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In the Matter of a Controversy

between

San Francisco Bay Area Rapid
Transit District

and

United Public Employees, Local 790,
and Amalgamated Transit Union,
Local 1555.

Order

Re: Request for
Reconsideration and
Exceptions to Final
Decision and Order

On July 6, 1993, San Francisco Bay Area Rapid Transit District ("BART") filed a Request for Reconsideration and Exceptions to Final Decision and Order in this matter, together with a position statement in support thereof, five exhibits pertaining to the administrative history of this Department's 1983 regulations, and three declarations with exhibits thereto. On July 13, 1993, United Public Employees, SEIU Local 790 ("UPE") submitted a letter objecting to BART's request for reconsideration and exceptions, and to the additional evidence submitted by BART. On July 23, 1993, Amalgamated Transit Union, Local 1555 ("ATU") submitted its opposition to BART's request for reconsideration and exceptions.

Upon review the submissions of all of the parties, I have concluded that BART's request for reconsideration and exceptions should be denied. In reaching this conclusion, I note that UPE is correct in its assertion that there is no provision in the regulations for a request for reconsideration. However, I believe, as also suggested by UPE, that my authority as the final decision-maker in matters such as this includes the inherent authority to provide a procedure for reconsideration of such decisions. It was my intent to provide the parties with a procedure comparable to the procedure set forth in 8 California Code of Regulations ("CCR") section 15860 for filing exceptions to a proposed decision by a hearing officer. The relevant facts and legal analysis are set forth in detail in my Tentative Decision of April 2, 1993, and my Final Decision of June 14, 1993, and nothing in BART's most recent submission persuades me that those decisions should be set aside.

Both of the Unions contend that the additional evidence submitted by BART is untimely. 8 CCR section 15860 provides for the submission of "newly discovered evidence;" defined as "evidence that has become available only since the close of the hearing." In this instance, there has been no hearing, but the Tentative Decision invited the parties to submit additional evidence on or before April 22, 1993. Accordingly, by analogy to 8 CCR section 15860, the evidence now proffered by BART will not be regarded as "newly discovered evidence" if it was available to BART prior to April 22, 1993.

By this standard, neither the Declaration of Bill McCoy nor Exhibit A thereto constitutes newly discovered evidence, since this evidence was available to BART prior to April 22, 1993. The Declaration of John Weber asserts that a certain pattern of conduct has occurred consistently since 1979. The declaration and Exhibit A thereto cite an anecdotal example of this asserted pattern that occurred in May 1993. Documentation of this recent incident cannot be regarded as "newly discovered evidence," because it is offered not for its own intrinsic significance, but rather as an example of a pattern of conduct assertedly going back at least 14 years. BART has made no showing that the same declaration, albeit with a different example, could not have been submitted previously.¹ Accordingly, the McCoy and Weber declarations and the exhibits thereto are deemed untimely. I also note, however, that even if this evidence had been timely submitted, it would not be sufficiently persuasive to change my determination concerning the dismissal of BART's petition involving the Foreworker classification.

BART has also submitted the Declaration of Randall Franklin, with four exhibits, pertaining to ATU's certification petition regarding the Train Controllers. Again, virtually none of this material can be regarded as newly discovered evidence. Exhibits A, B, and C were all available to BART no later than December 1991. Although the declaration states that Exhibit D, a proposed new job description for Train Controllers, is dated May 28, 1993, that is actually the date of the cover memoranda. The memorandum to R. K. Green from V. M. Riera, Jr. indicates that the actual date of the proposed job description is March 1993. Thus, the Franklin declaration and exhibits are deemed untimely for purposes of reconsideration of the decision to conduct a hearing on the ATU petition. However, while it is unclear whether timely submission of this evidence submitted by BART concerning the Train Controllers contradicts the bases on which the hearing on the ATU petition was granted. Accordingly, although untimely for the present proceedings, this evidence may be submitted by BART at the hearing, and if unrebutted, may be sufficient to defeat ATU's petition. Therefore, considering the uncertainty in this matter for both sides, the parties may wish to consider whether they can resolve the matter without expending the additional resources necessary for a hearing.

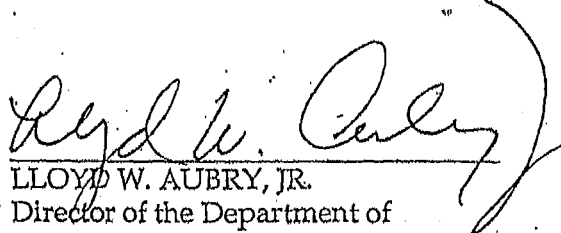
¹ Indeed, a lack of prior incidents would tend to negate the contention that the May 1993 incident exemplified a long-term pattern.

In addition to the declarations and exhibits discussed above, BART submitted five exhibits from the administrative history of the regulations of the State Mediation and Conciliation Service, 8 CCR sections 15800-15875.1 (1983 revision). These documents were obtained from the Department pursuant to BART's request of May 14, 1993, and I was cognizant of them at the time of my Final Decision. I disagree with BART's opinion that the administrative history of 8 CCR section 15875.1 requires reversal of the Final Decision.

For the foregoing reasons, it is ordered that BART's Request for Reconsideration and Exceptions are denied. This order constitutes final administrative action with respect to BART's petition, and judicial review may be obtained pursuant to applicable statutes. I will forthwith appoint a hearing officer to conduct a hearing on ATU's petition. The parties should contact me immediately if this matter is resolved in a manner which eliminates the need for hearing.

Dated:

10/20/93


LLOYD W. AUBRY, JR.
Director of the Department of
Industrial Relations

1 In the Matter of a Controversy,
2
3 between
4 San Francisco Bay Area Rapid Transit
District

CERTIFICATE
OF SERVICE

5 and
6 United Public Employees, Local 790, and
7 Amalgamated Transit Union, Local 1555

8
9 I declare that:

10 I am employed in the City and County of San Francisco; I
11 am over the age of eighteen years and not a party to the within
12 entitled action; my business address is 455 Golden Gate Avenue,
13 Room 3220, San Francisco, California 94102.

14 On October 21, 1993, I served the within

15
16 ORDER

17 RE: REQUEST FOR RECONSIDERATION AND EXCEPTIONS
TO FINAL DECISION AND ORDER

18 on all parties in this action by placing a true copy thereof
19 enclosed in a sealed envelope with postage thereon fully prepaid in
20 the United States mail in San Francisco, California addressed as
21 follows:

22 Anne E. Libbin, Esq.
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on October 21, 1993.



GLORIA M. CHEE - Declarant