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

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| MORONGO BASIN TRANSIT AUTHORITY,<br><br>Employer,<br><br>and<br><br>AMALGAMATED TRANSIT UNION LOCAL 1704,<br><br>Petitioner. | Case No. LA-RR-1244-M<br><br>Administrative Appeal<br><br>PERB Order No. Ad-430-M<br><br>December 14, 2015 |

Appearances: Rutan & Tucker by A. Patrick Muñoz, Joseph D. Larsen, and Shawna McKee, Attorneys, for Morongo Basin Transit Authority; Neyhart, Anderson, Flynn & Grosboll, A Professional Corporation by Wan Yan Ling, Attorney, for Amalgamated Transit Union Local 1704.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Morongo Basin Transit Authority (MBTA) of an administrative determination by PERB's Office of the General Counsel. The administrative determination granted Amalgamated Transit Union Local 1704's (ATU) representation petition (Petition) for recognition and certified it as the exclusive representative pursuant to section 3507.1(c) of the Meyers-Milias-Brown Act (MMBA).[1] The MBTA contends on appeal that the Office of the General Counsel erred by ignoring evidence of revocation of authorization cards and purported evidence that the proof of support filed with the Petition was tainted by misconduct. The appeal also asserts error in the Office of the General Counsel's refusal to consider two sworn declarations from employees alleging, respectively, coercion and a misunderstanding of the effect of his authorization. MBTA urges PERB to reverse the certification and either conduct

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

an election or an investigation to determine the validity of ATU's proof of support filed with its Petition.

We have reviewed the entire record in this matter and find that the Office of the General Counsel's administrative determination was well-reasoned, adequately supported by the record and in accordance with applicable law. We therefore affirm the Office of the General Counsel's certification of ATU as the exclusive representative of the petitioned-for unit in accordance with the following discussion.

## FACTUAL BACKGROUND

On June 1, 2015,[2] ATU filed a Petition with PERB pursuant to PERB Regulation 61000. The Petition sought a unit of "Bus Drivers, Maintenance, Administration/ Support," including "All FT-PT, Seasonal Drivers/Coach Operators, All Maintenance including Mechanics, and facilities employees Admin/Clerical, Dispatchers, Field Sups.," but excluding "Managerial employees." The Petition indicated that it included proof of majority support, but the Petition was not signed. After being informed by the Office of the General Counsel that the Petition lacked a signature, ATU filed a revised Petition on June 11, signed by ATU president and business agent, Jeff Caldwell.[3]

On June 4, the Office of the General Counsel notified the MBTA of the filing of the Petition and requested a copy of any local rules MBTA had adopted concerning representation petitions. MBTA verbally confirmed that it had not adopted such local rules.

On June 15, two documents containing collectively 16 employee signatures were filed with PERB stating the employees opposed the Petition, were not interested in ATU, and did not support ATU (Opposition Petitions).

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[2] Hereafter, all dates refer to 2015 unless otherwise noted.

[3] The proof of service for this document shows service on the MBTA on June 8.

On June 18, MBTA employee Noemi Adderley (Adderley) faxed a letter to PERB's Los Angeles Regional Office opposing representation by ATU and stating that although she had signed an authorization card for ATU, she felt coerced and strong-armed into signing it. This letter was not signed under penalty of perjury.[4]

On June 19, MBTA filed an employee list with PERB showing 33 employees in the proposed bargaining unit.

On June 22, PERB issued a letter informing the parties that the proof of support submitted with the Petition was sufficient to meet the requirements of PERB regulations, as it demonstrated that a majority of employees in the proposed bargaining unit authorized ATU to be their exclusive representative.[5] MBTA was directed to file a written response within 15 days. Because ATU evidenced majority support and no valid competing petition had been filed, the Office of the General Counsel informed MBTA that recognition must be granted unless it doubted the appropriateness of the proposed unit.

Also on June 22, a third document containing one employee signature was filed with PERB stating the employee opposed the Petition, was not interested in ATU, and did not support ATU. The names on the three Opposition Petitions totaled 17. On the same day, ATU filed additional proof of support in the form of authorization cards.

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[4] The letter itself does not identify either the employer or ATU by name. It was accompanied by a facsimile cover sheet sent from an office supply store that did identify "MBTA" as the "company."

[5]The Office of the General Counsel referenced PERB Regulations 61210(b) and 61250 in the letter, both of which apply to petitions for certification by means of an election after a showing of 30 percent support from the proposed bargaining unit. However, because ATU submitted proof of majority support with its Petition, and because the Office of the General Counsel referenced throughout her correspondence with the parties MMBA section 3507.1(c), requiring an employer to recognize an employee organization based on proof of majority support, unless it doubted the appropriateness of the proposed bargaining unit, we consider citation to this regulation an inadvertent error that has no bearing on the resolution of this appeal.

On July 6, MBTA sent to the Office of the General Counsel a letter including the June 18 Adderley letter and the three Opposition Petitions.[6] The letter states, in relevant part: .

> We are providing this response based on a strong sentiment provided to MBTA's management by numerous of its employees to the effect that they are opposed to the Petition. Based upon information provided by proposed unit employees, MBTA has serious doubts that the proof of support submitted with the Petition represents the desires of the majority of proposed unit employees at MBTA. In light of the level of doubt raised, . . . combined with MBTA's goal on ensuring its employees' actual desires (whatever they may be) be implemented, MBTA respectfully requests that the Board conduct an election . . . Alternately, MBTA respectfully requests that the Board conduct a hearing . . . as to the validity of the proof of support filed with the Petition. . .
>
> MBTA believes that the Opposition Documents . . . are a clear demonstration that any employees who signed the Opposition Documents have revoked any previous support of the Petition and desire not to be represented by ATU.

On July 20, the Office of the General Counsel issued to MBTA an Order to Show Cause (OSC) "as to why PERB should not certify the petitioner as the exclusive representative." (OSC, p. 5.) The OSC first noted that MBTA had not disputed the appropriateness of the proposed bargaining unit in any of its submissions to the Office of the General Counsel and, that under these circumstances, MBTA was required to recognize ATU as the exclusive representative, given that there was a sufficient showing of support for ATU's Petition.

Next, the OSC rejected MBTA's claim that the Opposition Petitions should be treated as revocations of support based on *Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M (*Antelope Valley*) and *State of California* (2007) PERB Order No. Ad-367-S. According to the Office of the General Counsel, "The Authority has not

[6] The proof of service for this letter shows service on June 6, but the letter is dated July 6, and it was received by PERB on July 7.

provided any facts demonstrating that the interested parties—the Authority and ATU—by their acts or otherwise, have acquiesced or agreed to an arrangement wherein employees may revoke their support." (OSC, p. 4.)

The OSC also concluded, pursuant to the language of PERB Regulation 61020(f)[7], as follows:

> The Authority's assertion that ATU obtained employee authorization by fraud or coercion is not accompanied by evidence in the form of declarations under penalty of perjury supporting such contentions. Moreover, the Authority's response was not filed within 20 days after ATU filed its petition on June 1, therefore the response is untimely under PERB Regulation 61020. Therefore, the Authority has not provided a basis for PERB to conduct further investigation pursuant to PERB Regulation 61020.

(OSC, p. 5.)

On August 4, MBTA filed its response to the OSC. Attached to MBTA's response is a sworn declaration by Adderley, who also signed the Opposition Petition, alleging that she was coerced and strong-armed into signing ATU's original authorization card. Also attached to MBTA's response is a sworn declaration by proposed bargaining unit member Rex Watson (Watson), who also signed the Opposition Petition, alleging that he did not understand the

[7] PERB Regulation 61020(f) states, in relevant part:

> Any party which contends that proof of employee support was obtained by fraud or coercion, or that the signatures on such support documents are not genuine, shall file with the regional office evidence in the form of declarations under penalty of perjury supporting such contention within 20 days after the filing of the petition which the proof of support accompanied. The Board shall refuse to consider any evidence not timely submitted, absent a showing of good cause for late submission. When prima facie evidence is submitted to the Board supporting a claim that proof of support was tainted by such misconduct, the Board shall conduct further investigations. If, as a result of such investigation, the Board determines that the proof of support is inadequate because of such misconduct, the petition shall be dismissed.

effect of signing ATU's authorization card and did not want to be part of a union. Watson's declaration did not allege fraud or coercion by ATU. MBTA stated that "these declarations and the Opposition Documents are prima facie evidence supporting a claim that the proof of support filed with the Petition was tainted by misconduct." (MBTA August 4, 2015, Response to OSC, p. 2.)

Administrative Determination

On August 17, the Office of the General Counsel issued the administrative determination granting ATU's Petition, issued a "Certification of Representative" along with the administrative determination and denied MBTA's request for an election or for an investigation or hearing as to the validity of the proof of support filed with the Petition. The Office of the General Counsel also rejected the two sworn declarations proffered by MBTA as evidence of fraud or coercion because MBTA had not shown good cause for their late submission as required by PERB Regulation 61020(f). The Office of the General Counsel noted pursuant to PERB Regulation 61275, the following:

> If the Board determines (1) an employee organization requesting recognition has demonstrated at least majority proof of the employees in an appropriate unit, (2) no other employee organization has demonstrated proof of support of at least 30 percent of the employees, and (3) the public agency has not granted recognition, the Board shall certify the petitioner as the exclusive representative.

The Office of the General Counsel also noted that under MMBA section 3507.1(c),[8] PERB must grant recognition unless the employer doubts the appropriateness of the unit. As

[8] MMBA section 3507.1(c) states, in relevant part:

> A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has

noted by the Office of the General Counsel, MBTA never expressed doubt as to the appropriateness of the petitioned-for unit.

MBTA's Appeal and Request for Stay

On September 1, MBTA filed its administrative appeal, requesting that the Board reverse the certification of ATU as the exclusive representative of the proposed unit and conduct an election pursuant to PERB Regulation 61270. Alternatively, MBTA asks that the Board conduct an investigation pursuant to PERB Regulation 61020(f) or a hearing pursuant to PERB Regulation 61270 as to the validity of the proof of support filed with the Petition. MBTA also requested a stay of the administrative determination and related Certification of Representative pending the appeal pursuant to PERB Regulation 32370.

MBTA urges PERB to consider the sworn declarations by Adderley and Watson, asserting that they were timely because they were submitted with MBTA's response to the OSC. MBTA also argues that even if the submission was untimely, good cause was shown for the late submission pursuant to PERB Regulation 61020(f), because the Opposition Petitions and Adderley's letter regarding alleged fraud and coercion were submitted directly to PERB by the respective MBTA employees, and MBTA had no knowledge that those documents would be rejected until it received PERB's July 20 OSC.

Additionally, MBTA argues that the employees who signed the Opposition Petitions revoked their support of ATU before PERB made any determination regarding the sufficiency of proof of support. MBTA also argues that it sufficiently raised issues of appropriateness of the unit, despite the Office of the General Counsel's statement to the contrary, in that the proof of support was induced by possible coercion and/or fraud. With the taint of misconduct that

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> previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. . . .

has surrounded the petitioning process, it is impossible to determine the composition of an appropriate unit, according to MBTA.

Finally, MBTA argues that the Board showed bias in favor of ATU by, on the one hand, advising ATU that its original petition was incomplete and instructing it on how to submit a complete petition, while on the other hand, failing to advise an individual employee that her letter alleging coercion was deficient because it did not state that it was executed under penalty of perjury under PERB Regulation 61020(f).

ATU's Opposition to MBTA's Appeal

On September 15, ATU filed its opposition to MBTA's appeal. ATU challenges the two declarations submitted by MBTA as untimely and asserts that there was no showing of good cause as required by PERB Regulation 61020(f). ATU further claims the declarations are implausible on their face.

ATU also challenges the Opposition Petitions on the grounds that no MMBA provision or PERB regulation authorizes the use of signature revocations, and that the documents contain signatures from MBTA supervisors and should not be credited. Additionally, ATU argues that MBTA failed to object to the appropriateness of the petitioned-for unit, and that MBTA's allegations of PERB's favoritism toward ATU are meritless.

## DISCUSSION

The MMBA provides that representation matters shall be determined in accordance with rules adopted by the public agency. However, in the absence of such local rules, representation matters must be processed in accordance with PERB's rules. (MMBA section 3509(a); *County of Orange* (2010) PERB Decision No. 2138-M, p. 8)

MBTA does not have local rules for representation matters, so we rely on PERB's rules and precedents in addressing the issues raised by this appeal. These issues are: (1) Did the

Office of the General Counsel err in refusing to consider the two employee declarations proffered by MBTA as evidence of fraud or coercion; and (2) Did the Office of the General Counsel err by refusing to consider the Opposition Petitions containing the names of 17 employees in the proposed bargaining unit as evidence of revocation?

Procedural Requirements for a Party to Allege Fraudulent or Coerced Procurement of Proof of Support

The procedure by which a party (viz., ATU or MBTA)[9] may challenge proof of support on the grounds that it was procured by fraud or coercion is set forth in PERB Regulation 61020(f), which requires a party to file evidence with PERB's regional office in the form of declarations under penalty of perjury within 20 days after the filing of the Petition which the proof of support accompanied.

The Office of the General Counsel correctly noted that this regulation prohibits the Board from considering "any evidence not timely submitted, absent a showing of good cause for late submission" and that the regulation must be strictly construed. (PERB Regulation 61020(f).) MBTA's two sworn declarations from Adderley and Watson were filed by MBTA on August 4, well beyond the 20-day deadline provided for in PERB Regulation 61020(f). In its August 4 response to the OSC, the MBTA made no effort to explain why there was good cause for late submission. Therefore, the Office of the General Counsel did not err in rejecting the late-submitted declarations of Adderley and Watson. In fact, PERB Regulation 61020(f) left the Office of the General Counsel with no choice but to refuse to consider them.

[9] PERB Regulation 61005 defines "Parties" as "the public agency, the employee organization that is the exclusive or majority representative . . . , any employee organization known to have an interest in representing any employees as demonstrated by having filed a pending petition, and/or any group of public employees which has filed a pending petition . . . pursuant to Government Code Section 3502.5(d) [providing for rescission of agency shop arrangements] or 3507 [representation petitions filed under local rules]." Individual employees are not considered parties for purposes of representation matters.

On appeal, MBTA belatedly asserts that its good cause for the late submission was that it did not know until July 20 that documents submitted by their employees to PERB would be rejected. This assertion falls short of demonstrating good cause for several reasons. First, MBTA claims in its response to the OSC, that it learned in June (no precise date given) that Adderley felt coerced and intimidated into signing the authorization card. It is presumed that MBTA knew of PERB Regulation 61020(f) and that only "parties" as defined by PERB Regulation 61005 may file declarations under penalty of perjury in support of a claim that proof of support was obtained by fraud or coercion, and that such declarations needed to be filed within 20 days of the filing of the petition for recognition. If Adderley's allegations came to MBTA's attention after the 20-day deadline, it could have submitted its own sworn declaration as to when and how it learned of Adderley's allegations in arguing for good cause to accept the late filing. It made no such effort at the time the declarations were filed with PERB, and thereby waived its claim for good cause for the late filing.

Nor can MBTA credibly claim that it was surprised by the Office of the General Counsel's rejection of Adderley's June 18 submission to PERB directly. PERB Regulation 61020(f) placed MBTA on notice that this submission met none of the regulation's requirements, since it was not submitted by a party under penalty of perjury. Therefore, we reject MBTA's belated assertion that it should be excused from a late filing because it did not know that PERB would reject Adderley's June 18 submission.

Although not directly raised in the appeal, we agree with the Office of the General Counsel that the Watson declaration did not allege fraud or coercion on its face. On that basis alone, the Office of the General Counsel was correct in discounting it, regardless of whether it was timely submitted, which it was not, and regardless of whether MBTA had good cause for late submission.

The Opposition Petitions

MMBA section 3507.1(c) provides what is colloquially known as "card check," i.e., a requirement that a public agency grant exclusive or majority representation to an employee organization "based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation. . . ." (MMBA, § 3507.1(c).) The purpose of this provision is to establish an expedited method for certifying an exclusive or majority representative for purposes of meeting and conferring over wages, hours and terms and conditions of employment. This procedure expedites the selection of an exclusive representative by obviating the need for an election unless there is a competing employee organization that submits 30 percent support in the proposed bargaining unit.

Furthering the purpose of expediting recognition procedures, PERB has held that an MMBA employer may not refuse to recognize an employee organization that has shown majority support based on an asserted reasonable doubt that the employee organization has majority support. (*Antelope Valley*, *supra*, PERB Decision No. 1816-M, pp. 9-10.) That is precisely what the MBTA attempts to accomplish by its appeal in this case—insert its claimed reasonable doubt of majority support as a reason to deny recognition. Specifically, MBTA argues that the 17 employees who signed the Opposition Petitions revoked their support for ATU and such revocations must be honored because they were done before PERB had made any determination regarding the sufficiency of support. We reject this argument for multiple reasons.

Although there is nothing in PERB's regulations or in the MMBA that provides for revocation of authorization cards, our case law permits revocation in certain circumstances described in *Antelope Valley*, *supra*, PERB Decision No. 1816-M. In that case, SEIU

requested recognition on the basis of a card check under MMBA section 3507.1(c). This followed an organizing campaign in which a group of employees circulated cards opposing SEIU. These cards contained only the words "No Union." The employer also informed employees how they could revoke earlier authorizations given to SEIU. Prior to SEIU filing its petition for representation, five employees submitted revocations in accordance with the employer's instructions. The revocation letters contained the statement: "I hereby revoke the authorization card which I previously signed for your union."

The State Mediation and Conciliation Service (SMCS) conducted the card check, but the parties could not agree on whether or how employees could revoke authorization cards, and stipulated that SMCS could neither rule on the legal effect of the revocations and the "No Union" cards nor verify majority status of any employee organization. Based on the combined tally of "No Union" cards and the five revocation letters, the employer refused to recognize SEIU and the unfair practice litigation ensued.

The Board framed the issue in *Antelope Valley*, *supra*, PERB Decision No. 1816-M as whether the employer unreasonably withheld recognition by subtracting 84 "No Union" cards from the total of 569 valid SEIU authorization cards, thereby concluding that SEIU lacked majority support. The Board first noted that MMBA section 3507.1(c) contains no provision that permits an employer to refuse recognition on the basis that it has a reasonable doubt that the employee organization has majority support, unlike a provision in the Higher Education Employment Relations Act (HEERA).[10]

The Board then turned to the question of whether the "No Union" cards were the equivalent to a revocation of authorization. It noted that a revocation of an authorization card or other proof of support should meet the same requirements as an authorization card to

[10] HEERA is codified at Government Code section 3560 et seq. See HEERA section 3574(a).

determine employee intent not to be represented by the employee organization. In the case of the "No Union" cards, PERB found that they evinced no statement of intent to *revoke* a previous authorization in favor of SEIU. They could not therefore be subtracted from the SEIU total tally of its valid authorization cards. In contrast, the five revocation letters that clearly expressed the intent to revoke the previously-signed authorization cards would therefore be subtracted from the total cards in favor of SEIU. The Board concluded that the employer unreasonably withheld recognition from SEIU by treating the "No Union" cards as revocations of SEIU authorization cards.

The facts in the instant case are strikingly similar to those in *Antelope Valley, supra,* PERB Decision No. 1816-M. Except for Adderley and Watson, none of the employees whose signatures appear on the Opposition Petitions establish the requisite intent to *revoke* a previously-given authorization. The Petitions read: "WE THE UNDERSIGNED EMPLOYEES, OPPOSE THE ATTACHED PETITION, WE ARE NOT INTERESTED IN THE ATU 1704, AND DO NOT SUPPORT THE UNION." For all we can discern, these signatories may have been employees who have always been opposed to ATU representation and never signed authorization cards in the first instance. Their signatures on the Opposition Petitions are the functional equivalent of the "No Union" cards in *Antelope Valley.* Based on that case, we conclude that there is no basis for treating the Opposition Petitions as revocations of authorizations.

Although individual employees in *Antelope Valley*, *supra*, PERB Decision No. 1816-M were permitted to revoke their authorizations where parties had implicitly agreed to a revocation process, the Office of the General Counsel nevertheless concluded in its OSC that *Antelope Valley* does not apply to this case. Instead the Office of the General Counsel relied

on *State of California, supra*, PERB Order No. Ad-367-S (*State of California*), which held, in relevant part:

> Because the right to revoke authorization cards was not disputed in *Antelope Valley*, it was not necessary for PERB to rule on whether the Legislature had intended that authorization signatures could be revoked in all MMBA card checks. PERB's holding in *Antelope Valley* that the right to revoke authorization cards exists is limited to MMBA card checks in which the interested parties do not dispute the right to revoke or in effect by their acts acquiesce to such a right.

(*Id.* at pp. 10-11)

Applying the *State of California, supra,* PERB Order No. Ad-367-S language, the Office of the General Counsel concluded that "[t]he Authority has not provided any facts demonstrating that the interested parties – the Authority and ATU – by their acts or otherwise, have acquiesced or agreed to an arrangement wherein employees may revoke their support." (OSC, p. 4.) We agree. In *Antelope Valley, supra,* PERB Decision No. 1816-M, the employer openly informed employees of a procedure they must follow to revoke authorization, and the union knew of this communication. Yet the union never complained to the employer or to PERB about the revocation instructions and never argued that employees did not have a right to revoke authorizations. Such circumstances demonstrate acquiescence in a revocation procedure. No similar facts are present here. ATU was never placed on notice by the MBTA that any revocation process was contemplated by MBTA. In ATU's opposition to MBTA's appeal, it unequivocally asserted that nothing in the MMBA or in PERB regulations authorize signature revocations and noted that there was no sanctioned method or agreement in this case on how revocations could occur. For this additional reason, we reject the Opposition Petitions and the declarations of Adderley and Watson as valid revocations of previously signed authorization cards.

Claim of Favoritism by PERB

MBTA claims that the Office of the General Counsel showed favoritism towards ATU by informing it of the defect in its original petition (viz., a lack of signature) and permitting it to file an amended petition, while failing to extend a similar courtesy to Adderley, who failed to sign her June 18 letter "under penalty of perjury" as required by PERB Regulation 61020(f).

MBTA's argument fails on its face because under PERB Regulation 61020(f), it is a "party" who must file a declaration under penalty of perjury. As Adderley is not a party to this proceeding, she could do nothing to cure the defect in her filing.

Permitting a party to cure a defect such as a lack of signature on a document that has no particular timeline for filing does not evince bias. The regulatory scheme in representation cases favors the petitioner in the more substantive matter of perfecting its showing of support. PERB Regulation 61240(b) provides that if the initial proof of support is insufficient, "the Board may allow up to 10 days to perfect the proof of support." If the Board may allow extra time to submit additional support, it cannot be said that the more innocuous act of informing a petitioner that the petition lacks a required signature evidences bias.

ORDER

The Office of the General Counsel's administrative determination and Certification of Representative in Case No. LA-RR-1244-M is hereby AFFIRMED.

Chair Martinez and Member Gregersen joined in this Decision.