



STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

In the Matter of the Administrative Appeal)

OCEANSIDE UNIFIED SCHOOL DISTRICT,
Employer, APPELLANT,)

and)

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,
CHAPTER 370,
Employee Organization.)

Case No. LA-R-502

EERB Order No. Ad-20

December 21, 1977

ORDER

The decision of the Los Angeles Regional Director, in the above-captioned matter, that a certification of results in organizational security elections will issue upon the approval of the provision by a simple majority of those voting is sustained by the Board itself.

The Board finds that the Regional Director correctly interpreted Government Code Section 3546(a).

Educational Employment Relations Board

by

STEPHEN BARBER

Executive Assistant to the Board

Reginald Alleyne, Chairman, dissenting:

I disagree with the Board's decision to invalidate the District's and CSEA's uncontested agreement to require a 67-percent vote rather than a majority vote of employees to make effective an agency shop clause in a negotiated agreement.

Few labor relations issues have prompted more heated debate than the question of whether the law should permit negotiated agreements requiring unwilling employees to join or support unions. In response, legislatures have devised different means of reconciling arguably valid but competing claims concerning organizational security clauses.¹

¹The term "organizational security" is defined in Gov. Code Sec. 3540.1(i) as follows:

"Organizational security" means either:

- (1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or
- (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

Gov. Code Sec. 3540.1(i)(1) defines what is known in private sector labor law as a maintenance of membership clause. Gov. Code Sec. 3540.1(i)(2) defines what is known in private sector labor law as an agency shop agreement. These two clauses and others of similar vein are known generically as union security clauses in private sector labor law. The California Legislature has substituted the generic term "organizational security" for the private sector generic term "union security." But "organizational security" in the EERA is limited to maintenance of membership and agency shop clauses. It does not include union shop clauses, which require union membership within a reasonable time (usually 30 days) as a condition of employment, without the option of paying the equivalent of membership fees and dues. See Aboud v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411, 2414, n. 10 (1977).

Federal labor law authorizes union security clauses,² but with the unique compromise proviso that states may enact legislation making them illegal.³ In the public sector, the issue of the validity of organizational security clauses has been further complicated by only recently resolved questions concerning their constitutional validity.⁴

The California Legislature, in enacting the Educational Employment Relations Act, expressly authorized the negotiability of "organizational security clauses."⁵ A palliative compromise, favoring those opposed to required employee organization membership or support, provides for a vote of affected employees, at the option of the employer, before a negotiated organizational security clause may become

²NLRA Section 8(a)(3) (proviso), 29 U.S.C. Sec. 158(a)(3).

³NLRA Section 14(b), 29 U.S.C. 164(b).

⁴See Abood v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411 (1977), a United States Supreme Court decision sustaining the constitutional validity of agency shop clauses in negotiated public employment agreements.

⁵Gov. Code Secs. 3543.2, 3546.

Valid agency shop agreements require express legislative authorization in California. City of Hayward v. United Public Employees, Local 390, SEIU, AFL-CIO, 54 Cal. App. 3d 761, 91 LRRM 2898 (1976). See NLRB v. General Motors, sustaining the validity of agency shop agreements under the National Labor Relations Act, 373 U.S. 734, 53 LRRM 2312 (1963).

effective. Specifically, Government Code Section 3546(a) provides:

An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.⁶

No other negotiable subject, as defined in the EERA,⁷ requires such a

⁶Gov. Code Sec. 3546 was derived in the main from former and now repealed National Labor Relations Act Section 9(e)(1) of the 1947 Taft-Hartley Amendments. Section 9(e)(1) was repealed in 1951, Act of October 22, 1951, Chapter 534, Section 1(b), 65 Stat. 601, principally for the reason that 97 percent of the elections conducted under the union shop authorization vote resulted in authorization of the union shop. See 16th Annual Report of NLRB, p. 54 (1952). Under the present NLRA Section 9(e)(1), a majority of employees subject to a union security arrangement may vote, under proper circumstances, to rescind a negotiated union security arrangement then in effect. See Morris, The Developing Labor Law, pp. 699, 700. The difference is that the old NLRA Section 9(e)(1), like the present EERA Section 3546(a), authorized a vote to bring a nonexistent union security clause into being; the new and present NLRA Section 9(e)(1) only deals with an already existing union security clause, which voters may rescind.

⁷See Gov. Code Sec. 3543.2.

vote before negotiating parties may include it in their agreement, another indication of the uniquely volatile status of organizational security clause issues.

While the agreement is against the interests of one of its parties, California School Employees Association, the interests of the other party, the District, are presumably favored by the agreement. But in this context, I believe that the question should not be whether a party to the agreement is favored by it but whether those not party to the agreement and in a position to be disfavored by the agreement, to the detriment of a statutory right established for their benefit, are in fact disfavored by the agreement. I not only find no such prejudicial effect inherent in this agreement, but find instead, as I think one must necessarily find, that the more stringent 67-percent vote required by the agreement furthers the interests of those opposed to organizational security clauses, beyond what the Act provides. The agreement should be regarded, then, as a valid waiver of a statutory provision.

In contrast, an agreement to require less than a majority vote for an organizational security clause would be against the interests of the individuals the majority vote requirement was intended to benefit, and, it seems, could not be regarded as a valid waiver. But that is not this case.

With the interpretation I would give to Government Code Section 3546(a), under an employer's threat that no organizational security clause will be entered into unless the vote requirement demanded by the employer is met, employee organizations might be pressured into an agreement requiring a more-than-simple majority vote. However, an employee

organization may be validly pressured into an agreement containing no organizational security clause at all. Whether and to what extent an employee organization is so pressured is a matter the Act commits to the dynamics of the negotiating process, the relative strength of negotiating parties, their priorities, ultimate objectives, and what they are willing to sacrifice in order to achieve them, the same things that control the outcome of negotiations on other subjects and dictate the terms of final agreements between negotiating parties.

It is axiomatic that under the EERA, an employer is not bound to make concessions to an employee organization,⁸ but must instead attempt in good faith to reach an agreement with an exclusive representative on negotiable subjects.⁹ An employer with the negotiating strength to command a 67-percent vote in favor of an organizational security clause, might well have the negotiating strength to resist including an organizational clause of any kind in an agreement. The Act does not require an organizational security vote in all cases where the issue of organizational security arises at the negotiating table. The organizational security vote is called at the option of the employer.¹⁰ The employer's exercise of the option not to call an organizational security vote may be tantamount to the rejection of a negotiated organizational

⁸Gov. Code Sec. 3549; compare NLRA Section 8(d), 29 U.S.C. 158(d).

⁹Gov. Code Secs. 3540.1(h), 3543.5(c).

¹⁰Gov. Code Sec. 3546(a) provides that the "public school employer may require . . ." an organizational security vote. The vote itself is not made mandatory with the use of the word "shall", rather than the word "may".

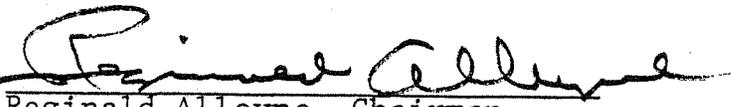
security clause. If the organizational-security vote and the organizational security clause itself are within the employer's discretion to reject, following good faith negotiations on the subject, it should follow that the employer and a willing employee organization acting against its own interests, have the discretion to require a more-than-simple majority organizational-security vote.

In this case, the District, having succeeded in obtaining a 67-percent vote requirement in an agreement, and having been rebuffed in that effort by this Board, may possibly have the negotiating strength to resist an organizational security vote based on a majority vote and, consequently, to resist an organizational security clause altogether. It is beside the point that the comparative negotiating power of the parties and their priorities may make that not true in this case, for it may be true in future cases to which this decision of the Board will apply.

Finally, implicit in the Board's decision is a rationale based on a literal reading of Government Code Section 3546(a). On that, I think resolution of a conflict between a literal reading of the statute and some other evidence of legislative intent is unnecessary here. I find that, like most disputed labor legislation, a literal reading of Government Code Section 3546(a) does not resolve this issue either way. The Board's interpretation of that section would be consonant with a literal reading if Government Code Section 3546(a) provided that ". . . no more than a majority . . ."; my interpretation of the Act would be consonant with a literal reading of that section if it read ". . . no less than a majority . . ." I believe that logic, the history of organizational security clauses, their unique treatment by both the

Congress and the California Legislature, and consideration of Government Code Section 3546(a) in light of the class of persons intended to be benefited, all support the latter interpretation.

For these reasons, I would conclude that the parties' agreement to require a 67-percent vote in favor of an agency shop clause is valid and that the Board incorrectly decides otherwise.


Reginald Alleyne, Chairman