

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

ROBERT L. MUELLER CHARTER SCHOOL,

Employer,

and

MUELLER CHARTER SCHOOL TEACHERS
ASSOCIATION, CTA/NEA,

Petitioner.

Case No. LA-RR-1079-E

Administrative Appeal

PERB Order No. Ad-320

March 5, 2003

Appearances: Parham & Rajcic by Jackson E. Parham and Stefanie K. Vandreuil, Attorneys, for Robert L. Mueller Charter School; California Teachers Association by Rosalind D. Wolf, Attorney, for Mueller Charter School Teachers Association, CTA/NEA.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's administrative determination that Robert L. Mueller Charter School's (Mueller) objections to the Mueller Charter School Teachers Association, CTA/NEA's (MCSTA) request for representation are without merit and that an election should therefore be conducted. The request initially seeks to establish MCSTA as the exclusive representative of the 41 certificated employees at the school but was amended orally by MCSTA to exclude the eight certificated members of the 13-member Mueller Leadership Council (Council). Representation is sought under Article 5, beginning with section 3544, of the Educational Employment Relations Act (EERA).¹

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

The Board agent's administrative determination found the bargaining unit, excluding the eight certificated members of the 13-member Mueller Leadership Council, to be appropriate and ordered an election. Mueller claims that any bargaining unit is inappropriate, because an inherent conflict of interest exists between EERA and the requirements of the charter. Mueller requests that the election be stayed until the Board issues a final decision in this matter. MCSTA has requested that the Board expedite this matter and in addition, seeks an election for the unit described in its original petition. After review of all documents in the record, including the administrative determination, Mueller's appeal and request for stay of the administrative determination, and MCSTA's opposition to Mueller's appeal and request for stay, the Board affirms the Board agent's administrative determination that an appropriate unit exists consistent with the Board's holding in Franklin-McKinley School District (1979) PERB Decision No. 108 (Franklin-McKinley) and directs that an election be held in the unit described in MCSTA's original request for recognition. The Board shall also address below the pertinent issues raised in the parties' appellate documents.

BACKGROUND

On March 27, 2002,² MCSTA filed a petition to be exclusive representative for the 41 certificated employees of Mueller, the public school employer, selected pursuant to the Charter Schools Act of 1992, Education Code section 47600 et seq.³ On May 1, the Board agent determined that MCSTA had shown sufficient support to meet the requirements of PERB

²All dates refer to 2002 unless otherwise noted.

³See specifically Education Code section 47611.5.

Regulation 33050(b).⁴ By letter dated May 9, the Council submitted its decision⁵ requesting that PERB conduct an election pursuant to PERB Regulation 33190.⁶ Subsequent to discussions among the Board agent and the parties, on May 28, Mueller filed an amended decision in which it asserts that any PERB certification of a bargaining unit would conflict with the provisions of Mueller's charter⁷ and violate Government Code section 1090.⁸ Mueller

⁴PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 33050(b) provides:

(b) A copy of the request and proof of majority support in the unit claimed to be appropriate shall be filed with the regional office concurrently with the filing of the request upon the employer. Proof of support is defined in Chapter 1, Section 32700 of these Regulations.

⁵There is no evidence in the record that the letter from the Council was accompanied by a proof of service or even "cc" on the letter, i.e., that this decision was served on or in any way provided to MCSTA.

⁶PERB Regulation 33190 provides, in pertinent part:

(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.

(b) Service and proof of service of the employer decision pursuant to section 32140 are required.

(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.

(5) If no unit dispute exists, does the employer request an election?

⁷Neither party provided a copy of the charter before the administrative determination was issued.

⁸Government Code section 1090 provides, in pertinent part:

thereby requested that PERB conduct an investigation and/or hearing into the matter. In its amended decision, Mueller argued that although the teachers on the Council do not possess management “titles,” they perform management and supervisory functions, analogous to the facts in Rocklin Teachers Professional Association, CTA/NEA (Romero) (1995) PERB Decision No. 1112. Mueller also claimed that even if certificated Council members were excluded from the unit, there would exist a conflict of interest between those employees and the unit because the Council members would be bargaining on their own behalf.

On May 29, the Board agent provided MCSTA with an opportunity to respond. On May 30, MCSTA replied that Mueller’s response was a continuing effort to deny certificated employees their rights under EERA. MCSTA refers to a previous unfair practice charge filed with PERB (Case No. LA-CE-4125-E) in which the ALJ, in his proposed decision, found that the Chula Vista Elementary School District, Mueller’s parent district, interfered with employee rights in its conduct surrounding an election to determine the identity of the public school employer under Education Code section 47611.5.⁹ MCSTA asserted that EERA section 3544.1 requires PERB to conduct the election, that Mueller’s objections are not appropriate objections under EERA section 3545, and that there are alternative appropriate forums for Mueller to raise its objections. MCSTA argues that PERB precedent has allowed employees to return to the unit if they no longer work in an excluded position, citing Franklin-McKinley.

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.

⁹That case is currently on appeal before the Board.

Sometime in May 2002, by telephone, MCSTA's counsel informed the Board agent that MCSTA would be willing to exclude the eight certificated Council members from the proposed unit in order to expedite the election. The Board agent, in turn, communicated this information to Mueller. Mueller filed a reply on June 7, 2002, disputing the relevance of the reference to LA-CE-4125-E and reiterating its contention that no unit would be appropriate because of the inherent conflict with Mueller's charter.

The Board agent found that under the Charter Schools Act of 1992, as amended effective January 1, 2000, charter schools became subject to EERA.¹⁰ Should provisions of the two laws appear to conflict, the Board is required to harmonize them. (See San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal. 3d 850, 864-866 [191 Cal.Rptr. 800].) The Board agent noted that Mueller did not dispute the appropriateness of the unit under EERA section 3545, but rather argued that the establishment of any unit was inappropriate because it would conflict with the charter and with statutory conflict of interest laws. According to the Board agent, such an argument, if accepted, would serve to deny all unit employees their rights under EERA. In addition, such conflict already exists since the Council already sets terms and conditions for certificated employees, including Council members. Mueller's objections are insufficient to deny unit employees their EERA rights and are outside the scope of objections contemplated by PERB Regulation 33190. Consistent with the Board's decision in Franklin-McKinley, the Board agent ordered an election in the certificated unit, which excluded teachers who serve on the Council.

¹⁰See also EERA section 3540.1(k).

MUELLER'S APPEAL AND REQUEST FOR STAY

In its appeal, Mueller alleges that the Board agent did not conduct an investigation or hearing as required by PERB Regulations 33190 and 33220, but merely asked MCSTA for a response. Mueller reiterates its position that Board certification of any bargaining unit would conflict with Mueller's governance structure under its charter. According to Mueller, this could result in revocation of the charter. Mueller contends that exempting the teachers on the Council does not resolve the conflict since the majority of the Council members are teachers. Mueller states that the certificated Council members perform management functions but are neither management nor supervisory employees; their primary duties involve teaching. As a result, these teachers would directly benefit from negotiations conducted for the bargaining unit. When their terms expire, they enter the bargaining unit. Any negotiated agreement directly benefits them. Mueller further argues that MCSTA recognizes the conflict since it is willing to exclude the certificated Council members from the bargaining unit. Because of this conflict, Mueller contends that those Council members' priorities will shift from representation of students, teachers, parents and staff, as required by the charter, to solely the interests of teachers. Mueller concludes that in effect, those teachers are negotiating with themselves. Mueller is also concerned that excluding the certificated Council members violates EERA since EERA section 3545 requires that the bargaining unit be comprised of all classroom teachers employed by the public school employer.

Mueller further alleges that the requirement to bargain over mandatory issues violates the Mueller charter because the charter requires the Council to independently make decisions that represent all interests at Mueller, not just the teachers' interests. However, as the teachers make up the majority of the Council, they are adequately represented within the Mueller

governance structure without the need for collective bargaining. Mueller further speculates that the teacher majority on the Council would appoint fellow teachers to represent Mueller's bargaining team against the exclusive representative. EERA does not prevent this outcome and since it was only recently amended to include charter schools, there are no cases that address this issue. Mueller further argues that there are no rules to prevent the Council from modifying the unit to include its teacher members.

Mueller contends that certain provisions of the charter conflict with EERA. For example, the charter provides for a grievance procedure intended to be the sole process for resolving disputes. However, grievance procedures are mandatory subjects of bargaining under EERA. Mueller therefore concludes that establishment of a bargaining unit coupled with the requirement to negotiate a grievance procedure could nullify the charter. As the governing document of Mueller, where the charter conflicts with a collective bargaining agreement, the charter would have to be amended to accommodate the conflict or violate EERA. According to Mueller, Education Code section 47611.5(d) requires that PERB take the Charter Schools Act into account in deciding cases involving charter schools. Under the Charter Schools Act, Mueller must provide a governance structure. PERB therefore cannot order Mueller to amend its charter to accommodate the bargaining unit. In summary, Mueller believes that Board certification of a bargaining unit would violate the charter and lead to revocation of the charter as set forth in the provisions of the charter and in Education Code section 47607(b).

Mueller finally requests that the Board stay the election pending the Board decision on this appeal.

MCSTA'S RESPONSE TO MUELLER'S APPEAL¹¹

MCSTA objects to facts stated by Mueller in its appeal. First, the designation of Mueller as the public school employer is currently on appeal before the Board from the administrative law judge's proposed decision in Case No. LA-CE-4125.¹² Second, MCSTA objects to Mueller's characterization that excluding the Council teachers from the unit was MCSTA's acknowledgment that their membership in the unit was inappropriate. Instead, in a telephone conversation with the Board agent, MCSTA offered to exclude the Council members in order to expedite the election process. As a result of Mueller's alleged misstatements, MCSTA now wishes to withdraw its offer to exclude the Council members from the unit. MCSTA further disputes Mueller's contention that it lacks alternative means to raise its concerns about the unit, citing PERB Regulation 32738, or a technical "refusal to bargain." (Jefferson School District (1980) PERB Order No. Ad-82; The Regents of the University of California (1989) PERB Decision No. 722-H.) MCSTA also notes that Mueller inconsistently alleges that the Council teachers are neither management nor supervisory employees but perform management functions, and asserts that Mueller "cannot have it both ways."

MCSTA contends that under PERB Regulation 33237 and the Board's decision in Pasadena Area Community College District (1990) PERB Order No. Ad-219 (Pasadena), the Board agent has discretion to determine whether a hearing is necessary. Mueller's stated

¹¹MCSTA provided a copy of the charter in its opposition to Mueller's appeal and request for stay. This is the first time this document appears in this proceeding. Interestingly, there is no mention of the Council in this document.

¹²In its request for recognition, MCSTA seeks to represent a unit of certificated employees at Mueller and identifies Mueller as the employer. The ultimate identification of the employer of the unit employees is therefore not at issue in this matter and will be determined by the Board in another proceeding.

concerns about the unit are outside the scope of objections contemplated by EERA section 3545 and PERB Regulation 33190. Under these circumstances, according to MCSTA, the Board agent properly concluded that no hearing was required.

MCSTA agrees that the Board must consider the Legislative intent behind the Charter Schools Act when deciding cases involving charter schools. However, it sees that intent differently. MCSTA contends that the Charter Schools Act envisioned teachers both as having decision-making authority and as having rights under EERA and concludes that the Council appropriately includes unit members. (See Educ. Code secs. 47601(d) and 47611.5(d).) MCSTA concurs with the Board agent that the Council already sets terms and conditions of employment affecting unit members.

MCSTA opposes a stay of the election because under Board precedent, absent an unfair practice charge, the election should occur and any representation issues be decided after the election. (PERB Reg. 32752; Capistrano Unified School District (1994) PERB Order No. Ad-254; Long Beach Community College District (2000) PERB Order No. Ad-301.)

DISCUSSION

The Board affirms the Board agent's holding that there exists an appropriate unit of certificated employees but orders an election in the certificated unit as described in MCSTA's original request for recognition.

MCSTA, in its opposition to Mueller's appeal, attempted to rescind its offer to exclude the eight current certificated Council members from the unit. This offer occurred during a telephone conversation with the Board agent before issuance of the administrative

determination.¹³ Although it would normally be appropriate to determine the composition of the unit before holding the election, the following factors favor holding the election immediately in the described unit: (1) the lack of a dispute over the essential nature of the unit (all classroom teachers) as opposed to a possible dispute over the eligibility of specified individuals to vote (see Palomar Community College District (1992) PERB Decision No. 947); and (2) the need to prevent further delay of the exercise of unit members' rights to vote for representation. The Board therefore allows the election to take place in the certificated unit as described in MCSTA's original request for recognition. This order to proceed with the election renders Mueller's request for a stay moot. The Board's decision does not rule on the propriety of including the certificated Council members in the bargaining unit, and should not preclude Mueller from requesting that the Board resolve the issue of the eligibility of the certificated Council members through challenged ballots (PERB Reg. 32732). At this time, there is insufficient information in the record for the Board to determine the eligibility of the current certificated Council members.¹⁴

We disagree with Mueller's contention that the Board agent improperly failed to investigate and conduct a hearing regarding the alleged conflict between the Board's

¹³The first indication of this phone conversation was in the administrative determination. In both parties' appellate documents, however, there appeared to be no dispute that MCSTA had agreed to exclude the certificated Council members before the administrative determination was issued. Normally, such information should be filed with the employer as an amendment to the request for recognition with copies served concurrently on the appropriate regional office of the Board. (PERB Reg. 33100.)

¹⁴The Board has long held that the party arguing for exclusion of employees from the unit has the burden of proving by a preponderance of the evidence that such employees possess the requisite authority and/or exercise the requisite functions and duties to qualify them for exclusion from the proposed unit. (San Francisco Unified School District (1977) EERB Decision No. 23; prior to Jan. 1978, PERB was known as the Educational Employment Relations Board or EERB.) At this point, Mueller has not met this burden.

certification of any bargaining unit and the provisions of the charter. Presumably, Mueller made its request pursuant to EERA section 3544.5(a) and through either PERB Regulation 33200 or 33220 in its amended decision filed May 28. Under EERA, the Board agent must conduct inquiries and investigations but has discretion as to whether or not to hold a hearing. (EERA sec. 3544.7(a) and PERB Reg. 33237(a).) PERB Regulation 33237(a) provides in pertinent part that, pursuant to such a petition, “the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election or take other such action as deemed necessary to decide the questions raised by the petition.” (Emphasis added.) (Compare Pasadena.) In reviewing whether a Board agent has conducted a proper investigation, the Board generally has looked at whether or not the Board agent abused her discretion. (See Jefferson School District (1980) PERB Order No. Ad-82; State of California (Department of Personnel Administration) (1985) PERB Order No. Ad-151-S; California State University (1988) PERB Order No. Ad-177-H; Pleasant Valley Elementary School District (1984) PERB Decision No. 380.) The Board disagrees that the Board agent abused her discretion in the performance of the investigation and the failure to conduct a hearing. After Mueller made its request for an investigation and hearing, the Board agent sought and received MCSTA’s written response to Mueller’s allegations and then Mueller’s written reply to MCSTA’s response. In its reply, as in previous submissions, Mueller failed to allege objections to the appropriateness of the unit contemplated by EERA section 3545 and PERB Regulations 33200 or 33220. Furthermore, the Board agent’s administrative determination complied with the requirements of PERB Regulation 32350(b), expressing the results of her inquiry and legal analysis as the basis for her findings. Although the Board agent did not discuss why a hearing was not conducted, as stated above, in failing to state appropriate objections under EERA, the

matter did not warrant further inquiry or a hearing. The parties in this matter were provided with sufficient opportunity to articulate their positions. In addition, even assuming such objections were appropriate under EERA, Mueller failed to provide a copy of the charter to support its allegations of conflict.

Mueller's objections continue to be based upon the alleged conflict with its charter; but, as stated, Mueller failed to provide a copy of the charter throughout these proceedings. Rather, the charter was submitted by MCSTA after the administrative determination was issued in its response to Mueller's appeal. Mueller says nothing new in its appeal that was not adequately addressed by the Board agent.

The Board further finds that the Board agent was correct in finding the described unit to be appropriate consistent with the Board's decision in Franklin-McKinley. In that case, the district claimed that all 11 principals should be excluded from a supervisory unit because they periodically served on the district's bargaining team. However, the Board only found the four principals who currently participated on the district's negotiating team to be confidential employees and excluded them from the unit.

This case is similar in that according to Mueller, the eight certificated members of the Council are selected annually.¹⁵ We therefore disagree with Mueller concerning its argument that no unit would be appropriate since Council members rotate and are bargaining with and for themselves. As stated by the Board agent, such a result would serve to deprive all unit members of their rights under EERA. This cannot be a result contemplated by the Charter Schools Act, as amended. In 1999, the Charter Schools Act was amended to apply EERA to

¹⁵Again, the Board is not ruling at this time on whether or not the certificated Council members should be excluded from the unit as managerial or supervisory employees, but instead is affirming that there exists an appropriate unit of all certificated employees.

employees of charter schools. (Ed. Code sec. 47611.5(d).) Under established rules of statutory construction, both statutes should be harmonized, if possible, to effectuate their collective intent. (See Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal.App.3d 689, 701-702 [163 Cal.Rptr. 464]; San Bernardino City Unified School District (1989) PERB Decision No. 723; State of California (State Personnel Board) (2002) PERB Decision No. 1491-S.)

Furthermore, Mueller's contention that exclusion of the eight certificated Council members from the unit would violate EERA since the unit must comprise all teachers, misstates the law. EERA section 3545(b)(1) provides:

(b) In all cases:

(1) 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. [Emphasis added.]

The statute thus describes an appropriate unit of classroom teachers as excluding managerial and supervisory employees. (See also, Pasadena Community College District (1995) PERB Decision No. 1098.) As stated above, whether or not the certificated Council members are supervisory or management employees, and should be excluded from the unit, will not be addressed in this proceeding.

ORDER

For the reasons described above, the Board finds that a unit comprised of all certificated employees pursuant to EERA section 3545(b)(1) is appropriate under the Board's holding in Franklin-McKinley School District (1979) PERB Decision No. 108 and thereby

orders that an election be conducted in the certificated unit as described in the Mueller Charter School Teachers Association's (MCSTA) original request for recognition.

Within 10 days following issuance of this decision, Robert L. Mueller Charter School (Mueller) shall post on all employee bulletin boards a copy of the Notice of Decision attached hereto as an Appendix. The Notice of Decision shall remain posted for a minimum of 15 working days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

The regional director shall conduct an election at the end of the posting period to determine whether the employees in the appropriate unit wish to be represented by MCSTA, unless Mueller chooses to grant voluntary recognition to the employee organization.

The Board hereby ORDERS that this case be REMANDED to the San Francisco regional director for proceedings consistent with this decision.

The Robert L. Mueller Charter School's request for stay of the ordered election in the administrative determination is hereby DENIED.

Members Baker and Neima joined in this Decision.

APPENDIX

NOTICE OF DECISION
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

CASE: ROBERT L. MUELLER CHARTER SCHOOL
Case No. LA-RR-1079-E
PERB Order No.

EMPLOYER: Robert L. Mueller Charter School
715 "I" Street
Chula Vista, CA 91910

EMPLOYEE ORGANIZATION
PARTY TO PROCEEDING:

Mueller Charter School Teachers Association/CTA/NEA
11745 East Telegraph Road
Santa Fe Springs, CA 90670

FINDINGS:

The Board finds the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

Unit Title: Classroom teachers

Shall Include: Full-time and part-time certificated non-supervisory teaching personnel, counselors, literacy-media specialists.

Shall Exclude: Principal, psychologist, student advocate, classified employees, certificated special ed. employees.

Pursuant to PERB Regulation section 33450, within 10 days following issuance of this Notice of Decision, the Robert L. Mueller Charter School shall post on all employee bulletin boards a copy of the Notice of Decision. The Notice of Decision shall remain posted

for a minimum of 15 workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material.

The regional director shall conduct an election at the end of the posting period to determine whether the employees in the appropriate unit wish to be represented by the Mueller Charter School Teachers Association/CTA/NEA, unless the Robert L. Mueller Charter School chooses to grant voluntary recognition to the employee organization.

Dated: _____

ROBERT L. MUELLER CHARTER SCHOOL

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR A MINIMUM OF FIFTEEN (15) WORKDAYS. REASONABLE STEPS SHALL BE TAKEN TO ENSURE THAT THIS NOTICE IS NOT REDUCED IN SIZE, ALTERED, DEFACED OR COVERED WITH ANY OTHER MATERIAL.