81 Cal.App.3d 48 [146 Cal.Rptr. 155] (City of Azusa) supports its claim that it has no obligation to adopt rules regarding representation. In that case, a union sought recognition to represent a unit of fire fighters, fire engineers and fire captains. The union alleged that the city had failed to follow the requirements of the MMBA when it unilaterally excluded fire captains from the unit as managers. The court agreed and held that a public agency is required to meet and consult with an employee organization conceded to represent the agency's employees before making a final determination as to the scope of the appropriate unit. PTSC points out that the court made no finding that the city was required to adopt rules under section 3507, even though it was clear that no such rules had been adopted. PTSC argues that "the implicit" finding in City of Azusa, i.e., that a public agency need only meet and consult with an employee organization before making a final determination as to the scope of the bargaining unit, applies here and relieves it of any obligation to adopt rules regarding recognition.

I find that the holding in City of Azusa is limited and adds little to the resolution of this dispute. The union in that case argued only that "a local agency must meet and consult in good faith with representatives of an employee organization actually conceded to represent employees, prior to making a determination as to what is an appropriate bargaining unit, whether or not the employee organization has officially become a 'recognized' employee

organization." (City of Azusa at p. 58.) The court found that such a duty existed, and it was clear that local rules for recognition did not exist. However, the court was not presented with the arguably related but somewhat different question that is at issue here; that is, whether a public agency has a duty to promulgate local rules dealing with exclusive recognition. I do not construe City of Azusa as resolving this question, "implicitly" or otherwise. Therefore, I conclude that PTSC's reliance on that case is misplaced.

Even if a duty exists to promulgate rules and regulations regarding representation and recognition, PTSC argues further, no evidence was offered to support a claim that EAA requested that such rules be adopted or that PTSC refused. I disagree.

Aquino submitted EAA's first request for recognition under the MMBA on June 27, 2001. In addition to requesting recognition, the letter disputed PTSC's position with respect to the appropriateness of the unit. It agreed to a card check under the auspices of the SMCS in the event PTSC doubted the showing of support. And it indicated EAA's willingness to petition the "appropriate forum" for a representation election. If Aquino's letter didn't identify the need for a uniform set of rules to process the request, Levy's July 12, 2001, letter did.

The July 12 letter again demanded recognition. Levy wrote:

> PERB has now adopted regulations governing the processing or demands for recognition under MMB. Those regulations provide for the filing of a petition for an election or, where the local entity has adopted its own recognition/certification ordinance, a Petition for Review.
>
> Because PTSC has not responded to [Aquino's] June 25 demand, EAA is unaware as to whether PTSC has adopted its own ordinance with respect to recognition/certification proceedings. As such, and in order for EAA to determine the appropriate methodology of proceeding before PERB, demand is hereby made that your office provide the undersigned with either (1) a copy of the recognition/certification ordinance adopted by PTSC or (2) a statement that PTSC has no such ordinance and has adopted no procedures with respect to recognition/certification

> demands by labor organizations. Please provide such information by July 18, 2001.

It is difficult to construe Levy's letter as anything but a request for copies of local rules governing recognition or adoption of such rules.

In any event, the request was futile. It cannot be overlooked that, on July 30, 2001, Diederichs responded to Aquino's letter, indicating that the MMBA was not applicable to EAA's request for recognition and PTSC was governed by the PUC, not the MMBA. Stamm reiterated the PTSC position in an August 6 letter to Levy. EAA responded with this unfair practice charge on September 5. Even if EAA had failed to formally request that PTSC adopt rules dealing with recognition, the failure would not be fatal in the face of PTSC's clear assertion that MMBA did not apply.

In a lengthy argument, PTSC contends its response to EAA's request for recognition was reasonable. PTSC argues that Diederichs responded in a reasonable and timely manner, explaining its legal position with respect to MMBA application and its view that the unit was inappropriate. Even after the unfair practice was filed, PTSC points out, the parties met and PTSC provided lists of employee classifications in connection with a discussion of its claim that the unit was inappropriate.

It is true that PTSC engaged in various unit and other discussions with EAA, most of which took place after the unfair practice charge was filed. It is also true that PTSC may have had good faith doubts about the appropriateness of the unit requested by EAA, and even expressed a desire at one of the meetings to have an election. However, in view of the unwavering position taken by Diederichs and Stamm that the MMBA does not apply to PTSC employees or EAA's request, these discussions were an exercise in futility. It is unnecessary at this stage to address in detail the various unit issues raised by PTSC. It is enough to say, as PTSC does in its brief, that the MMBA and the NLRA, the law covering MTA employees,

treat supervisors and managers differently. Absent agreement by the parties on the fundamental question of which law applied, discussions about the appropriateness of the requested unit seem useless. The first step in any meaningful discussion about the unit depended on agreement about which law applied, and the parties were far apart on that issue. In these circumstances, PTSC's claim that its conduct was reasonable does not provide a valid defense.

REMEDY

As a remedy, EAA requests that PTSC be required to immediately recognize it as an employee representative, adopt recognition rules and regulations under PERB supervision and time schedule, hold exclusive recognition elections, and for any additional relief that is deemed appropriate. For its part, PTSC requests the complaint be dismissed for lack of jurisdiction under the MMBA. Even if the MMBA applies here, PTSC contends in the alternative, the evidence falls short of establishing an unfair practice. PTSC contends, moreover, that EAA has provided no evidence that it represents PTSC employees in the countywide planning and development department, nor has it proven that a countywide planning and development department unit is appropriate. Accordingly, PTSC concludes, if the MMBA applies a unit determination hearing should occur before the EAA is eligible for recognition as the employee representative of "PTSC (and/or MTA)."

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to:

> . . . take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It has been found that PTSC is a public agency under section 3501(c), and PTSC has unlawfully refused to acknowledge that the MMBA applies to PTSC and its employees. It also has been found that PTSC refused to adopt reasonable rules and regulations relating to

recognition of employee organizations, in violation of section 3507 and PERB Regulation 32603(g). By this conduct, PTSC interfered with EAA's right to represent its members, in violation of section 3503 and PERB Regulation 32603(b). The same conduct interfered with employees right to form, join, and participate in the activities of employee organizations of choice for the purpose of representation on all matters of employer-employee relations, in violation of sections 3502 and 3506, and PERB Regulation 32603(a). It is, therefore, appropriate to order PTSC to cease and desist from such conduct.

It is also appropriate to order PTSC to take the following affirmative actions. Within thirty workdays from service of a final decision in this matter, PTSC is directed to begin the process of adopting reasonable rules and regulations relating to recognition of employee organizations. Adoption of such rules and regulations shall be in accordance with the requirements of section 3507. PTSC is further ordered to process any request for recognition submitted by EAA in accordance with such rules and regulations and the MMBA.

It is not appropriate to direct PTSC to recognize EAA and conduct an election. EAA's showing of support in an appropriate unit has not been established. The outstanding unit issues were not litigated in this proceeding, and thus an appropriate unit has not been established. Under the legislative scheme embodied in the MMBA and PERB regulations, recognition and election matters are to be resolved in the first instance pursuant to reasonable rules adopted by the public agency, unless the public agency or the parties jointly agree to be bound by PERB's regulations. (See PERB Reg. 60070 et seq.) The same local governance reasoning applies to the unit questions. "Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter." (Sec. 3507.1.) Challenges to local rules may be pursued as an unfair practice (PERB Reg. 32602) and determinations under such rules may be contested as a petition for

board review. (PERB Reg. 60000.) Therefore, an order directing PTSC to recognize EAA and conduct an election is premature.

It is further appropriate that PTSC be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of PTSC, will provide employees with notice that PTSC has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the MMBA that employees are informed of the resolution of this controversy and PTSC's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record herein, it has been found that the Public Transportation Services Corporation (PTSC) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3502, 3503, 3506 and 3507 and Public Employment Relations Board (PERB or Board) Regulations 32603(a), (b) and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.) when it refused to acknowledge MMBA and PERB jurisdiction, and failed to adopt reasonable rules and regulations relating to recognition of employee organizations. By this conduct, PTSC interfered with the right of PTSC employees to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations, and interfered with the right of the Engineers and Architects Association (EAA) to represent its members in their employment relations with a public agency. All other allegations are hereby dismissed.

Pursuant to Government Code section 3509, it is hereby ORDERED that PTSC, its governing board and its representations shall:

A. CEASE AND DESIST FROM:

1. Refusing to acknowledge the MMBA as applying to PTSC and its employees.

2. Refusing to adopt reasonable rules and regulations relating to recognition of employee organizations.

3. Interfering with the right of PTSC employees to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations; and

4. Interfering with the right of EAA to represent employees in their employment relations with a public agency.

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

1. Within thirty (30) workdays from service of a final decision in this matter, begin the process of adopting reasonable rules and regulations relating to recognition of employee organizations. Adoption of such rules and regulations shall be conducted in accordance with Government Code section 3507.

2. Process any request for recognition by EAA pursuant to such rules and regulations.

3. Within (10) workdays of service of a final decision in this matter, post at all work locations at PTSC, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of PTSC, indicating that PTSC will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs. tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs. tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Cal. Code Regs. tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Fred D'Orazio

FRED D'ORAZIO
Administrative Law Judge