STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SALINAS UNION HIGH SCHOOL DISTRICT, Employer, and SALINAS VALLEY FEDERATION OF TEACHERS, LOCAL 1020, Exclusive Representative.	Case No. SF-UM-588-E Administrative Appeal PERB Order No. Ad-315 June 6, 2002

Appearances: Lozano Smith by Kristina A. Markey, Attorney, for Salinas Union High School District; Law Offices of Robert J. Bezemek by Martin Fassler, Attorney, for Salinas Valley Federation of Teachers, Local 1020.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Salinas Union High School District (District) of an administrative determination (attached) by a Board agent granting the Salinas Valley Federation of Teachers, Local 1020's (SVFT) unit modification petition seeking to add daily and long-term substitute teachers to the certificated bargaining unit it represents in the District.

After reviewing the entire record in this matter, including the administrative determination, the District's appeal and SVFT's response, the Board adopts the administrative determination as the decision of the Board itself consistent with the following discussion.

DISCUSSION

The District's Appeal

On appeal the District contends that PERB has the discretion to order an election in this case and should do so. The District argues that Dixie Elementary School District (1981) PERB Decision No. 171 (Dixie) is not controlling because in Dixie the employer never questioned majority support, instead focusing on whether the unit, as modified, would be appropriate.

The District argues PERB should follow the two-part test for determining the appropriateness of an election in the context of a unit modification found in El Monte Union High School District (1982) PERB Decision No. 220 (El Monte). In El Monte the Board stated:

> The Board's authority to define the appropriate bargaining unit is sufficiently broad to enable it to include new employees in an existing unit without holding an election when the requisite community of interests is present, and the equities dictate such a conclusion.

The District urges that El Monte establishes two general requirements for ordering unit modification without requiring an election. First, the "requisite community of interests" must be present. Second, a balancing of "the equities" must "dictate" adding unrepresented positions to an existing unit without an election. An election was not held in El Monte because the employer did not question the majority support of the petitioned-for employees. The District argues that as a corollary, had the employer questioned majority support, an election would have been required.

The District is not questioning the community of interest between its full-time and substitute teachers. Instead, it focuses on its argument that "the equities do not dictate an order granting unit modification without an election." The District argues the equities include

consideration of the fact that a large number of employees may be forced into an organization against their wishes. The District urges that requiring an election whenever large groups of unrepresented employees are being subsumed into an existing unit is the only way to determine that employee rights of self determination are not being thwarted.

The District asks the Board to look to the National Labor Relations Act (NLRA) precedent which supports its argument that an election in this case would be mandatory. The District equates the NLRA's unit clarification procedure with PERB's unit modification procedure.

The District argues that when considering a petition for unit clarification, the National Labor Relations Board (NLRB) usually determines the appropriateness of the proposed unit and then orders an election. Sometimes, the NLRB may exercise its discretion to accrete a small group of employees into a preexisting unit without requiring an election. The District cites federal precedent holding that the NLRB will not approve unit clarifications in the absence of an election unless the change involves only a very small group of employees. Baltimore Sun Co. v. N.L.R.B. (2001) 257 F.3d 419, 426-427 [167 LRRM 2850]. The District notes two basis for the conclusion. First, adding a large group to a preexisting unit calls into question the majority status of the representative in the acquiring unit. Second, accretion poses a significant threat to the self determination rights of employees. The District summarizes the federal standard as reserving accretion without an election for "those cases where there is no question regarding the petitioned for employees' desire to organize, and to join with the petitioning unit."

The District's final argument is that even with the rebuttable presumption that the substitute teachers should be in the same unit as their full time counterparts, the substitutes do

have the option [if justified] of forming their own unit. The District makes this claim to support its argument that an election should be held, even though it expressly states it does not claim the substitutes should be in a separate unit.

SVFT's Response to District's Appeal

SVFT responds that the Board agent's certification without an election is supported by Dixie as the authorization cards submitted by SVFT are unequivocal in the statement of their wish to be represented by SVFT. The SVFT notes there is no evidence to suggest any doubt as to the wishes of the substitutes to be included in the SVFT bargaining unit. SVFT also supports the Board agent's finding that as a 64 percent increase without an election was approved in Dixie, the less than 20 percent increase in the instant case should not be a barrier to granting the unit modification without an election.

SVFT argues that because of the presumption that all classroom teachers should be in a single bargaining unit and because the District does not argue an all inclusive unit is inappropriate, the presumption must be applied. SVFT disputes the District's assertion that "PERB has found separate bargaining units comprised solely of substitute teachers to be appropriate." SVFT argues the employees in each case cited by the District: (1) were part-time employees, not substitutes; (2) that the unions representing the full-time employees were actively opposed to the representation of part-time employees; and (3) the number of part-time employees was much larger than the number of full-time employees -- all of which would de-stabilize the existing collective bargaining relationship.

SVFT argues that because of the presumption, PERB's discretion in this matter is more limited than that of the NLRB, therefore an election is not warranted.

Application of El Monte

The parties are in agreement that the unit modification is appropriate. The only question for the Board is whether the proof of majority support indicated by the cards is sufficient to certify the new unit through a unit modification proceeding without an election. While the Board agrees with the District that the two part test in El Monte should be applied, this application does nothing to alter the outcome of the administrative determination. The Board agrees with the Board agent that the cards are a sufficient expression of the desire of the employees and that an election is not warranted. Applying El Monte, the equities do dictate that the unit modification order should issue without an election.

The District does not dispute the validity of the cards. The District's argument is that the cards may not reflect the will of the employees and that PERB accepting the cards as a sufficient showing of support to modify the unit without an election risks the employees' right to self determination. The Board disagrees.

The District argued before the Board agent that the employees may not have understood the significance of the cards. This argument, which was all but abandoned on appeal to the Board, is the District's strongest argument. It is possible that cards alone could leave less than an absolute certainty regarding the desire of employees in the following two respects.

First, only an election can be relied on to truly judge the will of individual employees. However, employees who signed the cards knew what they were signing. It was a distinct possibility at the time of signing the cards expressing a desire to be represented by SVFT that the signatures could result in exactly what happened in this case; placing the substitutes in the unit without an election. In fact, had the District not objected to the unit modification order

without an election, this case would not have come before the Board and the unit would be so modified, without an election.

Second, the substitutes signing the cards opted for SVFT to be the exclusive representative. The cards do not express a desire as to which unit the employees would be in. Perhaps some of the substitutes wanted their own unit. On the other hand, with the rebuttable presumption that all classroom teachers should be in the same unit and with no evidence at all that the substitutes contemplated a separate unit, the Board has no trouble overcoming this issue because employees only get to pick whom they want to represent them, if anyone. For the most part, employees do not get to pick and choose which unit they will be in, at least not at the expense of the community of interest factors.

Applicability of NLRB Unit Clarification Precedent

The Board declines to apply NLRB unit clarification precedent because the PERB unit modification procedure, based on differences between the Educational Employment Relations Act (EERA or Act)[1] and the NLRA, is fundamentally different regarding showing of interest. The NLRA itself does not contain a requirement that any election petitions be accompanied by evidence of employee interest. The NLRB has administratively imposed a showing of interest requirement for some petitions. Under the NLRA, an election determines the union's majority status; it cannot be determined through an administratively required showing of interest. (Northeastern University (1975) 218 NLRB 247, [89 LRRM 1862].) Significantly, NLRB unit clarification petitions need not be supported by a showing of interest at all. (NLRB Statements of Procedure sec. 101.17.)

[1] EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Under EERA, the statute itself calls for representation petitions to be supported by majority support. (See EERA Sec. 3544.) Also, PERB regulations[2] specifically contemplate the Board's discretion to require proof of majority support for a unit modification petition. (See PERB Reg. 32781 (e).) These statutory and regulatory differences provide the basis for declining the District's request that the Board follow federal precedent.

The Board's discretion to grant the unit modification order without an election is firmly rooted in PERB Regulation 32786(a) which was relied upon by the Board agent:

> (a) Upon receipt of a petition for unit modification, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary in order to decide the questions raised by the petition and to ensure full compliance with the provisions of the law.

Further, as the Board held in El Monte:

> …the purpose of the unit modification provisions is to provide a mechanism whereby positions or classifications may be, among other things, added to the established unit when a community of interest exists. By the modification process, the employees in question are thus able to exercise their right to exclusive representation and good faith negotiation without the need for separate units which would derogate the legislative concern over potential fragmentation of employee groups and proliferation of bargaining units. To require an election every time a new position or classification is at issue would have the inevitable consequence of destabilizing existing employer-employee relationships contrary to the Act's fundamental purpose, as well as being financially prohibitive and administratively cumbersome for the Board. It is within the Board's discretion to decide under what circumstances it might consider an election appropriate. The Act itself sets forth no requirement that an election be conducted where established units are to be modified.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and may be found on the Internet at www.perb.ca.gov.

ORDER

For the reasons set forth above and in the Board agent's administrative determination, the unit modification petition is hereby GRANTED. A unit modification order adding daily and long-term substitute teachers to the Salinas Union High School District's certificated bargaining unit shall be ISSUED.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SALINAS UNION HIGH SCHOOL DISTRICT, Employer, and SALINAS VALLEY FEDERATION OF TEACHERS, LOCAL 1020, CFT/AFT, Petitioner.	REPRESENTATION CASE NO. SF-UM-588-E ADMINISTRATIVE DETERMINATION OCTOBER 22, 2001

This determination finds that an election among substitute teachers to determine whether they wish to be represented by the Salinas Valley Federation of Teachers, Local 1020, CFT/AFT, will not be required .

PROCEDURAL HISTORY

On July 31, 2001,[1] the Salinas Valley Federation of Teachers, Local 1020, CFT/AFT (SVFT or petitioner) filed a unit modification petition with the Public Employment Relations Board (PERB or Board) to add daily and long-term substitute teachers to the certificated bargaining unit it represents in the Salinas Union High School District (District or employer) pursuant to PERB Regulation 32781(a).[2] The petition indicated that there are 120 substitute

[1] All dates herein are in 2001 unless otherwise noted.

[2] PERB Regulation 32781(a) provides, in pertinent part:

> (a) A recognized or certified employee organization may file with the regional office a petition for modification of its units:
>
> (1) To add to the unit unrepresented classifications or positions; . . .

employees in the District, and 680 employees in the established unit. The petitioner submitted proof of majority support with its petition in the form of authorization cards containing the following statement:

> I, _____, a substitute teacher in the Salinas Union High School District, hereby authorize the Salinas Valley Federation of Teachers, Local 1020, CFT/AFT, to serve as my exclusive representative in all aspects of my employee-employer relations with the Salinas Union High School District as provided under the Educational Employment Relations Act pursuant to Government Code, Sections 3540-3549.3, inclusive.

The cards contained spaces for signature and date, and also included the following statements: "This is not a ballot. This is not an application for membership." PERB issued a determination finding the support to be adequate on August 22.[3]

The District filed its response to the petition on September 18. The response stated that the District did not challenge the addition of substitutes to the established unit, but requested an election "due to the number of employees proposed to be added and the resulting impact on the District." The District submitted a supplemental response setting forth legal argument in support of its position on September 28. AFT submitted its argument against the request for an election on October 11.

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[3]PERB Regulation 32781(e) provides, in pertinent part:

> (e) If the petition requests the addition of classifications or positions to an established unit, the Board may require proof of majority support of persons employed in the classifications or positions to be added. . . .

PERB typically requires proof of support when the number of employees proposed to be added constitutes 10 percent or more of the established unit.

POSITIONS OF THE PARTIES

The District asserts that an election must be held for several reasons. First, it claims that the petition is seeking to add several hundred employees to the unit, unlike most unit modification petitions which concern only a few employees. Given this number, the District asserts that the petition has raised a "question concerning representation which cannot be resolved through a signed petition."

Secondly, the District cites as precedent two cases under the National Labor Relations Act.[4] These cases hold that the National Labor Relations Board (NLRB) will require a unit clarification election unless the case involves small groups of employees and particularly when "employees seeking to join an existing unit could lawfully form their own unit." Claiming that the large number of substitute employees could lawfully form their own unit here, and noting that PERB regularly relies on NLRB precedent, the District states that an election would be required by the NLRB and should therefore by required by PERB.

Third, the District contends that the unit modification process is being used as an "end run" around the vote requirement for unit creation, possibly forcing unrepresented employees to be represented without being allowed to vote on the issue. Finally, the District asserts that individuals signing the proof of support document may not have understood its significance and could make a more educated decision through the election process.

SVFT disputes the District's arguments, asserting that the number of employees to be added to the unit should not bar granting the unit modification petition, that NLRA precedent is not applicable in this case, and that there is no factual basis for the District's assertion that "there is a serious question regarding the desire for representation." SVFT cites the

Educational Employment Relations Act (EERA)[5] and PERB precedent[6] in support of its position that PERB should grant the unit modification petition without requiring an election.

ISSUE

The sole issue to be decided is whether PERB should require an election among the substitute teachers to determine whether they wish to be represented by SVFT.

DISCUSSION

PERB Regulation 32786(a) provides:

> (a) Upon receipt of a petition for unit modification, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary in order to decide the questions raised by the petition and to ensure full compliance with the provisions of the law.

PERB considers NLRB precedent where appropriate, but is not bound by it, particularly when the statutory language being interpreted by PERB has no corollary in the NLRA.[7] While NLRB case law may require a unit clarification election in certain cases where employees are to be added to a unit, PERB precedent has held otherwise.

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[4] The Baltimore Sun Co. v. NLRB (2001) 257 F.3d 419, 426-27; NLRB v. Stevens Ford, Inc. (1985) 883 F. 2d 468 at 473;

[5]EERA is codified at Government Code Section 3540.1 seq. All references herein are to the Government Code. Government Code Section 3545(b)(1) provides:

> A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

[6]Peralta Community College District (1978) PERB Decision No. 77 (Peralta); Dixie Elementary School District (1981) PERB Decision No. 171 (Dixie.)

[7]See Sweetwater Union High School District (1976) PERB Decision No. 4 (citing Fire Fighters Union v. City of Vallejo 12 Cal. 3d 608 (1974);Los Angeles Unified School District (UTLA) (1976) PERB Decision No. 5; and Mount Diablo Unified School District (1977) PERB Decision No. 44.

In this case, there is no dispute regarding the appropriateness of the unit modification requested. Indeed, PERB has long held that all classroom teachers should be included in the same bargaining unit. (Peralta.) More to the point, the Board in Dixie found that substitute teachers share a community of interest with regular teachers and are appropriately included in the same unit.

The petitioner in Dixie sought to add approximately 80 substitute employees to the established certificated unit of approximately 125 employees, thus increasing the unit size by 64 percent. In finding this modification appropriate, the Board did not require an election but ordered that

> [b]ased on a finding that there has been a sufficient showing of interest, the requisite number of authorization cards being on file herein, the unit, as modified above, shall be certified immediately. (Dixie at p.9.)

In this case, as in Dixie, the petitioner submitted proof that a majority of substitutes wish to be represented by SVFT in the form of signed authorization cards which are currently on file in this office. Furthermore, SVFT's petition seeks to add 120 employees to a unit of 680, increasing the unit size by approximately 18 percent.[8] Since the percentage of affected employees here is significantly less than that in Dixie, there is no numerical basis for requiring an election.

The District argues that adding employees to the established unit through the unit modification process avoids "the vote requirement for unit creation." This argument is mistaken. PERB regulation 33190[9] allows employers in response to an initial representation

[8]The District has submitted no facts to support its statement that the petition seeks to add "hundreds" of employees to the established unit.

[9]PERB Regulation 33190 provides, in pertinent part:

petition to either request an election or grant voluntary recognition to an employee organization when proof of majority support has been submitted and no valid intervening petition is filed. Thus, even when creating new units employee organizations may not be required to go through the election process.

The District's assertion that employees signing authorization cards may not have understood their significance is without merit. The information contained on the authorization card is plainly stated[10] and meets PERB's proof of support requirements.[11]

> (a) Unless otherwise directed by the Board, within 15 days following service of the Board's determination regarding the adequacy of proof of support, the employer shall file a decision with the regional office.
> ....
>
> (c) The employer shall use "Format A" if it has granted voluntary recognition pursuant to Government Code sections 3544 and 3544.1. As soon as possible, but in no event later than 10 days from its issuance, the employer shall post a copy of the employer decision conspicuously on all employee bulletin boards in each facility of the employer in which members of the unit affected are employed. The decision shall remain posted for at least 15 workdays.
> .....
>
> (d) The employer shall use "Format B" if it has not granted voluntary recognition. A request for a representation investigation or hearing to resolve a unit dispute may be raised by "Format B" or by the employer filing a subsequent petition pursuant to section 33220.
>
> .....

[10] See San Juan Unified School District (1995) PERB Decision No 1082.

[11] PERB regulation 32700 provides, in pertinent part:

> a) . . . proof of employee support for all petitions requiring such support shall clearly demonstrate that the employee desires to be represented by the employee organization for the purpose of

CONCLUSION

For the reasons stated above, it is determined that an election will not be required in this case. A Unit Modification Order adding daily and long-term substitute teachers to the established unit shall be issued by this office.

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. (Cal. Code Regs., tit. 8, sec. 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:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

> meeting and negotiating or meeting and conferring on wages, hours and other terms and conditions of employment.
>
> (b) The proof of support shall indicate each employee's printed name, signature, job title or classification and the date on which each individual's signature was obtained. . . .

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

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, sec. 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 justifications for the request (Cal. Code Regs., tit. 8, sec. 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 (Cal. Code Regs., tit. 8, sec. 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, sec. 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, sec. 32132).

_____
Jerilyn Gelt
Labor Relations Specialist