

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COMMUNICATIONS WORKERS OF AMERICA,)
)
 and) Case No. S-D-87-S
)
 CALIFORNIA ASSOCIATION OF) PERB Decision No. 525-S
 PSYCHIATRIC TECHNICIANS,)
)
 and) September 26, 1985
)
)
 STATE OF CALIFORNIA (DEPARTMENT)
 OF PERSONNEL ADMINISTRATION).)
)

Appearances; Ronald Rosenberg and Kanter, Williams, Merin and Dickstein by Howard L. Dickstein for Communications Workers of America; Loren E. McMaster for California Association of Psychiatric Technicians.

Before Hesse, Chairperson; Morgenstern, Burt, and Porter, Members.

DECISION

HESSE, Chairperson: The Communications Workers of America (CWA) appeals a decision of the Chief, Division of Representation (Chief) of the Public Employment Relations Board (PERB or Board), dismissing as untimely CWA's challenge to the status of the California Association of Psychiatric Technicians (CAPT) as an employee organization. For the reasons set forth below, we affirm the dismissal.

PROCEDURAL HISTORY

On April 26, 1985,¹ an agent of the Board certified

¹All dates are 1985 unless otherwise noted.

CAPT's petition to decertify CWA as the exclusive representative of employees of the State of California in Unit 18 (Psychiatric Technicians). The agent's decision, a prerequisite to a directed election order, was a determination that CAPT had demonstrated sufficient support among Unit 18 members to justify holding a representation election to allow the employees to select between CWA and CAPT.² The agent's

²See generally State Employer-Employee Relations Act (SEERA or the Act), Government Code section 3512 et seq. Section 3520.5 states:

- (a) The state shall grant exclusive recognition to employee organizations designated or selected pursuant to rules established by the board for employees of the state or an appropriate unit thereof, subject to the right of an employee to represent himself.
- (b) The board shall establish reasonable procedures for petitions and for holding elections and determining appropriate units pursuant to subdivision (a).
- (c) The board shall also establish procedures whereby recognition of employee organizations formally recognized as exclusive representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

PERB Regulation 32770, codified at California Administrative Code, title 8, section 31001 et seq. reads in relevant part:

- (a) A petition for an election to decertify an existing exclusive representative in an established unit may be filed by a group of employees within the unit or an employee organization. The petition shall be filed with the regional office utilizing forms provided by the Board.

determination was subject to the dictates of PERB Regulation 32705, which provides in relevant part:

Within 10 days following the service of a Board agent determination that any . . . decertification petition is valid, any party to the proceeding may file a challenge to the status of the petitioner as an employee organization.³

CWA filed a number of pleadings with PERB, challenging the directed election order issued on May 6, 1985, but did not file any challenge to CAPT's status as an employee organization within the allotted ten days.⁴

On May 27 or 28, CWA discovered a copy of an unsigned contract between CAPT and Western, Murch & Associates (WMA), detailing certain consulting arrangements and payments between CAPT and WMA. Based on the existence of this contract, on

(b) The petition shall be accompanied by proof that at least 30 percent of the employees in the established unit either:

- (1) No longer desire to be represented by the incumbent exclusive representative; or
- (2) Wish to be represented by another employee organization.

³Government Code section 3513(a) defines an employee organization as:

(a) "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state.

⁴The other grounds on which CWA challenged the directed election order were disposed of by the Board in PERB Order No. Ad-146-S, and are not relevant here.

June 7 CWA filed with the Board a challenge to CAPT's status as an employee organization. The Board remanded the challenge to the Chief for an "initial determination."⁵ On June 14, the Chief issued an Order to Show Cause to the parties, asking for briefs to be filed as to why CWA's challenge of June 7 should not be dismissed as untimely under Regulation 32705.

CWA filed briefs in support of its position that, since the consulting contract was not discovered by CWA until May 28th, CWA could not have filed its challenge before that date. Since it did file within 10 days of discovery of the contract, CWA argues it should be allowed to challenge CAPT's status. CAPT opposed the filing on the grounds that (1) Regulation 32705 provides for a challenge only within ten days of the agent's determination, and that, (2) in pleadings prior to June 7, CWA had specifically stated it did not challenge CAPT's status. Thus, CWA had waived its right to challenge CAPT.

On July 9, the Chief ruled that the discovery of the consulting contract did not constitute an extraordinary circumstance within the meaning of Regulation 32136 that would permit a late filing.⁶ In reaching this determination, the

⁵PERB Order No. Ad-146-S at page 7.

⁶Regulation 32136 provides:

A late filing may be excused in the discretion of the Board only under extraordinary circumstances. A late filing which has been excused becomes a timely filing under these regulations.

Chief examined whether the contract could be considered "newly discovered evidence" such that it would have affected the outcome of the agent's determination had its existence been known. The Chief ruled (1) that the discovery of the contract could have been made before May 28, and (2) even if it could not have been made before May 28, its existence was not "material," that is, it would not have altered the agent's determination. Thus, the consulting contract did not constitute "newly discovered evidence" that would qualify as an extraordinary circumstance excusing the late challenge to CAPT's status.

On appeal, CWA argues that the standard of "newly discovered evidence" used by the Chief is inappropriate because that standard applies only where an evidentiary hearing has already been held. San Joaquin Delta Community College District (1983) PERB Decision No. 261(b) sets forth a test to be used to determine whether the record in a case should be reopened after a hearing in order to admit "newly discovered evidence." Here, no evidentiary hearing has been held (although CWA has requested one) and thus the exclusion of the challenge under the above standard is highly inappropriate. In response, CAPT presents essentially the same arguments made to the Chief.

DISCUSSION

The assessment of whether "extraordinary circumstances" can excuse a late filing under Regulation 32705 depends in part on

the purpose of that regulation, and whether that purpose will be frustrated by a late filing. In that regard, whether events that cause an untimely challenge constitute "extraordinary circumstances" is also intertwined with an examination of other avenues of redress open to the aggrieved party. As set forth in our reasons below, we find that CWA did not show extraordinary circumstances to excuse its untimely challenge to CAPT's status, but note that PERB regulations do not preclude the timely filing of other challenges and charges that may raise the same issues as this untimely challenge sought to do.

SEERA, like other collective bargaining statutes, has as one of its purposes the recognition of state employees' right "to join organizations of their own choosing and be represented by those organizations in their employment relations with the State."⁷ The Legislature granted the right to represent state workers exclusively⁸ to an organization selected by a majority of employees in the bargaining unit.⁹

In order to protect the employees from either (1) being represented by an organization that no longer has the support of a majority in the unit, or (2) losing opportunities to bargain with the employer due to the uncertain status of an

⁷Government Code section 3512.

⁸Government Code section 3515.5.

⁹Government Code section 3520.5; PERB Regulation Nos. 32720-32786.

employee organization, this Board has always sought to resolve promptly any questions concerning representation. (See Folsom-Cordova USD (1978) PERB Order No. Ad-45.) To that end, certain determinations of the Board are not subject to judicial review.¹⁰ Furthermore, PERB regulations call for prompt investigation when unit employees file a decertification petition.¹¹

Within this context of prompt and rapid resolution of representational questions, the purpose of Regulation 32705 becomes clear. In order to insure that the actual conduct of the election will proceed promptly once a decertification petition has been filed, our regulations contemplate that only a limited time period be given to challenge the status of the decertifying employee organization. This limited challenge period effects a reasonable balance between the interest of the employees in electing promptly their spokesperson and the interest of an incumbent organization in not having to expend resources on an election campaign against a party that may not be an employee organization under the statute.

Thus, under PERB Regulation 32705, a party that believes, for example, that a decertifying organization is unlawfully dominated by management or has managerial and confidential

¹⁰See e.g., Government Code section 3520. (Determination of unit question is not reviewable.)

¹¹PERB Regulation No. 32776.

employees in elective offices is permitted to raise those challenges based on factual circumstances known at the time the Board agent makes a determination on the proof of support. Once the ten-day filing period has elapsed, however, challenges to an organization's status that would delay the actual balloting will be permitted only if the challenger establishes that "extraordinary circumstances" prohibited filing in a timely manner.

In so holding, we limit the application of "extraordinary circumstances" to those situations where events occurring prior to the expiration of the ten-day period prevent a timely filing. In other words, should some happenstance such as unexpected, serious illness or critical mechanical failure of office equipment occur on the tenth day and prevent a timely filing, the filing party could seek redress for the late filing under Regulation 32136. In contrast, when circumstances that occur after the ten-day period are relied on as a basis for untimely filing, the Board will not halt the election process at that juncture.

We note, however, that this application of the "extraordinary circumstances" standard to Regulation 32705 cases need not result in any permanent loss of rights held by the party challenging an organization's status. A party that acquires information germane to the status of another organization has other avenues available to it. Any evidence discovered prior to the ballots being mailed, as was the case

here, can certainly be brought to the attention of the unit members themselves. Those unit employees can express their opinion as to the legitimacy of the decertifying organization with their vote. Moreover, whatever transpires in the election process, the incumbent still has other options to challenge the decertifying organization's status.

Thus, PERB Regulation 32738(c)(1)¹² provides for post-election challenges. Newly discovered evidence, new facts, or other circumstances may be the basis for a challenge to the election after the ballot count has been completed.

This "election challenge" method has as an additional advantage the fact that the election result may obviate any need for the challenge. In such a case, the exclusive representative can begin to represent the employees immediately upon certification of the results.

On the other hand, the decertifying organization's status can still be challenged at a time when the controversy is ripe. Specifically, evidence as to the status of an organization is most relevant when that organization would be in a position to begin representation. Delaying challenges to

¹²PERB Regulation 32738(c)(1) reads:

(c) Objections shall be entertained by the Board only on the following grounds:

(1) The conduct complained of interfered with the employees' right to freely choose a representative. . . .

the status of a representative because of evidence gathered after the ten-day period serves the purpose of the Act by preserving the employees' rights to a speedy election while at the same time examining challenges only when there is immediate danger of an unqualified organization commencing action as an exclusive representative.¹³ We note that our approach is not new.¹⁴

Applying the foregoing analysis to the case at hand, the Board holds that CWA's discovery of the consulting contract on May 28th did not constitute "extraordinary circumstances" that would excuse a late-filed challenge to CAPT's status. Critically, there is no indication that CWA was prevented from filing a challenge to CAPT's status by May 6 due to unusual circumstances that occurred during the 10-day filing period.¹⁵ Thus, having missed the period in which to file, CWA is precluded from challenging CAPT's status before the

¹³Board Regulation 32705 does not mean that a charge that a purported employee organization does not meet the law's standards may only be brought, and is only timely, for a 10-day period following the service of the Board agent's determination that a representation or decertification petition is valid. Rather, the regulation is intended to preclude the filing of such a challenge during an election process that has commenced after the 10-day period has expired. The purpose is to prevent untimely delays or interruptions in the election process itself, but not to prevent challenges at an appropriate time.

¹⁴See Folsom-Cordova Unified School District (1978) PERB Order No. Ad-45 at pages 4-5 and the concurrence of Member Gonzales.

¹⁵To the contrary, for the time period in question CWA expressed in pleadings to this Board that its intent was not to challenge petitioner's status as an employee organization.

election results, but may persist in that claim through appropriate post-election challenges.

In its appeal to the Board, CWA argues that the Chief ruled on the merits of CWA's challenge without notice that she would do so and without a proper hearing on the merits. Because we have interpreted the application of "extraordinary circumstances" in a different manner than the Chief, we find it unnecessary to comment on the substance of CWA's challenge. Rather, we uphold the determination that the discovery of the contract on May 28th does not constitute extraordinary circumstances. Our ruling today does not preclude CWA from filing an objection after the election, if appropriate at that time.

ORDER

The appeal of CWA of the dismissal of the challenge to the status of CAPT is hereby DENIED.

Members Morgenstern, Burt, and Porter join in this Decision.