STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BASSETT UNIFIED SCHOOL DISTRICT, Employer, and BASSETT FEDERATION OF TEACHERS, AFT LOCAL 727, AFL-CIO, Employee Organization, APPELLANT, and BASSETT TEACHERS ASSOCIATION, Employee Organization.	Case No. LA-R-587 LA-D-42 PERB Order No. Ad-77 ADMINISTRATIVE APPEAL October 9, 1979

Appearances: Richard N. Fisher, Attorney (O'Melveny & Myers) for Bassett Unified School District; Charles R. Gustafson, Attorney for Bassett Teachers Association; and Lawrence Rosenzweig, Attorney (Levy & Goldman) for Bassett Federation of Teachers.

Before: Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This matter is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions by the Bassett Federation of Teachers, AFT Local 727, AFL-CIO (hereafter Federation) to an order of the regional director dismissing a decertification petition filed by the Federation. The exceptions are directed to the finding that certain agreements entered into by the Bassett Unified School District (hereafter District) and the Bassett Teachers Association (hereafter

Association) serve as a "contract bar" to conducting a decertification election.[1] The Federation contends that an earlier agreement between the same parties had not been an effective contract bar because it gave the District unilateral power to terminate the agreement after one year for financial reasons--with ultimate control over the duration of the negotiating relationship beyond the first year--and that subsequent agreements did not remedy the previous defect because they incorporated the provisions of the earlier agreement.

The Board has considered the Federation's exceptions, the record, and the attached decision of the hearing officer on behalf of the regional director. The Board agrees with the hearing officer's statement of facts that form the background

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[1]Government Code section 3544.7(b)(1), the provision of the Educational Employment Relations Act relevant to this proceeding, provides:

> (b) No election shall be held and the petition shall be dismissed whenever:
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> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration of the agreement.

to this controversy.[2] The Board also agrees with the conclusion reached by the hearing officer that the decertification petition should be dismissed, but for the reasons set forth below.

DISCUSSION

The parties and the hearing officer have advanced different interpretations of the various agreements and addenda[3] entered into by the District and the Association.

First, the Federation urges the Board to adopt the analysis of Bassett Unified School District (1/30/79) PERB Order No. Ad-57 (hereafter Bassett I) that a decertification petition was not barred even though the collective agreement had an express three-year term. In that case the Board found that the duration of the agreement was not definite because the employer actually retained the sole authority to terminate the agreement at the end of the first year if the employer determined that inadequate funds existed to pay a scheduled salary increase. Upon reconsideration, however, Bassett I was vacated by Bassett Unified School District (3/23/79) PERB Order No. Ad-63, the

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[2]See pp. 3-9 of attached decision. One correction should be made: the AFT request for reconsideration discussed in the last paragraph on page 8 was actually filed on March 26, 1979. See Bassett Unified School District (7/3/79) PERB Order No. Ad-67.

[3]The relevant contract provisions and addenda are set forth in the hearing officer's decision.

Board ruling that the earlier decertification petition had not been timely filed and should have been dismissed for that reason, regardless of the contract bar issue raised by the language of the agreement. Although Bassett I has no precedential value, the Federation claims that the theory of the case is sound and should apply here. Therefore, says the Federation, no contract bar can be found because the original agreement terminated on June 30, 1978, and because the subsequent addendums suffer from incorporation of the prior termination clause, thereby precluding a finding of a new, lawful agreement for contract bar purposes.

A second interpretation has been suggested by the District and the Association. They argue that the original agreement between the parties--the subject of Bassett I--is still in effect and constitutes a bar to a decertification effort. They ask the Board to explicitly reject its earlier analysis, although Bassett I was vacated on other grounds upon reconsideration in Bassett II.

A third, alternative interpretation, also put forward by the District and the Association, is that the June 1978 addendum was either a permissible two-year extension of the earlier agreement or an entirely new two-year agreement largely

incorporating the prior provisions.[4] These parties claim that the June 1978 agreement--whether viewed as an extension or a new contract--properly modified the earlier agreement, correcting any defect of duration uncertainty described in Bassett I by eliminating the District's apparent option to terminate the contract for financial reasons, and by providing for salary re-openers through June 1980, the balance of the contract term.[5] (The District and the Association also argue that the March 1979 addendum providing for a retroactive salary increase and a future re-opener option, reaffirmed the June 1978 modification as well as the decision of the parties to be contractually obligated through June 1980.)

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[4]Thiokol Corporation (1974) 215 NLRB 908 [88 LRRM 1080]; Appalachian Shale Products Co. (1958) 121 NLRB 1160 [42 LRRM 1506].

[5]One sentence in the June, 1978 agreement merits special analysis:

> Accordingly, the Association has determined that it should not cause the agreement to be prematurely terminated pursuant to Article XVII-A, and that instead the contract should be continued in full force and effect, except as modified herein, for the balance of its stated term (until June 30, 1980). (Emphasis added).

Under the initial contract the District, not the Association, had the power to terminate the agreement. This reference to "Association" in the June document may be viewed as either a typographical error, or, if not, as evidence of intent to nullify the previous option clause by withdrawing the Association's consent to the provision.

Finally, the hearing officer adopted one of the latter arguments and concluded that the June 1978 addendum was a modification and continuation of the original agreement, establishing a two year contract bar to a rival's decertification effort.

The Board, however, need not determine which, if any, of these conflicting theories is correct. In Bassett II the Board impliedly recognized that the original agreement considered in Bassett I, whether or not a three year contract bar, did serve at least as a one year agreement between the parties. Based on this implied reasoning the Board dismissed the original Federation petition because it was not filed within the time period allowed in section 3544.7(b)(1): "...less than 120 days, but more than 90 days, prior to the expiration of the agreement." Similar reasoning is applicable in this case.

If the original agreement was a three-year bar, the Federation's decertification petition is patently untimely. If, however, the termination clause resulted in the termination of that agreement at the end of its first year, the June 1978 agreement would necessarily constitute a new contract--for one or for two years--incorporating provisions of the expired agreement. On the one hand, if the termination clause was not eliminated by the June agreement, then the new contract would serve as a one year bar under the reasoning in Bassett II. On the other hand, we could construe the June 1978 agreement as a

new two-year contract by resolving the apparent conflict between the addendum language and the original termination clause in favor of a finding that the later agreement was meant to supplant the original language. In either event, the decertification petition would have had to be filed within the window period of that successor agreement, namely several days prior to April 6, 1979, the date on which it was actually filed. See Bassett II, supra. Thus, under any possible interpretation advanced, the decertification petition was properly dismissed as having been untimely filed.[6]

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[6]The Federation has also taken exception to two aspects of the hearing officer's treatment of this case. First, the Federation claims that its decertification effort was improperly delayed because a hearing was held at which the sole content was parol evidence about contractual intent, evidence that the Federation argues was inadmissible. Even if the hearing was not necessary, an issue of administrative discretion we need not decide, the Federation can show no prejudice in light of our decision affirming dismissal of its petition. Second, the Federation takes exception to the hearing officer's preliminary reference to NLRB authority describing the contract bar rule as an attempt to balance the two goals of industrial stability and employee freedom of choice. (See p. 10 of attached decision.) The Federation asserts that this reference conflicts with prior PERB analysis. There is nothing, however, in the hearing officer's reference to NLRB objectives with which this Board disagrees.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, the order of the regional director dismissing the decertification petition filed by the Bassett Federation of Teachers is hereby affirmed.

By: Harry Gluck, Chairperson

Raymond J. Gonzales, Member

Barbara D. Moore, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

BASSETT UNIFIED SCHOOL DISTRICT, Employer, and BASSETT FEDERATION OF TEACHERS, AFT LOCAL 727, AFL-CIO, Employee Organization, and BASSETT TEACHERS ASSOCIATION, Employee Organization.	Case No. LA-R-587 LA-D-42 ORDER DISMISSING PETITION FOR DECERTIFICATION (7/20/79)

Appearances: Richard N. Fisher, Attorney (O'Melveny & Myers) for Bassett Unified School District; Charles R. Gustafson, Attorney for Bassett Teachers Association; and Lawrence Rosenzweig, Attorney (Levy & Goldman) for Bassett Federation of Teachers.

INTRODUCTION

On April 6, 1979, the Bassett Federation of Teachers, AFT Local 727, AFL-CIO (hereafter Federation) filed a decertification petition pursuant to section 3544.5(d) of the Educational Employment Relations Act (hereafter EERA)[1] for a

[1]The EERA is codified at Government Code section 3540 et seq. All section references are to the Government Code unless otherwise indicated. (Footnote 1 continued)

unit of all certificated employees of the Bassett Unified School District (hereafter District).

The Federation alleges that a written agreement signed between the District and the Bassett Teachers Association (hereafter Association) on December 1, 1977, expired by its terms on June 30, 1978 and consequently does not constitute a bar to its petition.[2]

(Footnote 1 continued)

> Sec. 3544.5(d) provides:
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> A petition may be filed with the Board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:
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> An employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, provided that such petition is supported by current dues deduction authorizations or other evidence such as notarized membership lists, cards, or petitions from 30 percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incumbent exclusive representative.

[2]Sec. 3544.7(b)(1) states that:

> No election shall be held and the petition shall be dismissed whenever:
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> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less then 120 days, but more than 90 days, prior to the expiration of the agreement.

The District and the Association deny the Federation's allegations and assert that there is a three-year agreement ending in 1980 which bars the Federation from filing a decertification petition. As a result, the regional director has instituted a hearing to ascertain the relevant facts.

The hearing in this matter was held on June 12, 19793 and post-hearing briefs were filed June 29, 1979.

ISSUE

1. Does the written agreement between the District and the Association constitute a bar to the Federation's decertification petition?

DISCUSSION

Background

The history of this case, both in terms of negotiations between the District and the Association and efforts by the

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[3]At the hearing, counsel for the Federation vigorously objected to the introduction of parol evidence regarding the nature of the negotiations leading to the adoption of the written agreement in issue. Counsel cited National Labor Relations Board (hereafter NLRB) precedent which indicated that the NLRB, in deciding a contract bar case would not consider parol evidence but rather would only look to the face of the contract. (See, An Outline of Law and Procedure in Representation Cases, Office of the General Counsel, National Labor Relations Board (1974) p. 84; Union Fish Co. (1965) 156 NLRB 187 [61 LRRM 1012]; Cooper Tire & Rubber Co. (1970) 181 NLRB 509 [73 LRRM 1402]).

The hearing officer overruled counsel's objections and permitted introduction of parol evidence. Upon reflection, it is determined that the authorities cited by counsel for the Federation are persuasive and that parol evidence should not have been admitted into evidence. As a consequence, parol evidence has not been considered in making this decision.

Federation to decertify the Association, is somewhat complicated but bears restatement for a thorough understanding of the case.

On February 2, 1977, the Association was certified as the exclusive representative for certificated employees in the District. Negotiations commenced thereafter and on December 1, 1977 a written agreement covering wages, hours and other terms and conditions of employment was signed by representatives of the District and the Association.

Article XXI of the agreement, "Duration and Negotiation Procedures," provides in pertinent part that the agreement "shall remain in full force and effect up to and including June 30, 1980, unless earlier terminated pursuant to the express terms of Article XVII - SALARIES . . ." Article XVII provides in pertinent part:

> 2. Effective July 1, 1978, and again on July 1, 1979, each step of the following salary schedules is to be increased 6% (rounded as before), subject to the following contingency: The District's salary obligation for each of the second and third years of this Agreement is contingent upon receipt of anticipated State income, reasonable staffing ratios and upon the availability of sufficient unallocated general funds. In this regard the District has committed itself to a diligent effort to make such funds available by appropriate cost-cutting efforts, so long as educational programs are not jeopardized. In the event that adequate unallocated funds are not deemed available for such increases, the District shall not be obligated hereunder, but the Agreement shall in such an event be terminated in its entirety as of June 30.

> If this occurs, the Association shall not be limited in its proposals to the amounts set forth hereinabove. The District shall by March 1 of each year hereunder give the Association tentative notice of its perceived ability to fund the above salary provision, and shall also give notice of its position as of June 1.
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> Any disputes with respect to whether there is an availability of funds for the second and third-year salary increases are to be handled pursuant to applicable statutory negotiation and, if necessary, impasse procedures rather than through the grievance procedures of Article VI, and disputes with respect to whether the District has made an adequate effort to make such funds available are to be handled pursuant to the consultation provisions of Article VIII rather than through the grievance procedures of Article VI.

On April 3, 1978, the Federation filed with the Los Angeles Regional Office of the Public Employment Relations Board (hereafter PERB) a decertification petition pursuant to section 3544.5(d)[4] for the unit represented by the Association.

Because the agreement between the District and the Association was currently in effect, the regional director solicited memoranda of points and authorities on the issue of whether a contract bar existed (which would prevent the processing of a decertification petition).

On June 16, 1978, the regional director issued her decision finding that a three-year contract bar existed and consequently, the Federation's petition was untimely and must be dismissed.

The regional director's decision was appealed by the Federation to the PERB.

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[4]See n. 1, supra.

While the Federation's appeal was pending, the Association and the District agreed on June 29, 1978 to an addendum to their agreement. This addendum, known as "June 1978 Addendum to 1977-80 Agreement" stated that the addendum was a "supplement and addendum to the agreement between the [District] and the [Association] dated December 1, 1977, and effective through June 30, 1980." With reference to the provisions of Article XVII requiring the District to pay a 6 percent salary increase lest the agreement terminate, the addendum provides:

> 3. The District and Association agree that the District would have been able to meet the tentative salary agreement for the 1978-79 school year as provided in Article XVII (Salaries) but for the legal and fiscal constraints posed by the passage of Proposition 13 and Senate Bill 154. Accordingly, the Association has determined that it should not cause the Agreement to be prematurely terminated pursuant to Article XVII-A, and that instead the contract should be continued in full force and effect, except as modified herein, for the balance of its stated term (until June 30, 1980). All 1977-78 salary schedules and rules (including step and column advancement rules) shall be continued in effect for the 1978-79 school year, unless amended pursuant to continuing negotiations between the District and Association as provided hereinafter.
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> 4. The District and the Association shall upon request meet and negotiate with respect to possible salary schedule increases for the 1978-79 school year and also with respect to salary levels for the 1979-80 school year. Such negotiations (and related consultation regarding non-negotiable budgetary matters) shall be pursued pursuant to the second paragraph of Article XVII, Section A-2.

On January 30, 1979, the PERB issued its decision[5] on the Federation's appeal. The PERB found that the agreement between the District and the Association stated to be for a three-year period expiring June 30, 1980, actually had expired on June 30, 1978. It therefore reversed the regional director's determination and ordered her to process the Federation's petition.

Both the District and the Association thereafter filed requests for reconsideration on February 15 and 16, respectively.

While the requests for reconsideration were pending before the PERB, the California Supreme Court declared the wage freeze imposed by Senate Bill 154 unconstitutional.[6] On March 6, 1979, the Association and the District signed the "March 1979 addendum to 1977-80 Agreement." This addendum again stated that it was a "supplement and addendum" to the agreement which terminates June 30, 1980. The addendum proceeds to note that: [T]he parties have met and negotiated with respect to salary matters pursuant to article XVII of the agreement and paragraph 4 of the June 1978 addendum to the agreement, and whereas the Legislature's salary freeze (SB 154, 2212) has recently been set aside by the Supreme Court . . ."

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[5]Bassett Unified School District (1/30/79) PERB Order No. AD-57.

[6]Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296.

the 6 percent salary increases provided in the appendices of the 1977-80 agreement are granted retroactive to July 1, 1978. The addendum also provides that upon request at any time after April 15, 1979, the District and the Association shall commence negotiations on a general across-the-board salary increase for the 1979-80 school year. Finally, the addendum states that "the duration and validity of the remainder of the Agreement shall not be affected by . . .[specified] . . . reopener negotiations, regardless of their eventual outcome."

In decisions issued the same day (March 23, 1979), the PERB granted the District's and the Association's requests for reconsideration[7] and vacated its order issued January 30, 1979 by holding that the Federation's petition had not been filed within the "window period" even assuming that the agreement expired June 30, 1978.[8]

On March 23, 1979, the Federation filed with the PERB a request for reconsideration of the PERB's March 23 decision. The executive assistant refused to accept the request on March 29 and on April 2, 1979, the Federation filed with the PERB an appeal of the executive assistant's refusal to accept the request for reconsideration.[9]

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[7]Bassett Unified School District (3/23/79) PERB Order No. AD-62.

[8]Bassett Unified School District (3/23/79) PERB Order No. AD-63.

[9]In a decision dated July 3, 1979 (Bassett Unified School District, PERB Order No. AD-67) the PERB reversed the executive assistant's refusal to accept the request for reconsideration but at the same time denied the request for reconsideration.

Finally, on April 6, 1979, the Federation filed the decertification petition which is the subject of this inquiry.

Analysis

Section 3544.7(b)(1) regulates the processing of a decertification petition filed during the term of a collective negotiating agreement. It provides that:

> No election shall be held and the petition shall be dismissed whenever:
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> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

In interpreting section 3544.7(b)(1), federal precedent under the National Labor Relations Act (hereafter NLRA)[10] offers significant guidance.

Although there is no parallel language under the NLRA establishing a "contract bar" the California Supreme Court has stated that where the NLRA does not contain specific wording comparable to the state act, if the rationale that generated the language "lies imbedded in the federal precedents under the NLRA" and "the federal decisions effectively reflect the same interests as those that prompted the inclusion of the [language in the EERA], [then] federal precedents provide reliable if analogous authority on the issue.[11] The statutory "contract

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[10]29 U.S.C. sec. 151 et seq.

[11]Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616, 617 [87 LRRM 2453]. See also, Faeth & McCarty v. Redlands Teachers Association (9/25/78) PERB Decision No. 72; Sweetwater Union High School District (11/23/76) EERB Decision No. 4.

bar" language contained in section 3544.7(b)(1) is quite similar to the contract bar doctrine developed by the NLRB. In addition, the PERB recognized in its March 23 Bassett decision[12] that NLRB precedent "serves to illustrate the legislative intent underlying section 3544.7(b)(1)." Consequently, it is appropriate to consider federal precedent in determining whether a contract bar exists.

The purpose of the contract bar doctrine is eloquently stated in the NLRB's An Outline of Law and Procedure in Representation Cases:

> The major objective of the Board's contract-bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of industrial stability and freedom of employees' choice. This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so.[13]

In order to bar a decertification petition, an agreement must be written, signed by authorized representatives of both parties, have a definite duration,[14] contain substantial terms and conditions of employment and cover all employees in

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[12]See n. 8, supra.

[13]See n. 3, supra at p. 74. See also Union Fish Co., supra, 156 NLRB at p. 191.

[14]Contracts of indefinite duration, such as contracts which lack termination or duration provisions, and contracts terminable at will are not considered a bar for any period. Pacific Coast Association of Pulp & Paper, (1958) 121 NLRB 990, 993 [42 LRRM 1477].

the appropriate unit. Appalachian Shale Products Co. (1958) 121 NLRB 1160 [42 LRRM 1506].

None of the parties apparently disputes the fact that the agreement in question meets the requirements of Appalachian Shale. The Federation, however, argues that pursuant to the express terms of Article XVII, section (A)(2), the agreement terminated June 30, 1978 (and that no new agreement has yet been reached). Both the District and the Association argue that Article XVII is in effect a mid-term modification provision and that the addenda of June 1978 and March 1979 ensured that the agreement would not terminate June 30, 1978 but rather would continue until June 30, 1980.

Whether or not Article XVII, as originally drafted, was a modification provision or a termination provision need not be answered. The crux of the case is the legal effect of the two addendums to the agreement.

The Federation's argument depends upon a finding that without strict compliance with the terms of Article XVII (which did not happen) the agreement must be considered to have terminated (and therefore does not constitute a bar to its decertification petition). However, the Federation's argument ignores the concept that parties to a contract may, by mutual assent, at any time during the term of a contract, modify or amend the provisions of their contract.[15] This is what

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[15]See Deluxe Metal Furniture Co. (1958) 121 NLRB 995, 1003 [42 LRRM 1470].

Premature extensions, however, will not bar a petition filed during the "window period." Cf. H.L. Klion, Inc. (1964) 148 NLRB 656, 660 [57 LRRM 1073].; Deluxe Metal Furniture Co., supra, 121 NLRB at 1001.

occurred in this case. In June of 1978, before the provisions of Article XVII would require termination if a 6 percent salary increase were not granted, the District and the Association expressly agreed to continue their agreement in effect until June 30, 1980, notwithstanding the fact that a 6 percent salary increase would not be granted. In addition, the District and the Association agreed to a reopener on salaries for the 1978-79 and 1979-80 school years, thereby amending the first paragraph of Article XVII, Section A-2 out of existence.

The March 1979 addendum, granting a 6 percent salary increase for the 1978-79 school year and providing for negotiations on "general across-the-board salary increases" reaffirms the June addendum's elimination of Article XVII's required 6 percent salary increase or else termination provision from the agreement and reiterates the parties' clear intent that regardless of the outcome of various reopener provisions, the agreement would continue in effect until June 30, 1980.

In summary, at the time the Federation filed its decertification petition on April 6, 1979, the agreement between the District and the Association was in effect, provided for a salary reopener, and clearly stated that the agreement would continue in effect until June 30, 1980. Under these circumstances, the language of the agreement provides a clear and predictable indication of the length of bargaining relationship between the District and the Association. The Federation's decertification petition filed April 6, 1979, is therefore dismissed as untimely.

ORDER

The decertification petition filed by the Bassett Federation of Teachers, AFT Local 727, AFL-CIO, on April 6, 1979, is hereby dismissed.

This Administrative Order shall become final on July 30, 1979 unless a party files a timely statement of exceptions and supporting brief within ten (10) calendar days following the date of service of this Administrative Order. Any statement of exceptions and supporting brief must be filed with the executive assistant to the Board at 923 12th Street, Suite 201, Sacramento, CA 95814, and served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself.

Dated: July 20, 1979

FRANCES A. KREILING
Regional Director

By _____
Bruce Barsook
Hearing Officer