

*** PUC TRANSIT CASE. PERB DECISION NUMBER CONTAINS INCORRECT
LETTERING, AS CASE DID NOT ARISE UNDER MMBA ***

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



SAN DIEGO METROPOLITAN TRANSIT
SYSTEM,

Employer,

and

PUBLIC TRANSIT EMPLOYEES
ASSOCIATION,

Petitioner,

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 465,

Exclusive Representative.

SMCS Case No. 15-3-514

PERB Case No. LA-DP-425-M

Administrative Appeal

PERB Order No. Ad- 441-M

September 20, 2016

Appearance: Raul "Kiko" Diaz, Business Representative, for International Brotherhood of Electrical Workers, Local Union 465.

Before Winslow, Banks, and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by International Brotherhood of Electrical Workers, Local Union 465 (IBEW Local 465) from a hearing officer's recommendations (attached) to dismiss without a hearing IBEW Local 465's objections to a representation election conducted by the State Mediation and Conciliation Service (SMCS), and for SMCS to certify the Public Transit Employees Association (Association) to replace IBEW Local 465 as the exclusive representative of employees in the Trolley Unit of the San Diego Metropolitan Transit System

(System).¹ IBEW Local 465's election objections focused primarily on a conversation allegedly occurring during the two-week election period in which an auxiliary supervisor encouraged a bargaining-unit employee, with as many as ten other bargaining-unit employees present, to vote for the Association.² The hearing officer determined that the alleged conduct did not raise substantial and material issues of fact warranting an evidentiary hearing because, even if proven, the factual allegations supporting this objection would not have affected the outcome of the election, which the Association won by a margin of 38 votes. The hearing officer relied on similar reasoning regarding IBEW Local 465's objection to the inclusion of five auxiliary supervisors in SMCS's proof of support determination since, even without the five auxiliary supervisors, at least 30 percent of unit employees had signed the decertification petition calling for an election. The hearing officer determined that two other objections either lacked sufficient information to raise substantial and material issues of fact warranting an evidentiary hearing and/or were untimely.

¹ The System is a transit district established under the Public Utilities Code, which includes its own scheme for administering labor relations separate from the Meyers-Milias-Brown Act and other PERB-administered statutes. (Pub. Util. Code, §§ 120500-120509; see also *San Diego Trolley, Inc.* (2007) PERB Decision No. 1909-M, adopting dismissal letter at p. 4.) Public Utilities Code section 120505 confers jurisdiction on SMCS, rather than PERB, to investigate and issue determinations on questions concerning representation, including objections to the conduct of a representation election or to conduct allegedly affecting the result of such an election. (Pub. Util. Code, § 120505; see also 8 Cal. Code Regs. § 93070.) Thus, while PERB does not itself administer labor relations under the Public Utilities Code, when the Legislature transferred jurisdiction over the SMCS from the Department of Industrial Relations to PERB in 2012, it conferred on PERB jurisdiction to consider appeals from SMCS decisions. (Gov. Code, § 3603, subd. (a); 8 Cal. Code Regs. § 93025, subd. (d); *San Diego Trolley, supra*, PERB Decision No. 1909-M.)

² As memorialized in Article 2 and other provisions of the Collective Bargaining Agreement between the System and IBEW Local 465, auxiliary supervisors are bargaining-unit employees who are temporarily assigned to perform supervisory duties. While working as an auxiliary supervisor, employees shall not perform a dual role of bargaining unit member and non-bargaining unit member and must wear specific clothing designating their supervisory status.

Having reviewed the case file in its entirety in light of the issues raised in IBEW Local 465's exceptions, we conclude that the hearing officer's recommendations are in accordance with PERB regulations and applicable private-sector precedent. Pursuant to California Code of Regulations, title 8, section 93070, subdivision (f), the Board adopts the recommendations of the hearing officer issued under subdivision (d) of the regulation as its own Decision, subject to the following discussion of issues raised by IBEW Local 465's exceptions before the Board.

DISCUSSION

When interpreting the PERB-administered statutes, private-sector precedent established under the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and California's Agricultural Labor Relations Act, Labor Code sections 1140-1166.3, may provide persuasive authority for interpreting parallel or comparable statutory provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35.) However, the Public Utilities Code expressly requires SMCS to resolve questions concerning representation in accordance with federal administrative and judicial precedent. (Pub. Util. Code, § 120505.) In considering IBEW Local 465's exceptions, we therefore follow our own decisional law only to the extent it is consistent with private-sector precedent. For the most part, IBEW Local 465's exceptions before the Board repeat the points previously made before the hearing officer. It argues, for example, that an auxiliary supervisor's campaigning while in uniform renders the entire election process unfair and therefore warrants at least a second vote by the employees. We disagree. Assuming an employee is acting in a supervisory capacity at any time while wearing the supervisor uniform and that it was therefore improper for an auxiliary supervisor to attempt

to influence employee choice, even while the supervisor was ostensibly on his break, the facts alleged by IBEW Local 465, if proven, still do not involve a sufficient number of employees to have affected the 38-vote margin by which the Association won the election. (*Mid-Wilshire Healthcare Ctr.* (2007) 349 NLRB 1372, 1373–1374; *Harborside Healthcare, Inc.* (2004) 343 NLRB 906, 906–907.)

IBEW Local 465 also reiterates its argument that SMCS should not certify the Association as the exclusive representative of System employees because, according to IBEW Local 465, the Association fails to qualify as a “labor organization” within the meaning of the NLRA. The hearing officer determined that this issue was untimely and declined to consider its merits.

We decline to adopt the hearing officer’s determination that the issue was untimely. The election supervisor’s report was served on the parties electronically and by mail on April 13, 2016. Under PERB Regulation 93070, subdivision (c), Local 465 had ten days from the date of issuance of the report to file exceptions. Pursuant to PERB Regulation 32130, subdivision (c), this deadline should have been extended by an additional five days because the election supervisor’s report was served by mail. Five days after April 25, 2016 was April 30, 2016, a Saturday, meaning that the deadline must be extended to the following business day pursuant to PERB Regulation 32130, subdivision (b). Because Local 465 raised the issue on April 29, 2016, the exception was timely raised and properly before the hearing officer for consideration.

Although we conclude that the exception was timely, we reject it on its merits. The statutory definition of “labor organization” includes “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or conditions of work.” (29 U.S.C. § 152 (5).) The definition is construed broadly so that almost any group which deals with the management concerning employees’ wages and working conditions is a “labor organization.” (*Independent Circulation Union v. Item Co.* (E.D. La. 1958) 163 F.Supp. 399, 401–402; *NLRB v. Cabot Carbon Co.* (1959) 360 U.S. 203, 210–213.) An organization’s alleged failure to comply with financial disclosure requirements under the Labor Management Reporting and Disclosure Act does not preclude it from having status under the NLRA as a labor organization entitled to represent employees. (*Family Service Agency San Francisco v. NLRB* (D.C. Cir. 1999) 163 F.3d 1369, 1383–1384.) Accordingly, we find this exception without merit.

Additionally, we find it unnecessary to address IBEW Local 465’s other exceptions before the Board as they raise no issues that were not already adequately considered in the hearing officer’s determination.

ORDER

International Brotherhood of Electrical Workers, Local Union 465’s exceptions to the hearing officer’s recommendations in Case No. SMCS 15-3-514 are hereby DENIED.

Members Winslow and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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May 9, 2016

Loretta van der Pol, Chief
California State Mediation and Conciliation Service
1330 Broadway, Suite 1532
Oakland, CA 94612-2514

Re: San Diego Metropolitan Transit System
SMCS Case No. 15-3-514

HEARING OFFICER'S RECOMMENDATION

Dear Ms. van der Pol:

The undersigned Hearing Officer was appointed pursuant to PERB Regulation 93070¹ by the State Mediation and Conciliation Service (SMCS)² for the purposes of making the instant recommendation regarding the exceptions to SMCS's report on decertification election objections filed by the incumbent union, Brotherhood of Electrical Workers Union, Local 465 (IBEW). Having examined the exceptions to IBEW's objections, the Hearing Officer finds the conduct alleged to affect the outcome of the election raises no substantial and material factual disputes that would warrant an evidentiary hearing. The Hearing Officer recommends that SMCS take further action to certify the petitioning employee organization, Public Transit Employees Association (PTEA) as the exclusive representative of the Trolley Unit at Metropolitan Transit District (District).³

¹ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's regulations may be found at www.perb.ca.gov.

² SMCS is a division of the Public Employment Relations Board (PERB or Board).

³ The District is governed under the Public Utilities Code which provides at section 120505, in pertinent part:

If there is a question of whether a labor organization represents a majority of employees or whether the proposed unit is the appropriate unit for collective bargaining, *the question shall be submitted to the State [Mediation and] Conciliation Service for disposition.* [. . .]

The service shall provide for an *election* to determine the question of representation and shall certify the results to the parties.

(Italics added.)

BACKGROUND

On or about March 1, 2016,⁴ SMCS received a petition⁵ from PTEA seeking to decertify IBEW as the exclusive representative of District employees in the Trolley Unit. SMCS determined that there were sufficient employee signatures to support a decertification election and, on March 14, informed the parties that an “election is appropriate and ought to proceed without delay.” After requiring an election notice to be posted by the District, SMCS conducted a secret mail ballot election, with ballots mailed on March 24 and due to be returned to SMCS by April 9. On April 11, SMCS issued a “Tally of Balloting” that revealed PTEA received the majority of valid votes, calculated as follows:

1. Approximate number of eligible voters:	368
2. Void ballots	2
3. Votes cast for IBEW Local 465	112
4. Votes cast for PTEA	150
5. Votes cast for No Organization	8
6. Valid votes counted (sum of 3 and 4 and 5)	270
7. Challenged ballots . . .	[0]
8. Valid votes counted . . .	270
9. A majority of valid votes . . . equals	136

On or about April 11, IBEW filed objections that asserted, in relevant part:

On March 24, 2016 at approximately 1:50[]pm there was an employee who was representing MTS Supervision [sic] who, while on the Company’s time and wearing an Auxiliary Supervisor uniform, was actively campaigning for the decertification of IBEW Local 465 in favor of PTEA to one of IBEW’s members.

On April 13, SMCS issued a report rejecting IBEW’s objection. On April 21, IBEW filed exceptions to the report with SMCS requesting SMCS to conduct an investigation regarding the District’s conduct during the election, including:

⁴ All subsequent dates refer to 2016, unless otherwise specified.

⁵ The petition was submitted to SMCS after it was erroneously submitted to PERB.

May 9, 2016

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- Five Auxiliary Supervisors who signed the decertification petition should not have been counted by SMCS towards satisfying the 30% proof of support requirement. Auxiliary Supervisors are not subject to the memorandum of understanding between IBEW and the District when in their role as supervisors.
- On March 24, Auxiliary Supervisor Dwayne Greer, while in his uniform "designated for Supervision," spoke favorably of PTEA to an employee (Martin Ellison), in the vicinity of "10 or more employees" who were within "earshot" of the conversation, but choose to remain unnamed "out of fear of retaliation"; despite IBEW complaints to the petitioner Dan Bridges, IBEW was advised, on March 25, that Auxiliary Supervisors may communicate with employees concerning the petition while on their breaks.
- An "anonymous bulletin" with the acronym "TEAM" (i.e., Trolley Employee Associated Member) was removed from the "break room walls," but PTEA's election materials remained posted.

On April 25, in response to questions concerning Auxiliary Supervisors, the District informed SMCS as follows:

1. Auxiliary Supervisors do pay dues while in Aux [sic] capacity, as they alternate between being a supervisor and mechanic on a frequent basis (sometimes daily, weekly or monthly), depending on the needs of the operation.
2. While serving in the Aux [sic] capacity, they are [considered] full[y] functioning supervisors.
3. Attached are the job descriptions for two of them [(Transportation Supervisor and LRV Maintenance Supervisor).]

On April 27, SMCS appointed the undersigned Hearing Officer to examine IBEW's exceptions and make recommendations pursuant to PERB Regulation 93070. On April 28, the undersigned received a copy of the file in the above-captioned matter. On April 29, IBEW submitted to SMCS an unsolicited statement containing additional arguments.

DISCUSSION

Where a party to an election files objections to the conduct of the election or conduct affecting the result of the election within the five day period following the tally of the ballots, the SMCS election supervisor must investigate such objections and issue a report on such objections to the parties. (PERB Regulation 93070, subd. (a).) Within 10 days of issuance of the report, any party may file with the SMCS election supervisor "exceptions" to the report (PERB Regulation 93070, subd. (c)). Subsequently, SMCS must appoint a hearing officer to make a recommendation to the SMCS election supervisor regarding whether the exceptions "raise substantial and material factual issues with respect to the conduct of the election or conduct

affecting the results of the election” (PERB Regulation 93070, subd. (d)). If it appears to the hearing officer that any exceptions filed to the report on objections raise substantial and material factual issues, then the hearing officer must notice the parties, conduct an evidentiary hearing, and after the close of all evidence, issue a proposed decision. (PERB Regulation 93070, subd. (e).) Any party may appeal the hearing officer’s recommendation and/or proposed decision to the Board itself. (PERB Regulation 93070, subds. (d) and (e).) A party challenging a representation election is entitled to an evidentiary hearing where its objections raise substantial and material issues of fact and objecting party proffers evidence that establishes prima facie case for setting aside an election. (*Van Leer Containers, Inc. v. NLRB* (7th Cir. 1988) 841 F.2d 779, on remand.)

Moving to the merits of the election objection, Public Utilities Code, section 120500 provides that the District “shall not express any preference for one union over another.” PERB routinely interprets similar language under the Meyers-Milias Brown Act (MMBA) and other statutes that PERB is charged with enforcing.⁶ (See, e.g., Gov. Code § 3506.5.) Thus, PERB case law will be treated herein as analogous guidance. PERB’s inquiry in similar cases is whether the employer’s conduct interfered with the employees’ right to choose a representative. (*West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M.) Under PERB’s jurisprudence, an election will be set aside only when the conduct actually affects, or has a natural and probable effect on, employee free choice. (*Ibid.*) The conduct need not constitute an unfair practice to set aside the election. (*Ibid.*) Conversely, conduct amounting to an unfair practice does not necessarily require the election to be set aside. (*Ibid.*) So, the question in such cases is whether the employer’s conduct would reasonably tend to coerce or interfere with employee choice. (*County of Imperial* (2007) PERB Decision No. 1916-M; *Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333 [objecting party must show that there was improper conduct and that conduct had an objective impact on voters].) Similar standards are applied under federal authority. (See e.g., *Sonoco Products Co. v. NLRB* (9th Cir. 1971) 443 F.2d 1334 [in determining necessity of setting aside representation election, question is whether employees have been prevented from freely registering their choice of bargaining representative]; *NLRB v. Monark Boat Co.* (8th Cir. 1983) 713 F.2d 355 [NLRB must set aside an election if an atmosphere of coercion and fear rendered free choice impossible].)

PERB also sets aside elections when it is determined that the election supervisor commits an act that tends to destroy confidence in the election process, or could be reasonably interpreted as impugning the election standards the Board seeks to maintain. (*Poway Unified School District* (2000) PERB Order No. Ad-306 (*Poway USD*), relying on *Athbro Precision Engineering Corp.* (1967) 166 NLRB No. 116.) Election objections regarding the integrity of the election process require assessment of whether a reasonable possibility of irregularity exists. (*Poway USD, supra*, PERB Order No. Ad-306.) Since this is paramount, “the Board

⁶ The MMBA is codified at Government Code sections 3500 et seq. When construing MMBA and other California public sector labor relations statutes, California courts and PERB rely on cases construing similar language in the National Labor Relations Act. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity.” However, “an election need not be perfect to be valid. (*Ibid.*) Mistakes are made in any human endeavor. (*Ibid.*) The question is whether the mistakes were sufficient to affect the outcome of the election. (*State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S (*State of California*)). An evidentiary hearing in regard to election irregularities is not required where the labor board finds the alleged charges to be without merit. (*LTV Electrosystems, Inc. v. NLRB* (4th Cir 1968) 388 F.2d 683, certiorari denied 393 U.S. 843.)

I. Inclusion of Auxiliary Supervisors in SMCS’s Proof of Support Determination

IBEW’s first exception argues that the Auxiliary Supervisors should not have been included in the proof of support determination to meet the 30% threshold for SMCS to schedule an election. PERB Regulation 93015, subdivision (a) provides that a question concerning representation is raised when the petition shows proof of employee support of “at least 30 percent of the employees in the proposed unit.” After conducting an investigation under the auspices of PERB Regulation 93025, SMCS informed the parties on March 14 that there was a sufficient showing of interest to satisfy the 30 percent threshold needed for the decertification election. PERB Regulation 93025, subdivision (d) provides that any administrative determination made by SMCS is subject to appeal to the *Board itself* within the deadline set forth in PERB Regulation 32360, subdivision (b), i.e., “10 days following the date of service of the decision or letter of determination.” In the present case, the SMCS determination of whether a question concerning representation exists was not appealed to the Board itself.⁷

Nonetheless, turning to the substance of IBEW’s challenge to the SMCS proof of support determination, there are approximately 40 Auxiliary Supervisors, but only five of which signed proof of support documents with the decertification petition. Accordingly, SMCS’s March 14 letter determined that the five Auxiliary Supervisors “did not alter the outcome on meeting the 30% threshold.” So, even if it was the case that the Auxiliary Supervisors’ signatures were not counted, SMCS would still have reached the same determination concerning the sufficiency of support.

As the election results reveal, a majority of employees have cast their ballots in favor of PTEA, and there are no facts to show that there was any irregularity in that process. Thus, there are no grounds for setting aside the election, because SMCS’s determination of sufficient support for an election—even if improper—did not impact the integrity of the election process or affect the outcome of the election.

⁷ Chapter 9 of PERB’s Regulations (§ 93000 et seq.) governs election procedures for specified transit districts, including the District. These regulations do not specify the types of election objections that are to be entertained by SMCS and the Board. It appears that the proper avenue for challenging a proof of support determination is through the appeal process set forth in PERB Regulation 93025, subdivision (d), not through the filing of objections. IBEW has not invoked the appeal process under PERB Regulation 93025, subdivision (d).

II. The Effect Auxiliary Supervisor's Support for PTEA Had On the Outcome of the Election

IBEW's second exception asserts that, given Mr. Greer's supervisor uniform, he was acting as a supervisor on the District's behalf when campaigning in favor of PTEA to an employee, while in the vicinity of "10 or more employees" who were within "earshot" of the conversation. IBEW contends Mr. Greer was acting within the scope of his authority as a "supervisor" when speaking with the employee in favor of PTEA.

Common law agency rules apply in the present case. PERB and the National Labor Relations Board (NLRB) have adopted the principals of agency to determine liability of a charged party for the unlawful acts of its employees or representatives even if the principal is not at fault and takes no active part in the action. (*Inglewood Unified School District* (1990) PERB Decision No. 792; *Allegany Aggregates, Inc.* (1993) 311 NLRB 1165.)

An agent has such authority as the principal, actually or ostensibly, confers upon that agent. (Civil Code, § 2315.) Actual authority "is that which an employer intentionally confers upon the agent, or intentionally or negligently allows the agent to believe himself or herself to possess." (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647; see also Civil Code, § 2316.) Apparent or ostensible authority, on the other hand, is that which an employer, "intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civil Code, § 2317.) Apparent or ostensible authority may be found where an employer "allows employees to perceive that it has authorized the agent to engage in the conduct in question." (*Chula Vista Elementary School District, supra*, PERB Decision No. 1647, citing *Inglewood Teachers Assn. v. PERB* (1991) 227 Cal.App.3d 767.) Ostensible authority may be established when other representatives of the employer subsequently ratify or demonstrate approval of the agent's conduct. (*Compton Unified School District* (2003) PERB Decision No. 1518.)

In *San Diego Unified School District* (1980) PERB Decision No. 137, PERB held that two individual school board members were acting as agents of the school district when they authored commendation letters addressed to the District's teachers who did not participate in a strike. Among the factors the Board noted in holding the District liable for the board members' conduct, included the fact that the letters were written on District stationery, the authors were identified by title as school board members, District managers authorized placement of the letters in the teachers' personnel files, and the three other school board members who did not sign the letters failed to take any subsequent action to have the letters removed. (*Ibid.*) There was no finding of "actual authority;" rather, the Board concluded that "[u]nder these circumstances employees in the District had reasonable cause to believe that the District's personnel were acting with authority of the employer and the District is liable for their actions." (*Ibid.*)

The Board's decisions in *Chula Vista Elementary School District, supra*, PERB Decision No. 1647 and *Compton Unified School District, supra*, PERB Decision No. 1518, involved unlawful conduct by school principals—persons who are management employees of a school district, and thus, meet the test for "actual agents." In addition, in both cases the Board found

that these school principals were acting within the scope of their employment when they engaged in the conduct at issue, and that it was reasonable for other employees to conclude that these school principals were authorized by the employer to engage in that conduct, i.e., that they had apparent or ostensible authority. (*Ibid.*) Consequently, the Board concluded that the school districts were liable for the unlawful conduct. (*Ibid.*)

In *County of Riverside* (2010) PERB Decision No. 2119-M, PERB held that certain anti-union statements made by three members of a county board of supervisors constituted an unlawful threat to eliminate jobs if the employees continued their union organizing efforts. While the decision does not contain any express analysis of the agency issue, the decision notes that these statements were made in an official, public meeting of the board of supervisors, and that they were clearly made in the supervisors' official capacities.

In contrast, the Board in *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, upheld the dismissal of an unfair practice charge alleging that the nature of a lead worker's duties created a reasonable basis for employees to believe he was acting on behalf of the employer when he circulated an anti-incumbent petition during a decertification election.

Public Utilities Code section 120500 guarantees covered employees the "right to form, join, or assist labor organizations ... and to engage in other concerted activities. . . ." Auxiliary Supervisors pay union dues while in such capacity and are impacted by any Trolley Unit representation changes. Mr. Greer, as a member of the bargaining unit, has the right to participate in the activities of a labor organization such as PTEA, including campaigning in their favor.

IBEW also asserts that since Mr. Greer was in his supervisory uniform, he was acting on behalf of the District. It appears that IBEW is asserting that Mr. Greer was conferred with apparent authority by the District to conduct his campaign efforts in support of PTEA. There is no evidence to show that management at the District was made aware of, or condoned, Mr. Greer's conduct. And, there is no evidence to show that Mr. Greer's favoritism of PTEA was made at the direction of the District because, as described above, he may participate in the activities of an employee organization pursuant to PUC section 120500. Thus, having a supervisory role on occasion does not per se vest him with the apparent authority to act on behalf of the District. Mr. Greer's supervisory status also does not reasonably lead employees to believe that he was authorized to campaign in favor of PTEA on behalf of the District. To the contrary, a reasonable person would tend to believe that he was not acting on behalf of the District but rather on behalf of bargaining unit employees by his campaign efforts. Nonetheless, there is no showing that the District authorized or consented to Mr. Greer's actions. No agency relationship is established to show that the District coerced or interfered with employee free choice in the decertification election.

Further, participation by supervisory personnel in a union organizing campaign does not per se invalidate an election. Such participation may be grounds for overturning a union election only if the supervisor's actions would reasonably tend either to cause employees to believe that the supervisor acted on behalf of the employer or lead employees to support a union as result of fear of future retaliation by supervisor. (*Napili Shores Condominium Homeowners' Ass'n v.*

NLRB (9th Cir.) 939 F.2d 717.) Even if it were established that there was an agency relationship between Mr. Greer (in his supervisory capacity) and the District, there is no evidence that his alleged campaign efforts tended to coerce employees to vote in favor of PTEA out of fear of retaliation.

III. Removal of the "TEAM" Flyer From the District Facilities

IBEW's third exception contends, without any evidence, that the District was responsible for removing the anonymous "TEAM" flyer from the District's "break room walls." There is no merit in this argument. There are no facts describing the District's policy concerning unauthorized postings in the employee break rooms. Nonetheless, the TEAM flyer is not an official IBEW document and IBEW has not claimed that its official campaign documents, if any, were removed from the same locations as pro-PTEA flyers at designated posting locations within the District. There is also no showing that the District failed to enforce its policies for posting union materials in preference of PTEA or tend to influence employees to support PTEA over IBEW.

IV. Timeliness of IBEW's April 29 Letter

In its April 29 letter, IBEW asserts that that: (1) the District interfered with the election by allowing a supervisor to wear a "Supervisor's uniform" while campaigning in support of another employee organization; and (2) PTEA cannot be certified as a representative since it has not evidenced itself to be an employee organization under the standards set forth by the NLRB.

Within 10 days of issuance of the report by SMCS, any party may file "exceptions" to the report. (PERB Regulation 93070, subd. (c).) Given that the SMCS election supervisor issued her report to the IBEW's election objections on April 13,⁸ the final day to file exceptions was April 25.⁹ IBEW timely filed exceptions on April 21, but there were no challenges made as to PTEA's status as an employee organization. IBEW's April 29 letter asserts this contention for the first time. To the extent that this constitutes a new exception to the report, the filing is outside of the 10-day deadline. IBEW also failed to initially address this as an election objection within five days of the April 11 "Tally of Balloting" in accordance with PERB Regulation 93070. The hearing officer must only examine the exceptions to the SMCS election supervisors "report." (See PERB Regulation 93070, subds. (c), (d), and (e).) Because this appears to be a new exception that does not comport with the filing requirements under PERB's regulations and could not have been addressed by the SMCS election supervisor's

⁸ The proof of service shows that on April 13, the SMCS report was served via US Mail and electronically to IBEW's e-mail address.

⁹ Since the tenth day for filing exceptions fell on Saturday, April 23, the deadline was extended to the next business day, Monday, April 25.

report, the undersigned Board agent shall not address IBEW's allegation that PTEA is not a certifiable employee organization.¹⁰

CONCLUSION

Excluding the disputed Auxiliary Supervisors from the proof of support determination would have still satisfied the 30% threshold requirement needed in order to trigger a decertification election. Also, there is no evidence that SMCS's conduct hampered the integrity of the election process so as to affect employee free choice.

The Auxiliary Supervisor who campaigned in favor of PTEA did not have apparent authority to bind the District to affect the result of the election; Auxiliary Supervisors as union dues paying members of the bargaining unit are guaranteed representational rights to participate in employee organizations of their own choosing. (Pub. Util. Code, § 120500.) The Auxiliary Supervisor's particular conduct did not affect, or have a probable effect on, employee free choice in the election given that a relatively small number of employees were aware of the alleged conduct. The Board has dismissed similar election objections where the impact of the alleged conduct is not sufficiently widespread enough to affect the outcome of the election. (*Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M; *State of California, supra*, PERB Decision No. 601-S.) Further, even if the Auxiliary Supervisor was acting as a District agent, there is no evidence that his campaign efforts coerced employees—either via threat or promise of benefit—to support PTEA in the election. (*Napili Shores Condominium Homeowners' Ass'n v. NLRB, supra*, 939 F.2d 717.)

There was no evidence that the anonymous "TEAM" flyer was authorized for posting or that the District banned IBEW from posting election campaign material. Simply put, the District did not show favoritism to PTEA due to the removal of an anonymous flyer from the District's walls.

Viewed in totality, the conduct alleged above did not reasonably tend to coerce or interfere with employee free choice in the election.

¹⁰ IBEW's contention regarding the use of supervisory uniforms by an Auxiliary Supervisor to interfere with the election was addressed in the SMCS's report in response to election objections. Since this assertion is already discussed in Section II above, this recommendation does not reach whether such IBEW's April 29 letter, on this point, also comports with PERB's regulations for proper filing of election objections and exceptions to SMCS's report.

RECOMMENDATION

Review of IBEW's exceptions filed to the SMCS report on the objections did not reveal the existence of any substantial and material factual disputes concerning conduct that would affect the outcome of the election. Therefore, a hearing is not required and this recommendation must issue. (PERB Regulation 93070, subd. (c).)

SMCS may treat IBEW's April 29 letter as untimely. The Hearing Officer also recommends that, after the close of the deadline for filing exceptions to this recommendation, the SMCS election supervisor request that the Board issue a written decision—per PERB Regulation 93070, subdivision (f)—approving SMCS's plan to issue to the parties a certification of the result of the election, including certification of representatives, where appropriate, and to close the case.

The SMCS election supervisor should advise the parties of their appeal rights pursuant to PERB Regulation 93070, subdivision (d), which provides in relevant part:

Within 10 days from the date of issuance of the aforesaid recommendations, or within such additional period as the Supervisor may allow upon written application for extension made within the 10-day period, any party may file with the Board itself an original and five copies of exceptions to the hearing officer's recommendations, in accordance with the provisions of Section 93065.^[11] Concurrently upon the filing of such exceptions, the filing party shall serve a copy upon each of the other parties and proof thereof shall be promptly filed with the Board.

ADDITIONAL INFORMATION REGARDING APPEAL RIGHTS

Within the time specified by PERB Regulation 93070, subdivision (d) or as specified by the SMCS election supervisor, a party may file their statement of exceptions to this Hearing Officer's Recommendation with the Public Employment Relations Board's (PERB or Board).

¹¹ PERB Regulation 93065, provides in relevant part: "The provisions of Sections 32300 through 32320, and Section 32400 and 32410, shall be applicable to disputes arising under this Chapter." PERB Regulations 32300 through 32320 describe PERB's exception procedures and PERB Regulations 32400 and 32410 describe "requests for reconsideration" procedures.

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The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, §§ 93065, 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 93065, 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 93065, 32300, 32305, 32140, and 32135, subd. (c).)

Sincerely,



Yaron Partovi
Hearing Officer

YP

cc: Raul "Kiko" Diaz, Business Representative, IBEW, Local 465
Daniel Lee Bridges, Public Transit Employees Association
Jeffrey Stumbo, HR and Labor Relations Director, Metropolitan Transit System