

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE UNIVERSITY,	)	
	)	
Employer,	)	Case No. LA-M-1890-H
	)	
and	)	Administrative Appeal
	)	
CALIFORNIA FACULTY ASSOCIATION,	)	PERB Order No. Ad-177-H
	)	
Exclusive Representative.	)	December 16, 1988
	)	

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Appearances: Reich, Adell & Crost by Glenn Rothner, Attorney,  
for the California Faculty Association; William B. Haughton,  
Attorney, for the California State University.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (PERB) on appeal by the California Faculty Association (Association or CFA) from a PERB regional director's administrative determination of impasse. CFA also requested a stay in the impasse proceedings pending this appeal and until such time as related unfair practice charges in Case No. LA-CE-239-H can be litigated. The request of a stay is denied and we decline to set aside the regional director's determination.

Having considered all circumstances before the regional director, the Board itself finds that there has been no apparent abuse of discretion by the regional director. Following a review of the record, we find that the regional director fairly and

reasonably weighed the enumerated factors set forth in Public Employment Relations Board (PERB) Regulation section 32793(c).<sup>1</sup>

Therefore, the Board hereby ORDERS that the Association's administrative appeal is DENIED.<sup>2</sup>

Chairperson Hesse joined in this Decision.

Member Craib's concurrence begins on page 3.

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<sup>1</sup>PERB rules are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32793(c) states:

(c) In determining whether an impasse exists, the Board shall investigate and may consider the number and length of negotiating sessions between the parties, the time period over which the negotiations have occurred, the extent to which the parties have made and discussed counter-proposals to each other, the extent to which the parties have reached tentative agreement on issues during the negotiations, the extent to which unresolved issues remain, and other relevant data.

<sup>2</sup>In affirming the administrative determination we take no position on Case No. LA-CE-239-H, which is the Association's unfair practice charge that California State University failed to meet and confer in good faith in violation of California Government Code section 3571 of the Higher Education Employer-Employee Relations Act. The issues raised here will be accorded a full evidentiary hearing in that case.

Member Craib, concurring: I concur in the result reached by my colleagues, as I believe the regional director properly applied the criteria set forth in PERB Regulation 32793(c). However, I question the propriety of applying an abuse of discretion standard of review. In my view, the application of such a narrow standard of review exceeds the Board's authority to delegate its statutory powers.

An abuse of discretion standard of review is exceedingly narrow in scope. Under such a standard, the decision maker below is given discretionary power to decide the issue and the exercise of that discretion will not be disturbed unless it is abused. The key feature of this process is that the reviewing body may not substitute its own judgment for that of the body below. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, sec. 275, p. 286). By investing such discretion in the regional director, the Board has effectively delegated full authority to make impasse determinations.

As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be delegated to their employees in the absence of statutory authorization. (Bagley v. City of Manhattan Beach (1976) 18 Cal.3d 22, 24, [132 Cal.Rptr. 668]; California School Employees Association v. Personnel Commission of the Pajaro Valley Unified School District, et al. (1970) 3 Cal.3d 139, 144 [89 Cal.Rptr. 620]; Schechter v. County of Los Angeles (1968) 258 Cal.App.2d 391, 396 [65 Cal.Rptr. 739]; 67 Ops.Cal.Atty.Gen. 286, 290 (1968). The Higher Education

Employer-Employee Relations Act (HEERA) provides the Board with authority to delegate its powers, however, that authority is expressly limited. HEERA section 3563 enumerates the powers and duties of the Board. Subdivision (j) states that the Board shall have the following authority<sup>1</sup>:

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, and except that a decision to refuse to issue a complaint shall require the approval of two board members.  
(Emphasis added.)

While perhaps not artfully drafted, the underlined portion of the above provision is clearly set forth as a limitation on the Board's authority to delegate. As such, it may not be read to simply require that at least two members sign every decision issued by the Board. When viewed in context, the provision appears to require that at least two Board members decide the merits of any dispute coming before the Board. Such a reading of the provision, which is the one I find the most reasonable, directly conflicts with the vesting of discretion in the regional director that is inherent in the application of an abuse of discretion standard of review. Accordingly, I believe such a standard of review cannot be applied to proposed decisions of the Board's agents or employees.

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<sup>1</sup>The Educational Employment Relations Act (EERA) contains an identical provision at section 3541.3(k). The Ralph C. Dills Act incorporates EERA section 3541.3 by reference (see section 3513(g)).

To be fair to my colleagues, I must mention that there is Board precedent for applying an abuse of discretion standard in reviewing impasse determinations and "blocking charge" cases (which involve stays of elections pending resolution of unfair practice charges). However, that precedent is, at best, inconsistent. In three early cases involving review of impasse determinations, the Board applied, without comment, the abuse of discretion standard. (Ramona Unified School District) (1979) PERB Order No. Ad-73; Oakdale Union Elementary School District (1978) PERB Order No. Ad-46; Redwood City School District (1978) PERB Order No. Ad-26). However, the abuse of discretion standard has not been applied since to impasse cases. In fact, more recent cases appear to have overruled the earlier cases sub silentio, for the analysis therein reflects a de novo standard of review. (Regents of the University of California (1982) PERB Order Nos. Ad-129-H and Ad-129a-H; Marin Community College District (1982) PERB Order No. Ad-126; Mt. San Antonio Community College District (1981) PERB Order No. Ad-124).

The propriety of the abuse of discretion standard of review has been expressly endorsed only once by the Board, in a "blocking charge" case. (Jefferson School District (1980) PERB Order No. Ad-82.) That case drew a vociferous dissent from the then chairperson of, the Board. In three later "blocking charge" cases, the Board (again without expressly overruling the earlier case) applied a lesser standard, stating that it would defer to the conclusions of the regional director if they were amply supported by the record. (Grenada Elementary School District

(1984) PERB Decision No. 387; Regents of the University of California (1984) PERB Decision No. 381-H; Pleasant Valley-Elementary School District (1984) PERB Decision No. 380). The abuse of discretion standard has been mentioned only once since, in State of California (Department of Personnel Administration) (1985) PERB Order No. Ad-151-S, wherein the Board also cited the standard articulated in Regents No. 381-H and Pleasant Valley No. 380.

In sum, the history of this Board's application of an abuse of discretion standard of review is, at best, uneven. If this standard is to continue to be applied, I believe it is time for the Board to not only provide legal authority for its use, but also to articulate in what types of cases it will be applied and why. The practice of applying it only to regional directors' decisions involving impasse determinations and "blocking charges" (and not even in all such cases) and not to other types of decisions has never been explained. I, for one, question the wisdom of adopting several different standards of review for the various types of cases decided by Board agents, all of whom have the same apparent authority to issue decisions subject to the Board's review. I would suggest we simply apply the same de novo standard we use in unfair practice cases, while recognizing that certain types of determinations (for example, credibility determinations) are entitled to deference. (See Santa Clara Unified School District (1979) PERB Decision No. 104.)