STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT, Employer, and, CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #227, Exclusive Representative, and, LOCAL 6 60, SEIU, AFL-CIO, Petitioner.	)	Case No. LA-D-200 (LA-R-861C) Administrative Appeal PERB Order No. Ad-163 April 15, 1987

Appearance: E. Luis Saenz, Attorney for California School Employees Association and its Chapter #227.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the attached administrative decision by the PERB Los Angeles Regional Director finding the filing of a decertification petition by Local 660, SEIU, AFL-CIO (SEIU) to be timely. In short, the Regional Director's decision finds the petition timely despite a technical violation of PERB Regulation 32140(b),[1] which states that where service is required it shall be concurrent

[1]PERB Regulations are codified at California Administrative Code, title 8, part III, section 31001 et seq.

with the filing in question. While SEIU's petition was received by PERB in a timely fashion and included the required proof of service, investigation revealed that the other parties were in fact not served until two days later, after a new collective bargaining agreement had been agreed to by the Santa Monica-Malibu Unified School District (District) and the incumbent union, the California School Employees Association and its Chapter #227 (CSEA).[2]

We have reviewed the Regional Director's decision and the exceptions thereto filed by CSEA, as well as the entire record in this case. In light of all the circumstances, particularly the lack of prejudice reflected by the District and CSEA's actual knowledge of the filing of the petition prior to the signing of a new agreement, we find the Regional Director's decision free from prejudicial error and adopt it as the Decision of the Board itself.[3]

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[2]As we find that the petition was effectively filed prior to the execution of the tentative agreement, we need not consider whether, under the circumstances of this case, the existence of a tentative agreement would have barred a decertification petition.

[3]In his concurring opinion, Member Porter relies chiefly on the case of Dobrick v. Hathaway (1984) 160 Cal.App.3d 911 [207 Cal.Rptr. 50] for the proposition that service requirements must be strictly complied with in order to make a filing valid. We find more instructive the case of Lum v. Mission Inn Foundation. Inc. (1986) 180 Cal.App.3d 967. In Lum, as in Dobrick, a party filed a request for a trial de novo after an adverse arbitration award but failed to attach a proper proof of service or actually serve the opposing parties prior to the expiration of the filing period. However, in Lum, as in the instant case, the opposing parties received actual notice of the filing prior to the last day for filing. In finding the filing timely, the Lum court concluded that the

However, we emphasize that this decision is restricted to facts as they appear in the record and should not be construed as an indication that this Board will readily excuse a failure to abide by duly-promulgated regulations. Furthermore, though there is no indication in the record that SEIU's filing of an inaccurate proof of service was willful, nor was there any plausible motive under the circumstances for SEIU to have

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purpose of the service requirement was fulfilled and that the Dobrick decision was distinguishable:

> Where, as here, the request has been filed within the statutorily prescribed time and the adverse party has obtained within the statutory time actual notice the request was timely filed, the purpose of the proof of service requirement has been entirely fulfilled. That being so and defendants having admitted they were not prejudiced in any way by the omission, dismissal of the action was improvident. (Citations omitted)
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> We do not view Dobrick v. Hathaway, supra. 160 Cal.App.3d 913 as inconsistent with our conclusions. First of all, Dobrick is factually distinguishable on a fundamental point. In that case the attorney for the party resisting trial de novo did not obtain actual notice within the statutorily prescribed period that a request for trial had been filed. It is possible the result in Dobrick might have been different had the adverse party obtained actual notice. (Cf. Dobrick, supra, 160 Cal.App.3d at p. 923). The court in Dobrick seemed willing to accept the notion that in a proper case the doctrine of "substantial compliance" might apply but declined to apply it in that case because, as it stated, "notice is an essential element of substantial compliance" and the plaintiff obtained no notice, (id.) Here, of course, defendants did get actual notice within the statutory time that the request for trial had been filled.

willfully delayed service, we must stress that PERB requires that proof of service forms be completed under penalty of perjury. PERB Regulation 32140(a). Though the record reveals no evidence of fraud, the Board will closely scrutinize future filings by SEIU to ensure that it has strictly complied with our regulations.

ORDER

The Regional Director's administrative decision finding the decertification petition filed by Local 660, SEIU, AFL-CIO to be timely is hereby AFFIRMED and the Regional Director is ORDERED to take appropriate action consistent with this Decision.

Member Porter's concurring opinion begins on p. 5.

Porter, Member concurring: I concur in the results reached by the majority, but for different reasons. For the reasons set forth below, I conclude that the filing in this case was complete as of the date the other parties to the action were served with the petition, which was after the tentative agreement was reached. However, I find that it was nevertheless timely, since a collective bargaining agreement must be in effect to operate as a bar to a decertification petition. In this case, since the adoption of the agreement by the school board placing the agreement in effect apparently occurred after the effective filing of the petition, the petition was timely.

One day before CSEA and the District reached tentative agreement on a successor contract, SEIU filed its decertification petition, along with a proof of service indicating that the opposing parties were served concurrently with the filing, or at least on the same day. On its face, then, the petition met PERB's filing requirements and was "accepted" for filing on the date delivered to the regional office. However, SEIU readily concedes that, for whatever reason, the proof of service was false, notwithstanding that it was signed under penalty of perjury. The petition was not, in fact, served on the other parties until at least two days later. This was after the tentative agreement was reached, and apparently before the school board acted to adopt the tentative agreement. It is clear that SEIU did not comply with our regulation requiring concurrent service. (Sec. 32140(b).)

The issue is, what is the legal effect of such failure to comply, given that the District and CSEA reached tentative agreement the following day?

The Board's proof of service requirements are modeled after the service requirements of California Code of Civil Procedure and:

> are designed to inform the Board that all parties to a proceeding received all documents filed before or by the Board regarding that case. M. Lowenstein & Sons, Inc. v. Superior Court (1978) 80 Cal.App.3d 762, 770, 145 Cal.Rptr. 814. The Board's jurisdiction to hear an appeal depends on the fact of service rather than the proof thereof. Herman v. Santee (1894) 103 Cal.519, 523, 37 P. 509.1 (Los Angeles Community College District (1980) PERB Decision No. 153 at p. 2.)

In Los Angeles CCD, supra, the Board rejected the, petitioner's claim that a dismissal letter was ineffective in that it failed to include a proof of service as required by PERB's regulations. The Board found that the petitioner was, in fact, served with the dismissal letter and, therefore, failure to attach a proof of service was a nonfatal defect. (See also Los Angeles Unified School District (1980) PERB Decision No. 152; Los Angeles Community College District (1981) PERB Decision No. 186.) In contrast to these cases, in which the complaining party was *in* fact served, is the Board's decision in Los Angeles Community College District (1984) PERB Decision

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[1]Accord, Oats v. Oats (1983) 148 Cal.App.3d 416, 420 [196 Cal.Rptr. 20].

No. 395. In that case, the charging party's charges against the union and the district were both dismissed for failure to state a prima facie case. Charging party appealed, but failed to serve his appeal on the opposing parties or to file a proof of service. The appeals were rejected by the executive director based on failure to serve the other parties to the action. The executive director's decision rejecting the appeals was then appealed to the Board, but charging party again failed to serve that appeal on the opposing parties. He did file a proof of service, but it did not indicate that either respondent was served. The Board cited Regulation section 32635, saying that along with the filing of the appeal,

> "[S]ervice and proof of service of the appeal on the respondent pursuant to section 32140 are required." These requirements are not merely ritualistic. They are basic to providing due process to the involved parties. . . . Failure to follow the service and proof of service requirements is sufficient ground for denying an appeal, and the Executive Director properly rejected McConnell's appeals.
> (Los Angeles Community College District (1984) PERB Decision No. 395 at pp. 5, 6.)

The above cases reflect the Board's well-established position that the lack of a proof of service will not operate to defeat an otherwise effective filing or compliance with the Board's regulations, but where no service occurs, an appeal must be rejected. See also Riverside Unified School District (1986) PERB Decision No. 592, in which the Board rejected the argument that a proof of service with an erroneous date should result in

exclusion of the district's brief, which was otherwise timely filed and served.

In Lake Elsinore School District (1986) PERB Order No. Ad-154, the Board found that Code of Civil Procedure section 1013 applies to PERB and EERA. In so holding, the Board states that section 1013 has been found specifically applicable to actions, decisions and orders of administrative agencies, where the prescribed period of appeal runs from the service of the administrative document and the agency effects service by mail. Thus, the Board ruled that section 1013's five day extension of time to respond to a document served by mail applies to PERB proceedings, and overruled precedent to the contrary. (See also Los Angeles Unified School District (1986) PERB Order No. Ad-155.) Given this holding by the Board, it is instructive to look at court cases decided under the Code of Civil Procedure for direction in this case.

To begin with, section 1012 authorizes service by mail, as a substitute for personal service. Section 1013 specifies the requirements for such service, and section 1013a sets forth the specifications for the proof of service.

In order to find legal notice, courts require service of process, and judicial action without that service is void. Thus, in City of Los Angeles v. Morgan (1951) 105 Cal.App.2d 726 [234 Cal.Rptr. 319] the court found that a personal judgment rendered without service of process on, or legal notice to, a defendant is not merely voidable, but void, in the

absence of a voluntary appearance or waiver. In finding the judgment in the case to have no legal effect, even though recorded, the court made the following statements:

> A sworn return of service of a summons may be impeached by evidence that contradicts it. "It has long been established that a false affidavit of service constitutes extrinsic fraud." [Citation.] The rule is equally well-established that in the absence of service of process upon such a party there is no duty on his part, even though he has actual knowledge, to take any affirmative action at any time thereafter to preserve his right to challenge the judgment. "What is initially void is ever void and life may not be breathed into it by lapse of time."
> (City of Los Angeles v. Morgan, supra, 105 Cal.App.2d at p. 73177

In Oats v. Oats (1983) 148 Cal.App.3d 416 [196 Cal.Rptr. 20], the court held that the requirement of notice is so fundamental to concepts of due process that it is deemed jurisdictional in nature. In court proceedings, it is provided by service of process and it is the actual service which vests the court with jurisdiction to act, rather than proof of service. Hence, when the proof of service is mislaid, lost or otherwise unavailable, some courts have been liberal in allowing proof of actual service. The court goes on to say that the proof of service fulfills the function of establishing that procedures implementing constitutional requirements of due process were followed, giving assurance that service really had been made. Accordingly, when adequate proof of service is available, it is of no legal import that a party actually may

not have received service. That being the case, the courts are very strict in applying the statutory standards for the proof of service; failure to strictly comply with those standards deprives the court of jurisdiction to act.

Similarly, in M. Lowenstein & Sons, Inc. v. Superior Court (1978) 80 Cal.App.3d 762 [145 Cal.Rptr. 814] the court stated that the proof of service is required to inform the court that a defendant has received the necessary notice, and such proof presumptively establishes the fact of proper service, but it may be impeached and the lack of proper service shown by contradictory evidence. "Jurisdiction depends on the fact of service, rather than the proof thereof." (Id. at p. 770, emphasis in the original.)[2]

Cases have consistently held that effective service of process by mail requires strict compliance with the terms of sections 1013 and 1013a. For example, the court in Dobrick v. Hathaway (1984) 160 Cal.App.3d 913 [207 Cal.Rptr. 50] held that strict compliance is required and failure to comply deprives the court of jurisdiction. The case involved the effect of an arbitration award and whether the nonprevailing party had effectively blocked the finality of the award by filing a request for a trial de novo. The moving party in the case (who

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2Disapproved on other grounds in Johnson & Johnson v. Superior Court (1985) 38 Cal.3d 243, 255, fn. 7 [211 Cal.Rptr. 517; 695 P.2d 1058]. (See Courtney v. Abex Corporation (1986) 176 Cal.App.3d 343, 346-347 [221 Cal.Rptr. 770].)

filed a motion to confirm and enter the arbitration award as a final judgment) claimed that he was not served with the request for the trial de novo and did not, in fact, learn of it until after the statutory period had run.

The court found that effective service of process by mail requires strict compliance not only with section 1013, but also with section 1013a. Failure to comply deprives the court of jurisdiction. The court found that no proof of service was filed with the court and the affidavits that were filed in an attempt to prove service were defective and did not cure the problem, since the first failed to comply with the requirement of showing the address to which the request was sent, and the second was untimely and failed to indicate how the affiant knew the address eleven months after the alleged service.

The court went on to question the effect of the lack of proper proof of service, and concluded that the filing of the request for a trial de novo was ineffective; thus, the arbitration award became final as a matter of law. In so holding, the court emphasized that notice and opportunity to be heard are the most basic and crucial elements of due process, and the rule of court which required the concurrent filing of the proof of service with the filing of the document itself provided an essential rule of practice and procedure. The court rejected the respondent's argument that he had substantially complied with the requirements of the request, since notice is an essential element of substantial compliance.

The respondent next argued that the movant had actual knowledge of the request within a few weeks of the filing. The court likewise rejected this argument, since the requirements are that the proof of service be filed, the filing be within 20 days of issuance of the arbitrator's decision, and the time cannot be extended. Further, the court found that there was no competent evidence that the opposing party learned of the request within the 20-day period.

The Dobrick decision was factually distinguished in Lum v. Mission Inn Foundation, Inc. (1986) 180 Cal.App.3d 967 [226 Cal.Rptr. 22]. Lum involved the same procedure at issue in Dobrick of requesting a trial de novo following arbitration. In Lum, plaintiffs filed their request for a trial de novo shortly after the arbitration award was served and well within the statutory time for filing such requests, but neglected to serve a copy of the request on the defendants. Plaintiffs likewise did not file a proof of service with the filing of their request. Nonetheless, within the twenty-day period, defendants' counsel received actual notice when the court clerk sent the counsel a notice of trial setting conference. The counsel then called the clerk and learned the request had been filed. The lower court dismissed the request, which decision was then appealed. On appeal the court held that the request for trial de novo should not have been dismissed by the lower court, since the defendants received actual notice within the prescribed time period. In

reaching that holding, the court concluded that the Judicial Council is not "empowered to or intended to impose on litigants a jurisdictional prerequisite to obtaining a trial de novo which was not prescribed by the Legislature itself." (Id. at p. 970.) In deciding what result should flow from plaintiffs' omission of service, the court considered the purpose of the proof of service requirement, whether or not that purpose was fulfilled by defendants' obtaining actual notice within the time period, and the "nature and significance of the rights that would be lost as a result of the clerical-type error." (Id. at p. 972.) The court addressed the last consideration first and found that the right that would be lost was the statutory and constitutional right to a jury trial, and that access to the courts is a right of a fundamental nature. The court stated:

> [T]he admirable objective of establishing a preliminary "simplified and economical procedure for obtaining prompt and equitable resolution" of disputes (sec. 1141.10, subd.(b)(1)) was obviously not intended to supplant the right, ultimately, to have disputes resolved by the courts. . . . Manifestly, the important rights of access to the courts, jury trial and appeal should not be lost as a result of clerical-like errors in complying with procedural requirements, unless that result is absolutely compelled.
> (Id. at pp. 971-972.)

The court next found that the purpose of the proof of service requirement in 1616(a) is to give notice to the adverse parties so that they will not rely on the arbitration award.

The court is notified by the filing of the request. The court found that both of those purposes were fulfilled on the facts in that case, since both the filing and the actual notice to defendants were within the statutory time frame.

In the case before us, the majority relies on the fact that the district and the union had actual knowledge of the filing prior to reaching an agreement, and therefore there is no prejudice in finding the filing to be timely. Court decisions have held, however, that actual knowledge does not take the place of legal notice requirements.[3] Ursino v. Superior Court (1974) 39 Cal.App.3d 611, 617 [114 Cal.Rptr. 404] held that the constitutional guarantee of due process requires that proper notice be given to a party, and that this requirement is not satisfied by actual knowledge without notification conforming to the statutory requirements. In County of Alameda v. Lackner (1978) 79 Cal.App.3d 274, 280 [144 Cal.Rptr. 840] the court stated:

> It is well established that administrative regulations must conform to applicable legislative provisions, and that an administrative agency has no discretion to exceed the authority conferred upon it by

[3]Lum did not address, nor distinguish, prior cases that have held that actual knowledge does not take the place of the legal notice requirement. Based on Lum'S analysis of the service requirement involved, however, it is clear that the court in Lum did not consider the service requirement in rule 1616(a), enacted by the Judicial Council, to constitute a jurisdictional requirement, where the right that would be lost was the right of access to the courts and the defendant had actual knowledge within the statutorily prescribed time period.

statute. . . .

. . . . . .

> We said in Ursino v. Superior Court [1974] 39 Cal.App.3d 611, 617 [114 Cal.Rptr. 404], that a requirement that a statutory notice be given "is not satisfied by actual knowledge without notification conforming to the statutory requirements."

Reliance by the regional director in this case on United Farm Workers of America v. ALRB (1985) 37 Cal.3d 912 [210 Cal.Rptr. 453; 694 P.2d 138] is misplaced. The facts of that case reveal that the issue did not involve the service of a document on opposing parties, but instead, a failure to verify a pleading that was timely filed with the court. The clerk had returned the document after appellant attempted to file it, saying it lacked a table of authorities. Appellant pointed out that the rule governing ALRB appeals does not require the filing of the table of authorities. The clerk then noted that that rule does require verification, which was lacking. Appellant verified it and sent it back to the court, but it was received four days after the filing deadline. The court nevertheless found it to be timely on the ground that it was timely when it was first filed, even though it contained a "technical defect." Contrary to that case, however, lack of service has not been held to be a "technical defect." (See also North Side Property Owners Association v. County of Los Angeles (1945) 70 Cal.App.2d 598 [161 P.2d 613]; cf. Lum v. Mission Inn Foundation, Inc., supra, 180 Cal.App.3d 967.)

Applying the above case law and PERB precedent to the facts of this case leads me to the following conclusions. While SEIU facially complied with our regulations, the fact remains that the actual service of notice was not accomplished until several days later. If this were a scenario of a party failing to file the proof of service with the document to be filed, even though actual service of notice had occurred, we could accept a late filing of the proof of service and find the filing effective as of the date of the filing of the document itself, notwithstanding a technical failure to comply with our regulations.[4] That, however, is not the case before us. The filing of the petition for decertification is akin to the initial service of process or notice, in that it initiates an action with parties who are not otherwise before this agency, and which may ultimately affect their respective positions. As such, knowledge alone should not suffice and actual service of the documents should be required in compliance with our regulations. I do not find that the opposing parties' actual knowledge cured SEIU's failure to comply with the service requirement. Once the actual service of notice was effectuated by depositing the documents in the mail, SEIU should have filed an amended proof of service to reflect the date of actual

[4]Regulation 32140 sets out the proof of service requirements and requires that, whenever service is required in our regulations, it shall be on all parties and shall be concurrent with the filing.

service. The failure to do so is not, in my mind, fatal, since it is the fact of actual service to which we should look.

I conclude that the filing was not effectuated until actual service of notice occurred, and that was after the parties reached tentative agreement.

Under existing Board precedent with respect to contract bar, then, the existence of that agreement should have operated as a bar to the filing of the decertification petition. (See, e.g., San Francisco Unified School District (1984) PERB Decision No. 476.) I do not agree with the Board's holding in San Francisco.

This Board is charged with the administration of a specific statutory contract bar provision (Gov. Code, sec. 3544.7(b)) that states:

> [n]o election shall be held and the petition shall be dismissed whenever:
>
> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization . . . .

A tentative agreement does not, in my opinion, meet this description, as it is not "currently in effect" and does not and cannot impose a lawful obligation on the District until duly adopted by the governing board.[5]

The Education Code specifically requires school board action to create a binding and enforceable collective

[5]Accordingly, I would overrule San Francisco to the extent it is inconsistent.

bargaining agreement.

Education Code section 35163 states:

> Every official action taken by the governing board of every school district shall be affirmed by a formal vote of the members of the board, and the governing board of every school district shall keep minutes of its meetings, and shall maintain a journal of its proceedings in which shall be recorded every official act taken.

Section 35164 states, "[t]he governing board shall act by majority vote of all of the membership constituting the governing board." Section 35035 sets forth some of the duties and powers of the district superintendent, and subsection (f) grants the superintendent the power to enter into contracts for and on behalf of the district pursuant to Section 39656. Section 39656 provides that whenever the power to contract is invested in the governing board of the school district, such power may, by a majority vote of the board, be delegated to its district superintendent, or to such persons as he may designate, and goes on to state:

> . . . provided, however, that no contract made pursuant to such delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, said approval or ratification to be evidenced by a motion of said board duly passed and adopted.

The result of these various statutes is clear—no contract is enforceable against the district unless and until the board has taken official action to adopt such contract in the duly

authorized manner, i.e., by majority vote at a lawfully called board meeting. Very simply, what would be the outcome, under existing precedent, if the parties reached a tentative agreement, which the Board would hold barred the decertification petition, and then the school board rejected that tentative agreement?

For the reasons stated above, I would find that a collective bargaining agreement is not "in effect" until adopted by the employer-school district, and the absence of such adoption defeats the tentative agreement from acting to bar a decertification petition. (Cf. State of California (SETC) (1983) PERB Decision No. 348-S [union ratification not required for a tentative agreement to bar the filing of a severance petition, notwithstanding that ratification was required by the union's by-laws]; Downey Unified School District (1980) PERB Order No. Ad-97 [where ground rules required ratification before agreement would be effective, unratified tentative agreement did not bar the filing of a decertification petition].) Therefore, in this case, I would find that the decertification petition should be accepted for filing as of the date of actual service, and SEIU should be directed to file an amended proof of service.[6]

[6]I would also direct the General Counsel to conduct an investigation to determine what, if any, action is appropriate to take against SEIU for the filing of a fraudulent proof of service, which was signed under penalty of perjury.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT, Employer, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #227, Exclusive Representative, and, LOCAL 660, SEIU, AFL-CIO, Petitioner.	)	Case No. LA-D-200 (R-861C) ORDER FINDING DECERTIFICATION PETITION TO BE TIMELY FILED December 9, 1986

BACKGROUND

California School Employees Association and its Chapter #227 (CSEA) is the exclusive representative of a unit of paraprofessional employees at Santa Monica-Malibu Unified School District (District). The District and CSEA were parties to a written agreement which expired June 30, 1986. (All dates refer to 1986.) They continued negotiating the terms of a new agreement until approximately 11:00 a.m., September 23, at which time the chief negotiators for the parties initialed a written agreement which provided for a contract retroactive to July 1, 1986 and running through June 30, 1989.

At 3:44 p.m. on September 22, SEIU filed a decertification petition at the PERB Los Angeles regional office. The petition was accompanied by authorization cards and a proof of service

by mail form indicating the District and CSEA were served by mail that date. SEIU later informed this office that copies of the petition were not actually placed in the mail until some date after the agreement time of 11:00 a.m. on September 23.[1] 1

Both CSEA and the District were aware that a decertification petition had been filed at PERB prior to signing the agreement.

On October 3, the District supplied PERB with a list of employees from the preceding payroll period. SEIU demonstrated the requisite support to meet the requirement of regulation 32770(b)(2) based on that list.

ISSUE

Was the decertification petition properly filed by SEIU on September 22, and thus timely filed?

DISCUSSION

Regulation 32770 states that:

> (a) A petition for an election to decertify an existing exclusive representative in an established unit may be filed by a group of employees within the unit or an employee organization. The petition shall be filed with the regional office utilizing forms provided by the Board.
>
> (b) The petition shall be accompanied by

[1]The District received its copy on September 26, CSEA received its copy on September 29. The address to which SEIU mailed CSEA's copy contained the wrong zip code.

> proof that at least 30 percent of the employees in the established unit either:
>
> (1) No longer desire to be represented by the incumbent exclusive representative; or
>
> (2) Wish to be represented by another employee organization.
>
> Proof of support is defined in Division 1, section 32700 of these regulations.
>
> (c) Service of the petition, excluding the proof of at least 30 percent support, and proof of service pursuant to section 32140 are required.

There is no dispute that the petition was filed on forms provided by the Board, filed by an employee organization in an established unit, or that adequate proof of support was submitted. The District and CSEA contend, however, that SEIU's failure to concurrently serve the petition should be grounds for finding that the petition was untimely filed.[2] However, as found below, this contention must be rejected.

The California Supreme Court has said that:

> There is a strong public policy in favor of hearing cases on their merits and against depriving a party of his right of appeal because of technical noncompliance on

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[2]Regulation 32140(b) reads:

> (b) Whenever "service" is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

> matters of form. (United Farm Workers v. Agricultural Labor Relations Board (1985) 37 Cal.3d 912, 916, quoting Litzmann v. Workmen's Compensation Appeals Board (1968) 266 Cal. App.2d 203 [71 Cal. Rptr. 731].)

The UFW v. ALRB case also involved a filing problem in that verification did not accompany the pleadings. The ALRB and the real party in interest moved to dismiss the petition as untimely. The court of appeal agreed, and granted the motion to dismiss. The Supreme Court reversed and remanded the case to the appellate court based on the rationale that "(r)ejection . . . for a technical defect cannot undo a 'filing' that has already occurred." Id, at 918. The court stressed that neither party against whom it was deciding had contended that it was prejudiced by the filing problem at issue. UFW v. ALRB, op cit., at 916.

Similarly, in the instant case, neither CSEA nor the District purport to have been prejudiced by their receipt of the decertification petition subsequent to their agreement to a successor contract.[3] Indeed, the instant administrative

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3CSEA cites Alum Rock Union Elementary School District (1986) PERB Order No. Ad-158 but fails to state, nor does the undersigned understand, how that case would suggest that finding SEIU's petition to be timely would prejudice CSEA or result in "labor relations instability" as discussed in that case. It is particularly difficult to conceive of prejudice under the instant facts since CSEA and the District would probably not have received their copies of the petition until after 11 a.m. on September 23 had SEIU, in fact, mailed them on September 22. Moreover, CSEA and the District were already aware that the petition would be filed.

determination mandated by those parties' Untimeliness contention confirms that CSEA and the District have been afforded their due process. Consistent with the position of the Supreme Court, the Board itself has refused to elevate form over substance with respect to its service requirements where no prejudice was found. See Los Angeles Unified School District (1980) PERB Decision No. 152 and Los Angeles Community College District (1981) PERB Decision No. 186.

Los Angeles Community College District (1980) PERB Decision No. 153, Los Angeles Community College District (1983) PERB Decision No. 309 and Los Angeles Community College District (1983) PERB Decision No. 395, cited by the District, do not mandate a different result. Similar to the instant case, in the former decision (PERB Decision No. 153) no prejudice was found where service was, in fact, made, though somewhat improperly as a matter of form. Due process was absent and the filing found to be improper in the clearly distinguishable latter two cases where the charging party never served the respondents and, thus, the other parties were denied their opportunity to file responses.

CONCLUSION

The decertification petition is deemed to be timely filed. It is hereby ordered that an election be conducted to resolve the question concerning representation created by SEIU's

petition. Our office will be contacting you shortly to arrange the details of that election.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision (PERB regulation 32360). To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Members, Public Employment Relations Board
1031 18th Street, Suite 200
Sacramento, CA 95814-4174

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (regulation 32135). Code of Civil Procedure section 1013 shall apply.

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justification for the request (regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Los Angeles regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Dated: _____

Robert R. Bergeson
Regional Director