STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFERSON SCHOOL DISTRICT, Employer, and JEFFERSON FEDERATION OF TEACHERS, LOCAL 3267, AFT, AFL-CIO, Employee Organization, and JEFFERSON CLASSROOM TEACHERS ASSOCIATION, Employee Organization, APPELLANT.	Case Nos. SF-D-12; SF-D-41 (SF-CO-6; SF-CE-33) PERB Order No. Ad-82 Administrative Appeal March 7, 1980

Appearances: William F. Kay, Attorney for Jefferson School District; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Jefferson Federation of Teachers, Local 3267 AFT, AFL-CIO; Duane B. Beeson, Attorney (Beeson, Tayer, Kovach & Silbert) for Jefferson Classroom Teachers Association.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

The Jefferson Classroom Teachers Association (hereafter JCTA) appeals from a determination by the San Francisco regional director of the Public Employment Relations Board (hereafter PERB or Board) to proceed to a decertification election in the Jefferson School District (hereafter District) notwithstanding the pendency of mutual refusal to negotiate

charges.[1] For the reasons discussed below, the Board itself affirms the regional director's decision.

FACTS

As detailed at greater length in Jefferson School District (6/29/79) PERB Decision No. Ad-66, JCTA has been the exclusive representative of the District's certificated personnel since June 21, 1976. Early in their relationship, each party filed an unfair practice charge alleging that the other had failed and refused to meet and negotiate in good faith.[2] These charges were heard and resolved by a PERB hearing officer who sustained charges that the District had refused to negotiate on

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[1]Board rule 32360 (8 Cal. Admin. Code sec. 32360) governs appeals from PERB administrative decisions.

[2]On November 2, 1976, the District alleged that JCTA had violated section 3543.6(c) of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq., hereafter EERA or Act), which makes it unlawful for an employee organization to:

> Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

On November 15, 1976, JCTA in turn alleged that the District had violated Government Code section 3543.5(c), which makes it unlawful for a public school employer to:

> Refuse or fail to meet and negotiate in good faith with an exclusive representative.

All section references herein are to the Government Code unless otherwise noted.

27 items.[3] The charges against JCTA were dismissed. Both parties have filed exceptions to the proposed decision.[4]

On September 23, 1977, the Jefferson Federation of Teachers, Local 3267, AFT, AFL-CIO (hereafter JFT) petitioned to decertify JCTA.[5] At that time, the PERB executive director stayed the decertification election pending resolution of the unfair practice charges.[6] On March 29, 1979, JFT

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[3]The Board notes that at least five of these items are in fact incorporated in some form into the agreement the parties reached. In addition, the parties reached agreement in some form on at least three items that the hearing officer ruled were not in scope. See note 11, infra.

[4]Notwithstanding these pending unfair charges, the parties entered into a written agreement on February 6, 1978, which expired on June 30, 1979.

[5]Decertification petitions are authorized by section 3544.5 which provides in pertinent part:

> 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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> . . . . . .
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> (d) An employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, . . .

[6]In 1977, the San Francisco regional director directed a decertification election but on appeal the executive director reversed this determination and stayed the election pending resolution of the unfair practice charges. The Board itself sustained the executive director's decision. (Jefferson School District (12/30/77) EERB Order No. Ad-22.)

filed a second petition to decertify JCTA. Apparently without conducting any new investigation to ascertain whether the unfair practice charges, if true, would preclude employees from voting freely, the San Francisco regional director perpetuated the stay of the decertification election until the resolution of the unfair practice charges. Upon appeal by JFT, the Board itself held that PERB's discretion to stay a decertification election when unfair practice charges are pending may not be exercised by rote. Accordingly the case was remanded to the regional director to conduct an investigation to determine whether the pending unfair charges should continue to block the decertification election. (Jefferson School District, supra, PERB Decision No. Ad-66.)

Based on the results of that investigation, the regional director determined that the pending unfair practice charges should no longer block the decertification election. Summarizing the reasons for his decision, the regional director said:

> In light of the nature of the violations involved; the fact that they took place over two years ago; that a contract was eventually signed; that no negotiations are presently underway for future contracts; that there are currently no local elected officials of the JCTA, and that the JCTA members themselves have indicated their desire to proceed to an election, I feel the charges will not have a tendency to interfere with the free choice of the employees in an election. Under these circumstances, the policies of the Act will be best effectuated by allowing the

> employees an opportunity to decide the question of representation, as is their desire. Continuing to block the election in this case would frustrate the fundamental right of employees to be represented by an employee organization of their choice.[7]

DISCUSSION

Board rule 33620 (8 Cal. Admin. Code sec. 33620) gives PERB the discretion to stay a decertification election pending the resolution of unfair practice charges relating to the unit in question.[8] This "blocking charge rule" serves to insulate an

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[7]Board rule 32350 (8 Cal. Admin. Code sec. 32350) requires administrative decisions to "contain a statement of the issues, fact, law or rationale used as the method or basis for reaching determination."

On the same day that a majority of the Board agreed to sign this Decision, we received word from the Executive Assistant to the Board that the San Francisco regional director had received two communications relating to this case. The San Francisco regional director simply transmitted the letters to the Board without comment and did not indicate they caused him to change his determination.

It is not uncommon for some amount of time to elapse between the time an administrative appeal is docketed and the time it is considered by the Board itself. Obviously circumstances may change during this time, yet this Board's task is to evaluate the field in light of the facts that existed when the disputed administrative determination was rendered. Unless subsequent events change the administrative determination itself, our role is simply to decide if the decision was reasonably supported by the facts at the time it was made. Accordingly the communications the San Francisco regional director received did not alter the Board's Decision herein. (See Board rule 31090 (8 Cal. Admin. Code sec. 31090.))

[8]Board rule 33620 (8 Cal. Admin. Code sec. 33620) provides:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the unit petitioned for. [Emphasis added.]

election from unfair practices that may influence its outcome. In this way employees are insured the right to freely select their own representative without risk that their votes may be influenced by or cast in response to an unfair practice.

In Jefferson School District, supra, PERB Decision No. AD-66, the Board stated that the blocking charge rule will not be exercised mechanically; each case must be evaluated on its own facts to determine whether staying the election will further or deter the purposes of the Act to enable public school employees to determine whether and by whom they desire to be represented in their employment relationship with the public school employer. Accordingly, in Jefferson, supra, the Board unanimously instructed the regional director to:

> . . . conduct an investigation to determine whether a danger remains that the District's alleged unlawful conduct will so affect the election process as to prevent the employees from freely selecting their exclusive representative. [Emphasis added.]

Because we directed a determination, not just an investigation, and then directed the regional director not to be mechanical, it is obvious that the Board intended the determination to be based on the judgment and discretion of the regional director as applied to the facts ascertained in the investigation. If we had not so intended, the remand for "determination" would have been meaningless. In other words, in Jefferson, supra, this Board expressly conferred on the San

Francisco regional director its power to make the discretionary determination of whether to perpetuate or dissolve the blocking charge rule in this case.[9] We directed that this discretion not be exercised by rote, but that it be based on facts ascertained in an investigation. We indicated that the election should continue to be stayed only if the facts ascertained in the regional director's investigation revealed that:

> . . . the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents. [Jefferson School District, supra, PERB Decision No. Ad-66 at pages 5-6.]

In the instant appeal, JCTA does not argue that no investigation was undertaken, nor that the San Francisco

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[9]Section 3541.3(k) authorizes the Board to delegate certain of its powers.

The delegation of the Board's power to stay decertification elections in Jefferson, supra, is consistent with the policy expressed in Board Resolution No. 14 (4/4/78) which provides in pertinent part:

> Resolved that:
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> (1) It shall be the policy of regional staff to evaluate each representation case and decertification case where pending unfair practice charges have been filed with respect to the negotiating unit in question. In each case where there is a pending unfair practice charge, a determination shall be made on whether or not to conduct the election, stay the election or impound the ballots.

regional director's investigation was superficial. It does not quarrel with the facts the investigation revealed, nor argue that important undisclosed facts compel a different determination. Instead JCTA attacks the decision itself. It disagrees with the regional director's interpretation, urging that the facts mandate the opposite conclusion. Since there is no controversy concerning the investigation and the facts it revealed, the only question presented by this appeal is when and on what basis the Board will overturn a determination to dissolve a decertification election block and substitute its own judgment for that of the regional director.

Because Jefferson, supra, PERB Decision No. Ad-66 delegated to the San Francisco regional director the Board's power to make a discretionary decision to stay or conduct a decertification election, we believe that the appropriate inquiry upon appeal is whether that discretion has been abused.[10]

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[10]Like PERB, the National Labor Relations Board (hereafter NLRB) has delegated its powers over representation matters to the regional directors, whose decisions may be reviewed only for certain enumerated "compelling reasons":

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
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> (2) That the regional director's decision on a substantial factual issue is clearly

This standard of review is consonant with that applied in Oakdale Union Elementary School District (9/13/78) PERB Decision No. Ad-46, in which in reviewing the Sacramento regional director's decision to deny a request for post-factfinding mediation between the Oakdale Union Elementary Teachers Association and the Oakdale Union Elementary School District a unanimous Board said:

> EERA does not mandate post-factfinding mediation; it merely authorizes its occurrence. . . .
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> . . . . . .

> erroneous on the record and such error prejudicially affects the rights of a party.
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> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
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> (4) That there are compelling reasons for reconsideration of an important Board rule or policy. (NLRB rule 102.67(c) (29 CFR sec. 102.67(c)(1975)).)

In our view, such a rule serves to uphold the regional director's determinations except when there is a strong reason not to do so.

In a similar manner, California appellate courts will not disturb trial court findings that are reasonably based on the facts of the case, whether or not the reviewing court would have reached the same conclusion. (See, e.g. Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 527, and cases cited therein. See also, e.g., In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 114; Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal.App.3d 1054, 1064; In re Marriage of Carter (1971) 19 Cal.App.3d 479, 494.)

> A determination of whether further mediation would be productive requires knowledge of the negotiating history of the parties and their current relationship. This knowledge is best available to the regional directors and their staffs, who are in direct contact with both the parties and involved neutrals. The Board therefore finds that the decision as to whether post-factfinding mediation would be beneficial to the parties in helping them reach agreement is best left to the discretion of the regional director after satisfactory investigation.
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> In this case, the regional office staff made a careful investigation, discussing the circumstances with both the parties and the neutrals. From the discussions, the regional director decided that further mediation would neither help the parties' relationship nor further their reaching agreement. He therefore denied post-factfinding mediation. The Board affirms that decision.
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> . . . . . .
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> The real issue is whether such mediation will help the parties reach agreement. The regional director determined that it would not, and the Board affirms this determination as within his discretion. [Id. at 4-5, emphasis added.]

In Oakdale, supra, PERB Decision No. Ad-46 we found that as long as the regional director conducts a satisfactory investigation and adduces facts that reasonably support her or his decision, the Board will not overturn the regional director's decision. This is true whether or not we would have made the same determination ourselves.

In the instant case, based on facts ascertained in an investigation which even the challenger does not contest, the

regional director concluded that the conduct alleged in the pending unfair practice charges would not impede the employees from freely exercising their franchise because:

> The parties themselves have treated this case as one involving a technical refusal to bargain, rather than one in which overall good or bad faith in negotiation is an issue. The issue is whether certain items are within the scope of representation. They do not involve charges that the District tried to undermine the exclusive representative through actual bad faith bargaining. Subsequent to the filing of charges, the parties actually entered into a contract which was apparently administered successfully for its duration.

The regional director also considered that over two years had passed since the alleged unfair practices occurred,[11] and that the employees are now without effective representation: JCTA has no remaining elected officers, and no negotiations are underway. Finally, the regional director considered the fact that the employees themselves voted to file a request to

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[11]Without evaluating the contract, we note that its substantive provisions included: a salary schedule including step and column increases for 1977-78 and 1978-79; specification of the number of days in the work year and the number of hours in the work day and week; hospital-medical, dental, life and worker's compensation insurance; sick leave, extended leave for illness or accident, personal necessity leave, industrial accident and illness leaves, bereavement leave, leaves without pay, leaves for exchange teaching, leaves for JCTA business, and leaves for jury duty; voluntary and involuntary transfers; teacher safety; class size; evaluation procedure and appeal; dues deduction; maintenance of membership in JCTA; and grievance procedure.

proceed to a decertification election but that through no fault of their own their request to proceed was never filed.

These facts led the regional director to conclude that the pending unfair practice charges will not impede the District's certificated employees in freely voting whether to retain or unseat JCTA as their exclusive representative. Without reweighing these factors, we have examined them only to see if they reasonably support the regional director's determination; for we believe that an abuse of discretion could be found in this case if the regional director either failed to conduct a satisfactory investigation or if he made a determination that is contrary to the facts.[12]

Strictly speaking, the unfair practices involved here are not technical refusals to bargain, for in Jefferson the question is not whether the District must negotiate with JCTA, but what it must negotiate about.[13]

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[12]See Santa Clara Unified School District (9/26/79) PERB Decision No. 104 at pages 12-13.

[13]Under the National Labor Relations Act (29 U.S.C. sec. 150 et seq., hereafter NLRA), (as under EERA) the parties have no direct mechanism by which to challenge the Board's unit determination or its certification of the results of a representation election. (See, e.g., NLRB v. Hearst Publications (1943) 322 US 111 [88 LEd 1170] (employer refused to bargain because it contended that newsboys were not "employees" under the NLRA; Mountain States Telephone & Telegraph Co. (1962) 136 NLRB 1612 [50 LRRM 1012] (employer refusal to bargain to test the appropriateness of the unit).) Therefore a refusal to negotiate in order to challenge unit composition or certification is considered a "technical refusal to bargain."

The EERA limits the scope of negotiations to specific enumerated items.[14] While the employer at its option may consult with employees or employee organizations about other matters, "they may not be a subject of meeting and negotiating." Since PERB does not render advisory opinions or provide declaratory relief, Board designation of the parameters of the duty to negotiate can be obtained only by a party's refusal to discuss disputed items.

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[14]Section 3543.2 provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits . . . , leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . , procedures for processing grievances . . . , and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

The hearing officer's proposed decision in the underlying unfair practice charge acknowledged that:

> The posture of this case presents some difficult problems. The parties have treated this case as one involving a technical refusal to bargain, rather than one in which overall good or bad faith in negotiations is in issue. Although the parties discussed their widely divergent approaches to the scope problem at the table, there is no evidence that they seriously attempted to reconcile their differences or narrow the issues. Thus, for purposes of this hearing they placed the original contract proposals in issue. The parties have apparently assumed that there was no good faith obligation to attempt to narrow their differences on scope disputes, and that the issue as to whether a particular item is inside or outside the scope of representation is purely one of law to be determined primarily from the proposal on its face. [Proposed Decision at 12, emphasis added.]

In determining which of the disputed items were within the scope of negotiations, relying on cases that arose under the Meyers-Milias-Brown Act (Gov. Code sec. 3500 et seq.), the hearing officer adopted a test by which items "primarily related" to enumerated subjects of negotiation are and items "primarily related" to matters of educational policy are not within scope. (Id. at 8-11.)

Applying that test, the hearing officer found that "[W]ith respect to many of the proposals . . . the result i[s] far from clear" because although JCTA's initial proposals were related to enumerated scope items, they were "so broad as to significantly impinge on matters of educational policy which

are not properly subject to negotiation." (Id. at 12.) Rather than declining to rule on such items, the hearing officer said:

> [I]n the case of broad contract proposals which have some relation to an enumerated subject of negotiation, it will be recommended the District be required to negotiate the proposal, but only to the extent that it relates to a negotiable subject. [Id.]

Accordingly, we believe that the regional director reasonably determined that, absent other evidence of bad faith, when the parties have in fact reached an agreement covering the items enumerated supra at footnote 11 (including some of the disputed issues raised in the unfair practice charge), the section 3543.5(c) charge based on negotiability is akin to a technical refusal to bargain and does not without other factors require a decertification election to be delayed.

The regional director is also correct that passage of time can dissipate the influence an employer's unlawful conduct may have on an election. (See Columbia Pictures Corp. (1949) 81 NLRB 207 [23 LRRM 1504].) Since neither the EERA nor the Board itself gives priority to unfair practice charges that are delaying the disposition of representation cases,[15] it seems

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[15]Compare NLRA sections 10(k) and (1) (29 U.S.C. secs. 160(k) and 160(l)) which give priority to certain types of unfair labor practice cases. See also NLRB Casehandling Manual, Part II (1975), section 11740.2, giving priority to unfair labor practice charges that are delaying representation matters.

especially appropriate for PERB regional directors to consider the effect the passage of time has on the ability of employees to freely choose their own representative.

In this case, the original blocking charge was imposed by the executive director and sustained by the Board itself[16] before the parties reached an agreement and before the hearing officer's proposed decision issued characterizing the unfair practice charges as technical refusals to bargain in order to gain a PERB determination on scope. Since the original block, the parties reached and, according to the regional director, "apparently administered successfully" an agreement. That agreement in fact covered disputed as well as undisputed items. Moreover, the hearing officer held that the parties had treated the District's conduct as a technical (as opposed to a bad faith) refusal to negotiate. Finally, the hearing officer pointed out that many of the disputed proposals were so broad as to have no clear answer. These facts were unknown when the executive director investigated this case in November 1977. Since the passage of time has resulted in a change in the parties' relationship, as well as yielding an interim PERB finding on the nature of the underlying unfair practice charges, it was not unreasonable for the regional director to

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[16]Jefferson School District, supra, EERB Order No. Ad-22.

conclude that the employees will be able to vote their own minds uninfluenced by the employer's alleged unlawful conduct.

Finally, the regional director's investigation revealed that an overwhelming percentage of JCTA members had wanted to request the regional director to proceed with the election, but that the last JCTA officer had failed to file the request before leaving office. PERB's policy on requests to proceed to decertification elections in the face of pending unfair practice charges does not distinguish refusal to negotiate allegations from other unfair practice charges.[17] There is no reason to believe that the executive director would have failed to approve JCTA's request to proceed had it been filed. Hence there is no reason for this Board to hold that the

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[17]Compare NLRB Casehandling Manual, Part II (1975) sections 11730.4(b) and 11730.10(g) (in which the NLRB states its policy not to honor requests to proceed in 8(a)(5)(refusal to bargain) situations except upon specific authorization by the Board through the Office of the Executive Secretary) with Board Resolution No. 14, supra, which provides in pertinent part:

> (2) The Regional Director may proceed with the election, upon approval of the Executive Director, in those cases where:
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> . . . . . .
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> (a) The person filing the unfair practice charge has requested the agency to proceed with the election and has waived the right to file objections to the election based on conduct alleged in the unfair practice charge; or

regional director abused his discretion in considering all the relevant facts in this case, including the fact that the JCTA members made an abortive attempt to request PERB to conduct a decertification election in this matter notwithstanding the long-pending unfair practice charges they had filed three years before.

Above all, the purpose of the EERA is to enable public school employees to be represented in their employment relationship with their employer. To insure employees free choice in the selection or decertification of an exclusive representative, this Board may delay a representation election when there is a substantial risk that its outcome will be affected by conduct that is alleged to be an unfair practice when that charge is still pending before the Board. After an investigation, the regional director thoughtfully considered all of the competing factors in this case in context and determined that the District's alleged unlawful conduct does not pose a significant risk of tainting a fair and free election. The regional director's determination is reasonably based on the elements he cites, and is accordingly affirmed by the Board itself.

ORDER

Based on the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that

the determination of the San Francisco regional director to proceed to a decertification election in this matter is affirmed.

By: _____
Barbara D. Moore, Member

_____
Raymond J. Gonzales, Member

Harry Gluck, Chairperson, dissenting:

I

In establishing its "abuse of discretion" standard of review of a regional director's determination, the majority has exceeded its statutory authority to delegate and abdicated its statutory obligations.

In justifying its action, the majority has placed mistaken reliance on Rule 102.67(c) of the National Labor Relations Board (majority opinion pp 8-9) and section 3541.3(k) of the EERA, as well as on the Santa Clara[1] and Oakdale[2] decisions previously issued by PERB.

NLRB Rule 102.67(c), establishing a standard of administrative review, is based on section 3(b) of the National Labor Relations Act,[3] as amended by the Labor-Management

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[1]PERB Decision No. 104 (9/26/79).

[2]PERB Decision No. Ad-46 (9/13/78).

[3]29 U.S.C., section 151, et seq.

Reporting and Disclosure Act (1959). Section 3(b) states, in pertinent part, that the NLRB is authorized to delegate to its regional director its powers under section 9:

> to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9, and certify the results thereof, except that upon the filing of a request, therefore, with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph . . . (Emphasis added).

The point is that the Congress specifically authorized the delegation of section 9 powers without limitation and further, specifically left review of the regional directors' determinations to the discretion of the Board.

In its decision here, the majority refers to section 3541.3(k) of the EERA as though comparable legislative authority has been granted to the PERB. But, section 3541.3(k) severely limits the delegation by the Board of its powers. That EERA section authorizes the Board:

> To delegate its powers to any member of the Board or to any person appointed by the Board for the performance of its functions, except that no fewer than two Board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it . . . (Emphasis added.)

Granted, the Board can establish intermediate steps in the process of resolving issues in dispute, as the Board has done by creating a division of hearing officers to conduct formal hearings into allegations of unfair practices and the determination of bargaining units. But, hearing officer's decisions are only "proposed decisions" and become final only if not appealed and then only as to the parties to the case. They are nonprecedential and need not be followed by other hearing officers entertaining similar disputes. When proposed decisions are appealed, the Board itself reviews the record in full and decides the issues based on the preponderance of evidence produced, applying the independent judgment standard of review. With the same limitations the Board may delegate to a regional director the resolution of a dispute. But by establishing an "abuse of discretion" test here, the majority rejects appeals based on the merits of the dispute, upholding a regional director's decision "whether or not we would have made the same determination ourselves." (Ante, p. 10.)

The majority, in a footnote to its decision (page 8, footnote 10) in which it cites the NLRB rule, also states that the California appellate courts will not disturb trial court decisions that are reasonably based on the facts of the case.

First, there is no valid comparison between the truth-determination process of a court trial and the investigatory process involved here. Second, PERB is an

administrative agency and not a trial court. The rules applicable to administrative agencies and boards are quite another matter. For example, it was held that a board cannot legally confer on its employees the authority that under the law may be exercised only by the board itself. Schechter v. County of Los Angeles (1968) 258 C.A.2d 391. The United States Supreme Court, in upholding the National Labor Relations Board delegation to its regional directors, did so precisely on the basis of the board's statutory authority to do so. Magnesium Casting Co. v. NLRB (1971) 401 U.S. 137 [76 LRRM 2947]. See also Wallace Shops Inc. (1961) 133 NLRB 36 [48 LRRM 1564]. But, an attempt by the National Labor Relations Board to delegate to one board member and two staff employes was invalidated in KFC National Management Corp. v. NLRB (2d Cir. 1974) 497 F..2d 298 [86 LRRM 2271] as a violation of the specific statutory requirements and the fundamental concepts of administrative due process.

The majority here implies that because the staying of an election is "discretionary" with the Board it may delegate such discretion to the regional diector and then limit its own review of his determinations to "the abuse of discretion" test. But, authority to exercise its discretion is granted to a statutory board as a purely "personal" power which may not be further delegated in the absence of express statutory authorization. Schechter v. County of Los Angeles, supra, at 396, 397. Also see Taylor v. Crane (1979) 24 Cal.3d 442;

California School Employees Association v. Personnel Commission (1970) 3 Cal.3d 139; 56 Ops. Atty. Gen. 366 (1973). Compare Candlestick Prop. Inc. v. San Francisco Bay C & D Commission (1970) 11 Cal.App.3d 569.[4]

To the extent that section 3541.3 permits delegation to a staff member, it limits that delegation to administrative or ministerial acts since it expressly requires that the Board majority participate in resolving issues in dispute.[5] No matter who hears a dispute, the power of decision lies only in the board or commission in whom the law vests the power of decision. (Cal. Administrative Agency Practice, (Cont. Ed. Bar, 1970) p. 145.)

At stake here is the right of the employees in the unit to select an exclusive representative free of unlawful interference by their employer, and to be represented in collective negotiations by that organization. These rights, vested in the employees by section 3540, are fundamental. The determination that the employees' choice can or cannot be

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[4]The majority also refers to PERB Resolution 14 (footnote 9, page 6). It cites this as a "policy expression" since Board resolutions enjoy neither the status of rules or adjudications. Clearly, the Board cannot by "policy" delegate more than section 3541.3(k) permits.

[5]Section 3541(e), as amended by section 7 of the State Employer-Employee Relations Act (Gov. Code sec. 3512, et seq.) provides for the employment of an executive director and such persons deemed "necessary for the performance of the Board's administrative functions."

exercised in the manner required by the Act cannot be considered simply an "administrative" or ministerial act to be upheld even if the Board would act otherwise. Furthermore, the existence of a substantial "legal" dispute is demonstrated by the presence of AFT, the competing organization. It has filed a facially valid decertification petition accompanied by the required proof of support. A question of representation is raised. Section 3544.7(a) requires the Board to order an election if, pursuant to the evidence adduced, it determines that a question of representation does exist. The final determination of that issue is reserved to the Board itself, must be on the merits, and may not be delegated.

The majority's further reliance on Santa Clara Unified School District, supra, is unjustified. In Santa Clara, the Board acknowledged the error of its then existing standard of review[6] and stated:

> Therefore, while the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented. (Id. at 12. Emphasis added.)

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[6]The Board's standard of review prior to Santa Clara was to uphold a hearing officer's determination unless it was "clearly erroneous." Ironically, this Board gave no deference to the regional director's original decision in this case against blocking the election. That decision was reversed by the executive director and the Board affirmed the reversal on appeal. See Jefferson School District (12/30/77) PERB Decision No. Ad-22.

Compare this statement to the majority statement here:

> The only question presented by this appeal is when and on what basis the Board will overturn a determination . . . and substitute its own judgment . . . we believe that the appropriate inquiry upon appeal is whether (the regional director's) discretion has been abused. (Ante, page 8.)

Thus, the majority cites as precedent for its present position a case which doesn't hold at all what it is represented to hold. (Interestingly, one member of the majority in this case dissented in Santa Clara urging a "substantial evidence" standard of review, which, if not as stringent as an independent judgment standard, is still substantially more comprehensive than the "abuse of discretion" standard applied here).

The relevance of Oakdale, supra, as relied on by the majority, is difficult to grasp. In that case, the question was whether the regional director acted unreasonably in denying a request for appointment of a post-factfinding mediator. The Board, in upholding the regional director's actions, found that the parties enjoyed no right to post-factfinding mediation. But, even then, the Board disapproved certain parts of the regional director's findings and conclusions after examining the entire record before it. Nowhere in Oakdale was an abuse of discretion test set forth. To the contrary, the Board's analysis in that case requires the conclusion that its decision

looked to the weight of the evidence and the quality of the regional director's rationale.

In summary, then, in failing upon appeal to decide the issue on the merits, based on the facts produced in the course of the regional director's investigation, the Board has failed to fulfill its statutory obligations and has denied to the Association administrative due process.

Aside from the foregoing, the wisdom of the majority's decision is questionable in light of Board rule 32738.[7] There is nothing to prevent the Association, assuming it loses the forthcoming election, from filing objections to the results. A full evidentiary hearing will be required, with appeal rights to the Board itself. If the Board follows its existing practice, it will apply an independent judgment

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[7]8 Cal.Admin. Code section 32738 provides:

> (a) Within 10 days following the service of the tally of ballots, any party to the election may file with the regional office objections to the conduct of the election. Any objections must be filed within the 10 day time period whether or not a runoff election is necessary or challenged ballots are sufficient in number to affect the results of the election.
>
> (b) The objecting party shall concurrently serve a copy of its objections on each party to the election. A statement of service shall accompany the objections filed with the regional office.
>
> (c) Objections shall be entertained by the Board only on the following grounds:

standard of review. The determination here cannot serve as binding precedent.[8]

II

By any test, including the majority's, the regional director's decision to conduct the decertification election should be reversed.

The Board directed the regional director "to determine whether a danger remains that the District's alleged unlawful conduct will so affect the election process as to prevent the employees from freely selecting their exclusive representative." Jefferson School District (6/29/79) PERB Decision No. Ad-66, at 7 (emphasis added). The blocking order was to remain in effect if the "employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive

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> (1) The conduct complained of is tantamount to an unfair practice as defined in Government Code sections 3543.5 or 3543.6 of the EERA, 3519 or 3519.5 of the SEERA, or 3571 or 3571.1 of the HEERA, or
>
> (2) Serious irregularity in the conduct of the election.

[8]In view of the foregoing, this dissent will not consider the propriety of establishing a standard of review through the Board's adjudicatory process rather than through its rule-making powers.

representative's failure to respond to or serve the needs of the employees it represents. Id. at 5-6 (emphasis added). Clearly, then, the thrust of the Board's direction was for the regional director to conduct an investigation to determine if circumstances had changed since his original blocking order was issued.

A review of the regional director's findings fails to uncover one iota of evidence indicating that the danger no longer remains that the District's alleged misconduct will adversely affect the election process, or that dissatisfaction with the exclusive representative's performance is not attributable to the employer's conduct. In short, the regional director failed to produce any evidence that the circumstances had changed. Indeed, his investigation only demonstrates that the Board was initially correct in blocking the decertification election. (See Jefferson Ad-22, supra.)

1. The employer's refusal to bargain was a technical violation:

The regional director reached this "conclusion" because it was not alleged that the District intended to undermine the Association's support.

First, if it was a technical violation at the time the regional director investigated, it was a technical violation when the Board blocked the initial decertification election. No change is demonstrated.

Second, while the majority claims it is not evaluating the agreement actually reached by the parties and has not yet considered the appeal from the unfair practice charge filed by the Association, the majority supports the regional director's conclusion. But, assuming the violation was a technical one, what is the relevance of this characterization? The only question for the regional director and the Board to answer is simply: did the District's allegedly unlawful refusal to bargain impair the employees' opportunity to exercise their statutory right of free choice? The answer turns on a factual determination that the District's refusal, irrespective of reason, sufficiently derogated the exclusive representation in the eyes of the employees as to cast doubt as to the validity of any representation election that was to take place. Anything short of this test makes it virtually impossible to justify blocking an election since employers are unlikely ever to admit that their refusal to bargain is based on anything other than a heartfelt conviction that the subject matter is outside scope.

Furthermore, by its action here, the majority is retroactively modifying its order in Jefferson Ad-66. To the simple direction given there, it now adds the requirement that the regional director also find unlawful intent. It also appears that the majority now imposes on the employees the

obligation to determine the employer's motives before they develop an opinion as to the exclusive representative's performance. This is so because if they withdraw support from the representative, but the employer has not acted with anti-union animus, the employees cannot be protected from their own "neglect" and must cast their ballots despite the external influence on their attitudes.

The majority does not rest at this point. It goes on to decide that a "technical violation" based on a good faith doubt as to scope does not require that a decertification election be delayed. (Ante, p.15.) No explanation or authority is given for this statement which, apparently, is offered as a new and general rule of law. What makes the majority position more perplexing is its past history of finding 3543.5(a) and 3543.5(b) violations when refusal to bargain violations are proven without any claim or showing of evil motive by the employer. See San Francisco Community College District (10/12/79) PERB Decision No. 105; San Mateo Community College District (6/8/79) PERB Decision No. 94.

2. The Association successfully administered the contract . . . the employees voted to proceed with the election: These "facts" are considered together to emphasize the inconsistency of the regional director's conclusions.

What did the successful administration consist of? No facts are presented. The contract ran its course according to

its terms. But, it was a contract limited by the District's refusal to negotiate many items. (Ante, p.3, n.3.) It is impossible to transmute this fact into the conclusion that there was satisfaction among the employees which nullified the District's original adverse impact on the employees' attitude toward the Association.

It is also impossible to equate "successful administration" with the finding that the Association is virtually defunct. More importantly, if one accepts this "finding" of successful administration then one must conclude that the employees' attitude is not the result of the "exclusive representative's failure to respond to or serve the needs of the employees it represents," which the Board established as the test of whether the blocking order be continued. Jefferson Ad-66, supra.

The employees' desire to proceed with the election is not only irrelevant, but to consider it separate and apart from the wishes of the exclusive representative makes a mockery of the blocking process. What the Board seeks to determine is whether the District's conduct affected the employees' attitude. The finding here means that when an employer has successfully influenced the employees against their representative, the Board will sanction that unlawful conduct by submitting to the employees' improperly influenced wishes. Thus, the Board will order the election its blocking charge policy was meant to prevent!

Furthermore, the majority again misuses NLRB precedent. For the reason stated above the federal board only authorizes the charging party (in this case the employee organization) to request that the election proceed before the underlying unfair practice charge is resolved. Even when a request is made, the NLRB does not accede automatically. To the contrary, in refusal to bargain cases, it will be decline to do so where the impediment to employee free choice has not been removed.[9]

3. Two years have passed since the violation occurred: The regional director's and the majority's view that the passage of time may affect the employees' ability to exercise their voting rights freely warrants support if it is understood that it is not the mere passage of time alone, but the change of circumstances during that time which may be significant. The regional director has provided the Board with no information that such has occurred, nor any information to offset the more likely conclusion that the delay in resolving the unfair practice charge has only served to continue and exacerbate the employees' discontent, created by the District's bargaining posture, but which they now direct against their exclusive representative.

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[9]NLRB Casehandling Manual, Part II (1975) Section 11730.4(b) and 11730.10(g).

The majority does indicate that in the interim, the unfair practice charge has been resolved in the Association's favor, implying that the employees' desire for a change is, therefore, not related to the employer's wrongdoing. This overlooks the fact that the District has excepted to the hearing officer's findings and conclusions, thus effectively vacating that decision and precluding the imposition of the hearing officer's proposed remedy. There is no point to staying a decertification election pending the resolution of an unfair practice charge if the employees are not, at the very least, given a full opportunity to become aware, through a final order, of the underlying causes of the exclusive representative's failures. Only then can they exercise their voting rights freely. That is obviously the purpose of delaying an election until the unfair practice has been resolved in a final and binding way with an appropriate remedy. Nothing like that has occurred here.

The majority has also indicated that "successful administration" of the collective agreement was a change in circumstances over time. However, as discussed above, the so-called "successful administration" of a contract limited by the employer's refusal to negotiate hardly justifies being elevated to the status of a change in circumstances warranting removal of the blocking order.

4. Continuing the block would frustrate the fundamental right of employees to be represented by an organization of their choice: That this right is fundamental has already been emphasized in this dissent. But based on the investigation conducted, it is removal of the block which will defeat that right.

III

The majority's other actions: The contention that the Association did not quarrel with the regional director's facts, but only his conclusions, bears scrutiny. The Association's brief states it does not take issue with the conclusions reached by him that effective negotiations--indeed all negotiations--have ceased; that the employees are demoralized and that the collective bargaining relationship initially established is now in disarray. (CTA Brief, pp. 2-3.) The difficulty facing the majority, with which I sympathize, is that the regional director's "facts" are virtually indistinguishable from conclusions or opinions unsupported by facts.

As noted above, the majority claims not to have evaluated the collective bargaining agreement executed by the parties. CTA points out (Brief, p. 6) that "the contents of that contract are not disclosed [in the regional director's findings] and there is no comparison of it with the many proposals made by the Association which the District refused to discuss."

Recognizing the importance of this objection in view of the regional director's findings that a contract was executed and successfully administered, and that only a "technical violation" occurred, the majority turns to its own resources to supply the missing information. (See list of contract items, ante, p. 11, n. 11.) The majority offers these details to rehabilitate the regional director's investigation and exercise of discretion.

IV

In reaching its conclusion, the majority overlooks the potential incongruity of issuing a final order on the unfair practice charge affirming the hearing officer's finding that the District unlawfully refused to negotiate 27 items, after the decertification election has been conducted and the Association is decertified. What remedy would the Board then fashion? Such an order might amount to little more than a declaratory judgment. No affirmative obligation would be imposed on the violator. The violated organization might take some solace in the knowledge that it has served as a sacrificial lamb for the benefit of its competitor and the employees will be left with the anguished thought that had they but known... Possibly, the Board would vacate the election results, deny certification to the competing organization, reinstate the Association, and order the employer to negotiate in good faith. Given the various possibilities, what purpose is served by the Board's rush to judgment here?

In its footnote 7, page 5, the majority acknowledges receiving two communications from the regional director relating to this matter.[10] The footnote does not indicate the nature of the document's contents. It does reveal that the regional director simply transmitted the letters without comment and without any indication that they caused him to change his determination. In view of this reference, it is appropriate to summarize the contents of the letters and comment on the regional director's action.

The regional director's letter of transmittal clearly was nothing more than that. No inference should be drawn that the

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[10]The letters were served ex parte. However, the executive director served copies on all of the parties prior to transmitting them to the Board. Board rule 31090, "Ex Parte Communications" (8 Cal.Adm. Code), provides:

> (a) An ex parte request in any communication by a party which concerns a case and which may be expected to affect the interest of another party to a case.
>
> (b) Any ex parte request received by members of the Public Employment Relations Board, Board Counsel, or Executive Assistant to the Board which does not contain a proof of service indicating service of such request on all necessary parties shall be forwarded to the Executive Assistant to the Board. The Executive Assistant to the Board shall notify the requesting party that no action shall be taken until the requesting party has served all parties which would be affected by the requested action.
>
> (c) No action will be taken by the Board itself on any request addressed to it unless such a request contains a proof of servcie on all necessary parties and all necessary parties have had a reasonable opportunity to respond.

No objections or responses have been received by the Board. The executive director's service estops this Board from considering whether service was properly made under paragraph (b) of the rule.

contents of the documents failed to cause him to change his mind, as the majority footnote implies.

One of the documents is a letter from the Association to the District asserting majority support among the employees in the unit as evidenced by current membership cards, many of which were obtained in December 1979 and January 1980. The second document is a letter from the District to the Association, with a copy to the regional director, expressing the District's belief that the Association currently represents a large majority of the unit employees and the District's willingness to enter into negotiations with the Association.

The full significance of these documents cannot be determined merely from reading them. They do suggest that the Association's support has been revived or expanded. Ironically, further investigation might establish that the "change of circumstances" required by the Board to unblock the election has occurred. Such a finding, if made, would be directly on point, would comply with the Board's instructions to the regional director in Jefferson Ad-66, and would provide a factual basis for the conclusion reached by the majority.

The regional director's determination should be reversed and the matter remanded to him for further investigation consistent with the Jefferson Ad-66 instructions and to include reference to the matters alleged in the two documents received by the Board.

The Board itself should expedite resolution of the appeal from the hearing officer's proposed decision in the underlying unfair practice case.[11]

Harry Gluck, Chairperson

[11]The Board has consistently declined to establish any priority system for its calendar or for that of the division of hearing officers, a policy whose validity is made clearly questionable by this case, and for which I must share responsibility.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post St., 9th Floor
San Francisco, California 94108
(415) 557-1350

CERTIFIED MAIL
Return Receipt Requested

September 5, 1979

Jefferson School District
101 Lincoln Avenue
Daly City, CA 94015

William F. Kay, Esq.
706 Cowper Street
Palo Alto, CA 94301

Jefferson Classroom Teachers Association
151 87th Street, Suite 11
Daly City, CA 94015

Duane B. Beeson, Esq.
100 Bush Street, Suite 1500
San Francisco, CA 94104

American Federation of Teachers, Local 3267
151 87th Street, Suite 14
Daly City, CA 94015

Stewart Weinberg, Esq.
45 Polk Street
San Francisco, CA 94102

Re: Jefferson School District
CASE NUMBERS: SF-D-12, SF-D-41, SF-CO-6, SF-CE-33, (SF-R-130A),
EERB ORDER NUMBER AD-22 and PERB DECISION NUMBER AD-66

Dear Interested Parties:

The issue in this case is whether a decertification election shall continue to be stayed pending the outcome of unfair practice charges. On June 29, 1979 the Board itself remanded this case to the San Francisco Regional Director to investigate the matter and issue a determination. The results of this investigation are that the pending unfair practice charges should no longer block a decertification election and that an election should be held as quickly as possible.

Jefferson School District
September 6, 1979

On June 21, 1976 the Jefferson Classroom Teachers Association (J.C.T.A.) was certified as the exclusive representative of a unit of certificated employees. The J.C.T.A. and the District entered into negotiations, and on November 2, 1976, unfair practice charges were filed against the J.C.T.A. by the District (SF-CO-6). On November 15, 1976 charges were filed against the District by the J.C.T.A. (SF-CE-33). A hearing on the charges was held during 1977 and on July 13, 1978, a Hearing Officer's proposed decision was issued. The Hearing Officer sustained charges that the District has refused to negotiate on 27 items. The charges against the J.C.T.A. were dismissed. Both the District and the J.C.T.A. have filed exceptions to the proposed decision. The appeal to the proposed decision is currently pending before the Board itself.

Prior to the issuance of the Hearing Officer's proposed decision, the American Federation of Teachers (A.F.T.) filed a decertification petition on September 23, 1977 (SF-D-12). The San Francisco Regional Director directed a decertification election which was stayed by the Executive Director on November 9, 1977 pending the outcome of the unfair practice hearing. The Executive Director was sustained by the Board itself in Jefferson School District (12/30/77) EERB Order No. Ad-22.

On February 6, 1978, the District and J.C.T.A. entered into a written agreement covering school years 1977/78 and 1978/79. The agreement expired June 30, 1979.

A second valid decertification petition was filed by A.F.T. on March 29, 1979. However an election was stayed by the San Francisco Regional Director pending resolution of the unfair practice charges (SF-CO-6 and SF-CE-33). That stay was appealed to the Board itself and in Jefferson School District (6/29/79) PERB Decision No. AD-66, the case was remanded for investigation.

All the parties were contacted and asked for information and responses. The District and the A.F.T. submitted information. The J.C.T.A. failed to respond to the request for information and did not submit a response.

The parties themselves have treated this case as one involving a technical refusal to bargain, rather than one in which overall good or bad faith in negotiation is in issue. The issue is whether certain items are within the scope of representation. They do not involve charges that the District tried to undermine the exclusive representative through actual bad faith bargaining. Subsequent to the filing of charges, the parties actually entered into a contract which was apparently administered successfully for its duration.

The District has indicated to J.C.T.A. that it has a good faith doubt as to the current majority status of J.C.T.A. and because of that doubt the District will refuse to meet and negotiate with J.C.T.A. regarding a successor contract.

In early May of 1979, the local president of J.C.T.A. (who has since resigned) sent a memo to all schools in the Jefferson School District advertising the fact that nominations for elected offices in J.C.T.A were open. No nominations were submitted; consequently, no elections were held. On June 13, 1979, the last remaining elected officer of J.C.T.A resigned. Therefore, at the present time, there are no local elected officers of J.C.T.A.

Just prior to his resignation, the last remaining J.C.T.A. officer sent out a survey to all J.C.T.A. members, asking them if they wished to sign a waiver and proceed to a decertification election. Of the 98 that responded, over 75% stated they wished J.C.T.A. to file a "request to proceed" (i.e. waiver) to allow P.E.R.B. to go ahead with an election to decide which organization will represent teachers at the bargaining table. The local officer who sent out the survey resigned on the day the survey forms were returned, and therefore, no "request to proceed" was sent to P.E.R.B.

In light of the nature of the violations involved; the fact that they took place over two years ago; that a contract was eventually signed; that no negotiations are presently underway for future contracts; that there are currently no local elected officials of the J.C.T.A., and that the J.C.T.A members themselves have indicated their desire to proceed to an election, I feel the charges will not have a tendency to interfere with the free choice of the employees in an election. Under these circumstances, the policies of the Act will be best effectuated by allowing the employees an opportunity to decide the question of representation, as is their desire. Continuing to block the election in this case would frustrate the fundamental right of employees to be represented by an employee organization of their choice.

I am therefore directing that a decertification election be held in the Jefferson School District. You will be contacted in the near future to set up the details of the election.

An appeal to this decision may be made within 10 calendar days of service of this decision by filing a statement of the facts upon which the appeal is based with the P.E.R.B. Executive Assistant to the Board, Mr. Stephen Barber, at 923 12th Street, Suite 201, Sacramento, California, 95814. Copies of any appeal must be served upon all other parties to this action with an additional copy to this Regional Office.

Very truly yours,

James W. Tamm
Regional Director

JWT:ed