

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COMMUNICATIONS WORKERS OF AMERICA,)
PSYCH TECHS, LOCAL 11555,)
)
Employee Organization,) Case No. S-D-87-S (S-SR-18)
)
and) Administrative Appeal
)
CALIFORNIA ASSOCIATION OF)
PSYCHIATRIC TECHNICIANS,) PERB Order No. Ad-151-S
)
Employee Organization,) December 13, 1985
)
and)
)
STATE OF CALIFORNIA (DEPARTMENT)
OF PERSONNEL ADMINISTRATION),)
)
Employer.)

Appearances: Law Offices of Ronald Rosenberg by Ronald Rosenberg, and Kanter, Williams, Merin & Dickstein by Howard L. Dickstein for Communications Workers of America, Psych Techs, Local 11555; Loren E. McMaster for California Association of Psychiatric Technicians; Lester R. Jones for State of California, Department of Personnel Administration.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

PORTER, Member: Communications Workers of America, Psych Techs, Local 11555 (CWA), appeals a determination, attached to this Decision, of the general counsel of the Public Employment Relations Board (Board or PERB) to terminate the stay of the election for decertification filed by the California Association of Psychiatric Technicians (CAPT).¹ CWA does not assert the

¹At the time the election period was scheduled to commence on June 17, 1985, there were five pending unfair practice charges

general counsel made inaccurate factual statements in his letter² but, rather, alleges that his conclusions regarding the impact of the allegations on voter free choice were erroneous.

The general counsel considered the allegations contained in the two complaints currently pending against the employer, Case Nos. S-CE-249-S and S-CE-261-S.³ He determined that those allegations, whether viewed individually or in totality, could not be said to have so interfered with the election process as to prevent employees from exercising free choice.⁴

filed by CWA against the employer, State of California, Department of Personnel Administration (DPA). Since complaints had not issued in all of the cases, and they were in varying stages of investigation, the balloting-by-mail proceeded and the returned ballots were impounded. Termination of the stay would therefore result in the opening and tallying of the impounded ballots rather than delaying the election itself.

²The factual statements were derived by general counsel from a reading of the allegations in the charges and accompanying declarations filed by CWA; the investigations that occurred by the regional attorney in processing the charges; and by the responses with attached declarations submitted by the parties to the general counsel.

³The other unfair practice charge cases pending at the outset of the election period have either been dismissed, and the dismissals not appealed, or deferred to arbitration.

⁴PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Regulation 32752 provides, in relevant part:

The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.

DISCUSSION

PERB has previously held that the proper standard of review of a Board agent's decision to dissolve a decertification election block is whether the Board agent abused his/her discretion. Jefferson School District (1980) PERB Order No. Ad-82. The Board will generally defer to the conclusions reached by its agent if it finds those conclusions supported by facts developed during the course of a properly conducted investigation. Pleasant Valley Elementary School District (1984) PERB Decision No. 380. The agent's order should be the result of a sufficient investigation and analysis of the allegations of the complaint and the potential impact on the employees in the unit, and the agent's conclusions should be amply supported by the record. Regents of the University of California (1984) PERB Decision No. 381-H.

Applying the above standard to the present case, we affirm the general counsel's decision to dissolve the election stay. Pursuant to his investigation, the general counsel sent a letter on August 6, 1985 to all the parties, inviting their written responses on the issue of whether or not the election stay should be continued in effect. He attached the two complaints to that letter and informed the parties of PERB's standard and precedents that he would be applying in making the determination. Following the responses submitted by the parties, the general counsel prepared a thorough and detailed analysis of the allegations of the complaint, the background information, and the impact on the

employees in the unit of the employer's alleged misconduct. His conclusions are supported by the record. Therefore, we decline to set aside the general counsel's determination, and hereby adopt it as the decision of the Board itself.

We next turn to the additional allegations of Case No. S-CE-261-S as determined by this Board in State of California (Departments of Personnel Administration et al.) (1985) PERB Decision No. 542-S⁵ to decide whether those additional allegations, either individually or when viewed with the existing allegations, compel a different conclusion as to the termination of the stay. For the reasons discussed below, we again conclude the stay should be terminated and the ballots tallied.

⁵We take official notice of PERB Decision No. 542-S issued this same day. That decision is relevant to the issue before us in this case in that it involves CWA's appeal of a partial dismissal of one of the complaints (S-CE-261-S) considered by the general counsel in his termination of the stay. In PERB Decision No. 542-S, we have reversed the partial dismissal and ordered that the dismissed portions of the charge be consolidated with the complaint. The portions of the complaint which had been dismissed include various allegations CWA claims support its charge that, under the totality of the circumstances, DPA failed to maintain strict neutrality during the election and therefore violated the State Employer-Employee Relations Act (Government Code section 3512 et seq.).

It should be noted that the general counsel was limited to considering the allegations contained in complaints which had issued at the time of his decision. Thus, he did not have the opportunity to consider the additional allegations which will become a part of the complaint as a result of PERB Decision No. 542-S. Since this decision involves an election and a question concerning representation, it should be decided expeditiously; thus, rather than remanding the case to general counsel for further consideration, the Board will decide both whether to uphold or reverse the general counsel's decision to terminate the stay, and whether the additional allegations of the complaint compel a different conclusion on the blocking charge.

The additional allegations involve the alleged posting on employee bulletin boards of various management memoranda, as well as the filing and subsequent withdrawal by the State of a unit modification petition affecting a portion of the unit represented by CWA. The posting allegations are similar to those contained in the complaint in Case No. S-CE-261-S, and assert that management correspondence relating to CAPT was posted on employee bulletin boards at Napa, Sonoma, Porterville and Lanterman State Hospitals.

Of the additional allegations which will now be included in the complaint (PERB Decision No. 542-S, supra), all but one involve various management actions and memoranda, neutral on their face but claimed by CWA to have unlawfully created support for CAPT by creating confusion in the minds of employees through use of terminology normally used in conjunction with the exclusive representative. In addition, CWA alleges that these documents were not the type of documents normally posted by management and were posted on bulletin boards not normally used for the posting of management memoranda. These factors form the basis for CWA's assertion that DPA gave CAPT free publicity and generated the impression that CAPT had an "inside track" with the employer.

In keeping with the general counsel's analysis of the similar allegations, we find that, while these allegations tend to establish a prima facie case of assistance or employer preference, they do not support CWA's blocking charge at issue

here. Given the facial neutrality of the memos, combined with the fact of limited posting (four out of eleven hospitals) as well as the brief period of time in which the memos were posted, varying from two weeks to one and one-half months prior to the voting, we conclude that the allegations considered in PERB Decision No. 542-S, individually or when combined with the allegations of the two complaints, should not result in a continued stay of the election process. The allegations simply are not, on their face, the type of conduct which "would so affect the election process as to prevent the employees from exercising free choice."

The analysis of the remaining allegation is somewhat different. Here, CWA asserts that the filing and withdrawal of the unit modification petition created a divisive issue, due to the employer's alleged campaign to convince the senior psychiatric technicians they would receive higher wages only if they were not part of the unit. According to CWA, the employer filed the petition knowing CWA opposed the unit modification and knowing also that CWA would be forced to take an open stand against it, ostensibly alienating the senior psychiatric technicians. Then, in the middle of the voting period after most of the ballots had been returned, DPA suddenly and inexplicably withdrew its petition.

We find that, while this allegation regarding the unit modification might well involve every hospital at which senior psychiatric technicians are employed, we cannot conclude that, on its face, the mere filing and withdrawal of a unit

modification petition so affected the election process as to prevent the employees from exercising free choice. This is particularly true in the absence of any specific allegations that significant numbers of senior psychiatric technicians were aware of or influenced by the filing of the unit modification petition or CWA's response to that filing.

Further, and more significantly, we note that the unit modification allegation was not raised by CWA until July 3. This was two weeks into the voting process and, according to CWA, most of the ballots had already been returned to PERB.

Therefore, this allegation is more appropriately raised and addressed as an election objection. As noted by former Board Member Raymond J. Gonzales, in his concurring opinion in Folsom-Cordova Unified School District (1978) PERB Order No. Ad-45, the election objection process is the more appropriate vehicle for consideration of allegations of interference with employee free choice, rather than an appeal of the general counsel's decision. Additionally, the objection process provides for the possibility of a hearing, which could then be consolidated with the unfair practice procedures to save the parties and the agency time and expense.

ORDER

Based on the foregoing, the Board ORDERS the stay of the election be terminated and the ballots counted.

Chairperson Hesse and Member Morgenstern joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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August 15, 1985

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Re: Administrative Determination Regarding Unit 18 Election Stay;
Case No. S-D-87-S (S-SR-18)

Dear Parties:

INTRODUCTION

This is the administrative determination of an election stay request made by the Communication Workers of America, AFL-CIO (CWA) in the pending state Unit 18 decertification case (Case No. S-D-87-S). The determination begins with a description of the unfair practice complaint allegations upon which the stay request is based. This is followed by a description of the process to be followed in evaluating stay requests, application of the process to the unfair practice allegations, and the resultant conclusion that the election stay should be terminated and the ballots counted.

COMPLAINT ALLEGATIONS

1. Case No. S-CE-249-S.

This complaint alleges that the Department of Developmental Services, a component of the state employer, established an Employee Safety Task Force (ESTF) at Napa State Hospital on or about November 13, 1984. The ESTF included employees within its membership and "dealt" with the employer by making safety-related suggestions, some of which were implemented by the employer. The employer's conduct was deemed to be prima facie violative of Government Code sections 3519(a), (b), (c), and (d) for the following reasons. The ESTF may be an "employee organization" since it includes employees of the state and has as a central purpose, dealing with the state employer on employee safety-related matters which are within the scope of representation. The state employer initiated the ESTF, exercising control over the composition of the ESTF and other essential features of its operation and then, without affording CWA an opportunity to negotiate, implemented various ESTF proposals. The ESTF was formed to explore ways of minimizing employee injuries and deaths due to patient violence. Unit 18 employees were not the only ones at risk. In fact, among other groups, six employee organizations representing employees at Napa State Hospital were asked to nominate persons for ESTF membership. Most complied.

2. Case No. S-CE-261-S.

This 19-paragraph complaint contains allegations relating to a variety of violative employer activity. The first three allegations (paragraphs 4 through 9) allege conduct during the campaign period which may constitute unlawful unilateral changes and assistance to CAPT. One such act was imposition by the employer of the requirement that non-employee CWA representatives seeking work area access give 24-hour advance notice plus the names of the employees to be contacted and a summary of the proposed discussion. This occurred at Napa State Hospital. Formerly, under the MOU, a non-employee representative was required only to identify himself/herself to the facility labor relations coordinator who made necessary arrangements for access to employees. Additionally, CWA telephone access was changed at Patton State Hospital on or about June 20, 1985. Before that date CWA had been allowed to make calls from the employee organization room to points outside the hospital without charge. Thereafter, CWA was denied telephone use for a period and then allowed use on the condition that all calls to points outside the hospital be billed to CWA. Also at Patton State Hospital, on and after about May 22, 1985, the state employer, in contravention of past practice and terms of the MOU, refused to permit leafletting at the speed bumps on Patton Avenue by CWA representatives. The leafletting incident occurred at Patton only.

The remaining allegations of the complaint concern employer conduct which may have encouraged unit employees to support CAPT rather than CWA. (Paragraphs 12 through 16.) Two of these allegations involve the providing of services to CAPT which were not provided to CWA. The employer caused CAPT campaign literature to be delivered to Sonoma State Hospital work stations on at least one occasion, and twice CAPT was allowed to use the Executive Conference Room at Stockton State Hospital for meetings with Psychiatric Technicians. On the same date one of those meetings occurred, an employer Program Director told a CWA representative, in the presence of other Psychiatric Technicians, that he hoped CAPT "beat the hell" out of CWA.

Employer posting of letters and memos relating to CAPT's status on various employee organization and unit bulletin boards is also alleged as unlawful assistance to CAPT. In one instance, an employer representative at Metropolitan State Hospital posted a memo which purported to remove one CWA job steward and identified seven employees as CAPT job stewards. In another instance, a letter written by a DPA official to a CAPT consultant was posted on employee organization and other bulletin boards throughout the state hospital system. The letter was accompanied by a cover memorandum from a Department of Developmental Services Labor Relations Specialist to all hospital labor relations coordinators. The letter, ostensibly sent in response to a letter from the CAPT consultant seeking access information, states that DPA has "recognized" CAPT as an employee organization. CAPT is then described as an "independent employee organization incorporated by the State of California and formed to represent the interests of Psychiatric Technicians and related classifications in all matters relating to negotiations of wages, hours, and all other terms and conditions of employment." Next, the names and addresses of CAPT officers are listed. Thereafter access is discussed. The cover memo points out again that DPA has "recognized" CAPT as an employee organization under SEERA and purports to state the purposes for which CAPT was formed before advising the coordinators as to the access CAPT should be granted.

These documents were posted on bulletin boards on or about March 5, 1985, well before CAPT had filed a decertification petition (March 28, 1985) or been determined by PERB to be an "employee organization" with standing to file a decertification petition. (April 26, 1985).

ADMINISTRATIVE PROCESS

The object of the administrative investigation conducted and this determination is to apply PERB's Stay of Election provision (Board Regulation 32752) to the facts of this case in accordance with PERB and other appropriate precedent.

Board Regulation 32752³ asserts the Board's discretion to stay an election "upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice."

In an early "blocking charge" decision, issued before Regulation 32752 was adopted, the Board made clear that each stay request is to be investigated and evaluated on its merits rather than being disposed of by rote application of a blocking charge rule. Jefferson School District (1979) PERB Decision No. Ad-66. Recent additional guidance to Board agents proceeding under Regulation 32752 was provided by the Board in Pleasant Valley Elementary School District (1984) PERB Decision No. 380. At page 5 of that decision the Board states that, "the Board Agent's obligation is to determine whether the facts alleged in the unfair practice complaint, if true, would be likely to affect the vote of the employees, and, thus, the outcome of the election." (See also Grenada Elementary School District (1984) PERB Decision No. 387, page 14.) Hence, the truth of all relevant charging allegations has been assumed in this determination. Regents of the University of California (1984) PERB Decision No. 381-H was the next case decided by the Board after Pleasant Valley ESD, supra. In Regents, consistent with the rule defined in Pleasant Valley the Board held that the Regional Director acted correctly in analyzing, "whethe [the conduct alleged in the complaint] is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (Page 6.)

Moreover, complaint allegations are not evaluated separately and without regard to the factual contexts in which they arose. Instead,

³The regulation in its entirety reads as follows:

Stay of Election. The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination made by the Board pursuant to this Section may be appealed to the Board itself in accordance with the provisions of Division 1, Chapter 4, Article 2 of these regulations.

the totality of these circumstances is weighed. See Grenada Elementary School District, supra; Antelope Valley Community College District (1979) PERB Decision No. 97; Clovis Unified School District (1984) PERB Decision No. 389.

The Board's decisions in Santa Monica Community College District (1979) PERB Decision No. 103 and Sacramento City Unified School District (1982) PERB Decision No. 214 (cited by CWA) establish "the simple threshold test" for determining if a violation of subsection 3519(d) has been committed. That test requires strict employer neutrality, and it was applied when evaluating CWA's charges for purposes of complaint issuance. Neither of those cases involved an election stay request.

In applying these rules it is incumbent upon the investigating Board agent to consider the views of all interested parties. Regents of the University of California, supra. To this end, both complaints at issue were served on the Department of Personnel Administration (DPA), the representative of the state employer, CAPT and CWA. DPA and CWA submitted written responses which have been considered in arriving at this determination.

DISCUSSION

The complaint allegations are first discussed separately and then weighed together as a totality of circumstances.

1. Case No. S-CE-249-S

This complaint alleges misconduct of a character that has been termed serious by the Board in other cases, e.g., Antelope Valley CCD, supra, and Sacramento City USD, supra. Both of those cases involved formation of an employer dominated organization which then proceeded to deal with apparent effectiveness with the employer. However, the units in those cases were much smaller and more compact than 7,500 plus member Unit 18, which is spread over 11 hospitals throughout the state. In each of those cases it was clear that the employer had used the dominated organization to successfully demonstrate to all unit employees that supporting another employee organization was to their disadvantage. The extent of impact on voter free choice is not as clear in Case No. S-CE-349-S. First, the ESTF functioned only at Napa State Hospital where approximately 1,100 Unit 18 employees work. Second, CWA was not held up to the same stark, invidious comparison as the complaining employee organization in Antelope Valley CCD, supra, and Sacramento City USD, supra. All of the exclusive representatives at Napa State Hospital were treated identically. Each was offered the opportunity to nominate two members, one of which would be selected by the employer. This tends to reduce the likelihood that Unit 18

members would have perceived CWA as particularly ineffectual and, therefore, no longer worthy of employee support, simply because the employer organized the task force and accepted some of its suggestions.

Third, the task force was formed in the wake of a rash of deaths and serious injuries to hospital employees. Since the problem involved a wide range of employees not represented by CWA and was formed in November 1984 before CAPT began organizing, it is doubtful that Unit 18 employees perceived the task force as an employer comment on the relative merits of CWA versus CAPT representation. The fact that there is no connection between the task force and CAPT reduces the weight this complaint should be accorded in the totality of circumstance, but does not, as DPA seems to argue remove it from consideration. Any usurpation of an exclusive representative's statutory prerogatives by an employer may have some election impact. However, considering the nature of the employer's actions and the context in which they occurred, I accord them far less weight than CWA argues they are due.

2. Case No. S-CE-261-S

Paragraphs 3 and 4 allege a change in the notification to management requirement that a non-employee representative of CWA had to meet to gain access to employees in work units. The evidence submitted in support of this charge by CWA was limited to Napa State Hospital. DPA argues that the charge referred only to a change at Napa and that the Memorandum of Understanding (MOU) access provision which CWA claims was changed (Article XII, Section I) applies only to access for representational purposes, not organizational purposes. According to this argument, the MOU was not violated, instead, a reasonable measure was imposed to deny CWA an unfair organizing advantage via use of representational access contract rights for organizational purposes. No evidence was developed during the charge investigation to indicate that "the 24-hour rule" substantially undermined CWA's ability to contact employees for organizational purposes or that CWA's representational duties were interfered with. Declarations submitted by CWA in the election stay investigation suggest that the state employer may have allowed more work time discussion between CAPT organizers who were employees of the state and other employees than CWA organizer-employees were allowed. These declarations relate to a subject beyond the scope of the charge allegation (the charge alleges a unilateral change regarding non-employee CWA representative access). Further, most of them are so general that they deserve little evidentiary weight. Considered in context, I see this complaint allegation as having slight impact on voter exercise of free choice.

The telephone access and leafletting changes at Patton also seem to pose slight likelihood of voter free choice interference. The changes in CWA access to the employee organization room telephone concerned calls from the hospital to points outside only. This did not prevent CWA from calling employees at the hospital. Nor, but for a period of six days, was CWA prevented from making calls to points outside the hospital, so long as they paid for the calls. This is not a unilateral change, such as a wage increase or decrease, raising, in a high profile manner, a question of CWA's effectiveness as an exclusive representative. The change was not likely to come to the attention of unit employees since they were not the ones making the calls.

The leafletting change whereby the employer prevented CWA representatives from distributing leaflets at the "speed bumps" on Patton Ave. is similar. It ran only to one means of attempting to communicate with Patton Hospital employees, and was felt directly only by those seeking to leaflet. The investigation did not reveal that CWA was deprived in any substantial way of access to employees for organization purposes, or that CAPT was accorded preferred treatment in this regard. Hence, while these employer actions constituted prima facie violations under the section 3519(d) threshold test, they register low on the election impact scale.

The next allegation in the complaint (paragraph 12) alleges that a state employer Personnel Officer/Labor Relations Coordinator caused a memorandum to be posted on various employee organization and unit bulletin boards at Metropolitan State Hospital. The memorandum addressed to all managers and supervisors purported to remove one CWA job steward and identified seven employees as job stewards for CAPT. CWA's submission indicates that the memorandum was posted at several locations within the hospital. DPA states that it was posted by mistake and removed as soon as DPA was advised. According to DPA, a memorandum was sent to supervisors and managers pointing out that the posted memorandum was in error and telling them to ignore it. This retracting memorandum, though, was not posted. Since only an exclusive representative can appoint job stewards to represent unit employees in grievance matters, the posted memorandum undoubtedly generated some employee confusion at Metropolitan. On the other hand, the employer did take action to clear up the confusion and no evidence was revealed in the charge or stay of election investigations of the employer treating with "CAPT job stewards" at Metropolitan or elsewhere. Giving unit employees reasonable credit for being able to assess the situation, it is unlikely that many were misled for any length of time into believing that CAPT has attained exclusive representative standing, CWA's declarations notwithstanding. Employee declarations as to the impact of alleged employer misconduct may have some evidentiary value, but they are not determinative in assessing impact. That may be inferred from the seriousness and character of

the alleged misconduct. See San Ramon Valley Unified School District (1979) PERB Decision No. 111; see also Carian v. Agricultural Labor Relations Board (1984) 36 Cal. 3d 654, 661 and G. H. Hess, Inc. (1949) 82 NLRB No. 52 [23 LRRM 1581].

Paragraphs 13 and 14 concern two related charges. CAPT was allowed use of the Executive Conference Room at Stockton Hospital on two occasions in the spring of 1985 and, at or about the time the first of those meetings was to occur, an employer program director told CWA's chief steward in the presence of other Psychiatric Technicians that he hoped CAPT "beat the hell" out of CWA. CWA argues that this conduct had a significant impact on unit employees' attitudes toward the decertification election, convincing employees that the state employer wanted CAPT as the employee's exclusive representative and implying that the employees would, therefore, advance their interests by voting for CAPT. DPA replies that other employee organizations seeking to represent hospital employees had been allowed to use the room upon request but that CWA had never requested use. This is not directly refuted by CWA who relies on Clovis USD, supra, for the proposition that an employee organization is not required to ask in order to be entitled to receive equal employee organizing access treatment from an employer. However, CWA was not prevented from meeting with employees on hospital premises. The meetings took place in the employee organization room. Hence, with respect to this allegation it would appear that CWA was not deprived of the opportunity to contact employees for organizational purposes, and that the only adverse impact is the possible suggestion or "implied promise" that employees would fare better in their dealing with the employer if CAPT were to replace CWA as exclusive representative. The program director's remark ties in with this since it was made at or about the time employees were assembling for CAPT's first meeting in the executive conference room. It contained no direct threat or promise of benefit and, without more, would as an exercise of free speech, or an isolated statement of opinion by a supervisor or manager, not be considered as evidence in determining if CWA's charge met the section 3519(d) threshold test. Proximity of the comment to the CAPT meeting and the presence of other violative employer conduct discussed herein brings it within the 3519(d) ambit. Nonetheless, the limited use of the executive conference room granted CAPT, CWA's ability to hold meetings with Stockton employees in other hospital facilities and the fact that the offensive remark was a personal expression of hope by one program administrator at a single hospital discount their probable impact on voter free choice.

The only clear-cut evidence of preferential treatment to CAPT in terms of delivery of campaign literature to employees at their work stations (paragraph 15) relates to a single instance at Sonoma State Hospital where, apparently, one mailing was delivered. DPA asserts that it was a one-time mistake involving only a few pieces of mail. CWA suggests

that the discriminatory mail delivery practice may have been more widespread than the evidence has so far revealed. On the other hand, the August 9, 1985, declaration of CWA Representative Douglas Grant, relying on information supplied by an Agnews State Hospital employee, undercuts CWA's assertion that employee organization mail never has been delivered to employee work stations. The Agnews employee averred that before the election campaign, all staff at that hospital "used intra-hospital mail to circulate personal and even work related union information." The limited scope of the delivery of CAPT mail at Sonoma and that fact that "union information" may have been delivered to work stations in the past, with or without employer knowledge, depreciates the likelihood that the conduct described in this allegation influenced employees to vote for CAPT.

The remaining allegations (paragraph 16) concern the widespread posting of two documents. One is a February 26, 1985, letter from a DPA official to a CAPT consultant. The letter goes beyond merely informing the CAPT consultant regarding access groundrules, as he had requested. It purports to "recognize" CAPT as an employee organization "under 3513(a)," describes CAPT as an "independent" organization created to represent psychiatric technicians in their dealings with their employer and lists the names and addresses of CAPT officers. The second document is a memorandum from a Department of Developmental Services Labor Relations Specialist to all hospital labor relations coordinators. It attached a copy of the February 26, 1985, letter and repeated a description of the purposes for which CAPT was organized before discussing CAPT's access rights. Neither the letter nor the memorandum, on their faces, are statements of state employer preference for CAPT as Unit 18 exclusive representative rather than CWA, as was indicated to CWA in a PERB warning letter on July 22, 1985, and a July 26, 1985, supplement. Further, the access granted to CAPT seemed in line with the access PERB has determined to be a statutory right of all employee organizations. (State of California, (Department of Corrections) (1980) PERB Decision No. 127-S. See also University of California (Berkeley) (1984) PERB Decision No. 420-H.) Nor is it alleged that the documents purport to grant greater organizing access to CAPT than to CWA.

These allegations were included in the complaint for two reasons. First, since the term "recognize" is normally used in labor relations (and in SEERA) to signify that an employee organization is an exclusive representative, it is possible that employees were misled by DPA's use of this term into believing that CAPT had somehow ascended to that status. Second, the postings tended to help publicize CAPT in a favorable light. CAPT was described as an independent organization and one of the decertification campaign issues was that unit employees would benefit by ridding themselves of CWA and its affiliation to the AFL-CIO. It was also helpful to CAPT to have the names, hospitals of employment, and addresses of its principal officers posted throughout

the hospital system by the employer. However, the degree of impact these documents had on election free choice is questionable. To the extent employees were initially confused as to their meaning in terms of the standing of CWA and CAPT as exclusive representative, that confusion should have been dispelled well before the voting took place between June 17 and July 17. This is so because the investigations revealed no evidence that the employer negotiated with CAPT concerning terms and conditions of employment or allowed CAPT representatives to represent unit employees in grievance arbitration matters between March and July. Also, another memorandum posted by the employer on most if not all of the same bulletin boards states that CWA retained its access rights under the MOU and adjures managers and supervisors to maintain "absolute neutrality" in the campaign between CWA and CAPT. (Gary W. Scott memorandum dated May 3, 1985.) In sum, the primary reason for including these allegations in the complaint is that they can be characterized as "assisting" CAPT by typing, duplicating and posting documents which gave CAPT free election publicity. For the reasons stated above, the possibility of employee confusion was not considered significant. Granting clerical assistance to one employee organization while not doing the same for another may be considered in determining if the section 3519(d) threshold test is met (Clovis USD, supra.) It may as well, of course, be weighed in the totality of circumstances to decide if the election process was so tainted as to warrant blocking or setting the election aside (Clovis, id.).

3. Totality of Circumstances

As indicated in the above review of each complaint allegation, I believe that the conduct involved had far less potential for influencing employee free election choice than CWA argues. My view of these allegations as a totality of circumstances is similar.

Each of the cases in which PERB has either imposed an election stay or set aside an election has involved a more telling and comprehensive course of employer misconduct than is present in this case. In Jefferson School District (1977) PERB Order No. Ad-22, the Board upheld the stay of a decertification election when the employer had undermined the exclusive representative by refusing to negotiate in good faith with respect to 27 of the exclusive representative's negotiating proposals. Frustrating such an essential right on that broad basis obviously would cause many unit members to question the effectiveness of their bargaining agent. In Pleasant Valley ESD, supra, an employer who had contractually agreed that payment of a service fee was a condition of continued employment for unit members flatly refused to terminate the employment of those who did not pay. An election to rescind the service fee arrangement was stayed by the Board pending resolution of the employee organization's unilateral change complaint against the employer. Again, the employer's allege

misconduct had to have stirred deeply the resentment of employees who complied with the service fee provision and strongly influenced many to want to get rid of the provision if the employer was not going to enforce it. Likewise, in Regents of the University of California, supra, a decertification election was stayed where the employer's conduct, assuming it occurred, had a clear tendency to diminish the exclusive representative in the eyes of unit employees. Benefits were granted to non-represented employees and withheld from unit employees. Working conditions within scope were unilaterally changed and surface bargaining made the prospect of reaching an agreement appear hopeless.

In Santa Monica CCD, supra, full time employees comprising the power base of one employee organization competing in a representation election were granted a wage increase while the part-time employees generally supportive of the other organization were denied an increase because their organization refused to waive the statutory right to negotiate wages in the following year. The employer compounded its misconduct by publishing a newsletter to everyone in the school community laying blame for the plight of the part-time employees at the feet of the complaining employee organization. A violation was found and the election would have been set aside had the election bar period not already passed. In Grenada ESD, supra, the likelihood that the employer's conduct would have influenced voter free choice was equally apparent. The employer reneged on a tentative agreement, failed to provide a final typed version of a tentative agreement, then refused to negotiate with the exclusive representative thereafter and granted a unilateral one-time pay increase to unit employees. The Board stayed the election.

In Sacramento USD, supra, and Clovis USD, supra, the Board found violations sufficient to warrant setting elections aside based on similar, well defined, patterns of misconduct. In each case the employer dealt with a dominated or assisted employee organization on matters of critical importance to unit employees, extolled the virtue of the organization to unit employees and committed other acts which clearly assisted and demonstrated employer preference for that organization.

The totality of circumstances in this case does not approach the magnitude present in any of the above cases. That is not to say that the PERB cases decided to date spell out the minimum degree of misconduct that must be alleged to sustain an election stay or proven to cause an election to be set aside. The stay of election standard is as stated in the regulation and defined by the Board in Pleasant Valley ESD, supra; namely, is it likely that the employer's alleged misconduct would affect the employees' vote?

The alleged employer misconduct in this case is generally of a peripheral nature. With the exception of the establishment of and dealing with the ESTF at Napa State Hospital, none of the employer's actions resulted in changes in terms and conditions of employment. Further, the ESTF was established before CAPT started organizing and was unrelated to CAPT. It was set up, albeit potentially in violation of provisions of SEERA, to deal with a serious, specific safety problem and CWA was offered the same participation right accorded other similarly situated employee organizations. This activity, removed in point of time and subject matter from the CAPT-CWA election contest, adds little to a totality of circumstances likely to have influenced unit voters in June. The Patton incidents may have hampered minimally CWA organizing efforts but the employees themselves, other than possibly losing out on some information, were not directly impacted. Much the same can be said of the remaining allegations. A prima facie case of assistance or employer preference has been made out but it is thin.

In sum, but for the ESTF incident at Napa, the acts of employer misconduct did not change terms or conditions of employment for unit employees. Nor did the employer's actions enable CAPT to represent unit employees in derogation of CWA's exclusive representative status or deny CWA a reasonable opportunity to present its anti-decertification case to unit employees.

Despite CWA's declarations from employees who claim that the employer's actions were threatening to them as CWA adherents, when due credit to the powers of discernment of Unit 18 employees is given, the totality of circumstances is not likely to have influenced their exercise of free choice. Consequently, the expressed desire of a substantial portion of the unit employees to have a question concerning representation resolved becomes paramount, and the election should proceed.

This determination was reached without benefit of a hearing. That the employer misconduct alleged does not appear likely to have influenced voters free choice based on the facts determinable through investigation does not negate the possibility that upon the filing of election objections regarding these matters and full hearing on the unfair practice complaints the Board will set aside the election.

CONCLUSION

For the reasons stated above, it is my determination that the election stay should be terminated and the ballots counted.

An appeal to this decision pursuant to PERB Regulations section 32350 through 32380 may be made within 10 calendar days following the date

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of service of this decision by filing a statement of facts upon which the appeal is based with the Board itself at 1031 18th Street, Suite 200, Sacramento, California 95814. Copies of any appeal must be concurrently served upon all other parties and the Sacramento Regional Office. Proof of service pursuant to Regulation 32140 is required.

Very truly yours,

Dennis M. Sullivan
General Counsel

DMS:mm