STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GILROY UNIFIED SCHOOL DISTRICT, Employer, and GILROY TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and GILROY FEDERATION OF TEACHERS, CFT/AFT, Employee Organization.	Case No. SF-OB-3 (SF-D-188) (SF-R-215) Administrative Appeal PERB Order No. Ad-226 December 12, 1991

Appearances: California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Gilroy Teachers Association, CTA/NEA; Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Gilroy Federation of Teachers, CFT/AFT.

Before Shank, Camilli and Carlyle, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Gilroy Teachers Association, CTA/NEA (Association) to the administrative determination of a PERB Board agent (attached hereto) which held that conduct surrounding the decertification election in the established certificated bargaining unit of the Gilroy Unified School District constituted a material breach of the election process and significantly impaired the fairness of the election process.

The Board has reviewed the entire record in this matter, including the administrative determination, the Association's appeal and the response of the Gilroy Federation of Teachers, CFT/AFT, and finding the administrative determination to be free from prejudicial error, adopts it as the decision of the Board itself.

It is hereby ORDERED that the San Francisco Regional Director not certify the results of the election tallied on June 5, 1991, and that a new election be conducted. The election objections concerning the ballot party and irregularities in the mailed ballot procedures, other than those concerning the issuance of mailed ballots to voters who were not eligible to vote by mail, are hereby DISMISSED WITH PREJUDICE.

Members Shank and Carlyle joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GILROY UNIFIED SCHOOL DISTRICT, Employer, -and- GILROY TEACHERS ASSOCIATION, CTA/NEA, -and- GILROY FEDERATION OF TEACHERS, CFT/AFT, Employee Organizations.	Case No. SF-OB-3 (SF-D-188) (SF-R-215) ADMINISTRATIVE DETERMINATION September 26, 1991

This administrative determination finds that the election objections in the above-referenced case warrant setting aside the decertification election, and orders a new election.

PROCEDURAL HISTORY

On June 5, 1991,[1] the Public Employment Relations Board (PERB or Board) conducted a tally of ballots in a decertification election in the established certificated bargaining unit of Gilroy Unified School District (District). On the ballot, along with the choice of "No Representation," were the Gilroy Teachers Association CTA/NEA (CTA) and the Gilroy Federation of Teachers CFT/AFT, Local 1921 (CFT or Petitioner). With 448 employees eligible to vote, 204 votes were cast for CTA; 192 for CFT; 3 for No Representation; and there was 1 challenged ballot and 1 void ballot. The official tally of ballots, personally served on each

[1]All dates referenced herein are in the calendar year 1991, unless specified otherwise.

party that same day, thus showed that a majority of the votes had been cast for CTA.

On June 12, the Petitioner filed election objections pursuant to PERB regulation 32738[2] with the San Francisco

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Section 32738 provides as follows:

32738. Objections.

(a) Within 10 days following the service of the tally of ballots, any party to the election may file with the regional office objections to the conduct of the election. Any objections must be filed within the 10 day time period whether or not a runoff election is necessary or challenged ballots are sufficient in number to affect the results of the election.

(b) Service and proof of service of the objections pursuant to section 32140 are required.

(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, or

(2) Serious irregularity in the conduct of the election.

(d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

(e) No party may allege as grounds for setting aside an election its own conduct or the conduct of its agents.

(f) At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a PERB election objections hearing. The declarations shall specify the details of each occurrence; identify the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state where and when the allegedly objectionable conduct occurred; and give a detailed description

Regional Office of PERB, and the objections were subsequently assigned to the undersigned for investigation.[3] On June 25, an

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of the allegedly objectionable conduct. All declarations shall state the date and place of execution and shall be signed by the declarant and certified by him or her to be true under penalty of perjury.

(g) The Board agent shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d). The objecting party may appeal the dismissal to the Board itself in accordance with Division 1, Chapter 4, Article 2 of these regulations.

[3]The powers and duties of a Board agent investigating election objections are set forth in PERB regulation 32739, as follows:

32739. Powers and Duties of Board Agent Concerning Objections. Concerning objections, the Board agent has the power to:

(a) Direct any party to submit evidence through declarations or documents;

(b) Order the inspection of document by Board agent or the parties;

(c) Direct any party to submit an offer of proof;

(d) Obtain declarations from witnesses based on personal knowledge;

(e) Conduct investigatory conferences with the parties to explore and resolve factual or legal issues;

(f) Dismiss any objections which, after investigation, do not warrant setting aside the election. Any such dismissal is appealable to the Board itself pursuant to Division 1, Chapter 4, Article 2 of these regulations.

(g) Issue a written determination setting aside the election when, after investigation, it appears that such action is warranted, and that no material factual disputes exist. Such determination shall be in writing and served on the parties. Any such determination is appealable to the Board itself pursuant to Division 1, Chapter 4, Article 2 of these regulations.

Order for Investigation and Production of Documents was issued concerning the above-referenced matter, requiring the filing of certain information by the District (Phase I) and also providing (Phase II) an opportunity for responsive submissions of information by CTA and CFT.

Timely submissions were received from both the District and CTA.[4]

On July 26, by an Order and Request for Argument, parties were advised of the determination that the factual submissions did not present any material factual disputes requiring a hearing,[5] and the parties were afforded an opportunity to file argument. All parties responded in a timely fashion, with both CTA and the District arguing for dismissal of the objections, and the matter was taken under submission on August 19.

(h) Schedule a hearing when substantial and material factual disputes exist. Any hearing shall be limited to the issues set forth in the notice of hearing.

[4]Counsel for the Petitioner verbally confirmed by telephone on July 24 that Petitioner waived its opportunity to file a response.

[5]PERB regulation 32739(h) provides that a hearing shall be scheduled in an objections case "when substantial and material factual disputes exist." (Emphasis added; see, also, Los Angeles Community College District (1983) PERB Decision No. 331). A party is not entitled to a hearing on election objections where it is clear that, based on the content of the objections, no possible factual showing could justify the relief sought. (NLRB v. Singleton Packing Corp. (5th Cir. 1969) 418 F2d 272 [72 LRRM 2519].)

ISSUES

In its initial statement of objections, CFT identified three areas for investigation, but later withdrew an objection based on the marking and circulation of a sample ballot. The two issues still before PERB are the following:

1. Petitioner's statement of objections focusses most of its attention on alleged irregularities concerning the mailed ballot procedures, especially regarding the mailing of ballots to 83 employees whose names were submitted to the District by CTA on May 6.

2. Petitioner also contends that CTA "held a ballot mailing party for the 83 individuals as to whom it had arranged for the receipt of such ballots. The individuals were offered benefits at this party for voting for [CTA]."

FINDINGS OF FACT

Mailed Ballot Procedures

The Directed Election Order (DEO) issued on May 16, by PERB's San Francisco Regional Director,[6] provided in section 14 for certain voters to vote by mail:[7]

> Mailed Ballots: All eligible voters on leave of absence, off-track teachers not teaching on the election date and eligible voters who are required to

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[6]Earlier, a consent election agreement had been developed for signature by the parties. A dispute over the ballot designation of the Petitioner resulted in the issuance, instead, of the DEO. It is undisputed, however, that the provisions of the DEO were, in all sections relevant to this determination, identical to those agreed to by all parties.

[7]All other eligible voters were scheduled to vote on-site at one of two locations on June 5, between 2:00 and 5:00 p.m.

> be out of the District on the election date and whose names have been submitted to the District by 4:00 p.m. on May 6, 1991 have been designated to receive mailed ballots in this election. Ballots will be mailed to the home addresses of these voters on May 14, 1991. Voted ballots must be received by PERB by 12:00 p.m., May 31, 1991 in order to be counted. PERB will accept requests for duplicate ballots from any employee on the mailed ballot list who has not received a ballot between 8:30 a.m. and 4:30 p.m. on May 20, 1991 and May 21, 1991 ONLY. The employee must call him/herself and may call the PERB office collect. [Emphasis in original.]

Section 15 of the DEO provided, in part, for the District to file with PERB, not later than May 7, a list of all "eligible voters designated to receive mailed ballots." A copy of this list was to be served concurrently on CTA and CFT. Section 16 of the DEO further provided for a Notice of Election to be mailed by PERB to each eligible voter designated to receive a mailed ballot on May 10.

The District timely filed with PERB a list of 28 employees (List I) designated to receive mailed ballots. The list included an indication that each employee was either on leave of absence or an off-track employee.

On May 6, the District received from CTA a list of 83 employees (List II) which included the notation that the "following people have requested absentee ballots." CTA had developed this list from the responses to a form it had circulated to its members in the bargaining unit. The form indicated that an "election to keep the [CTA] as exclusive representative" was to be conducted by PERB on June 5, and invited employees to return the form to CTA "[i]f you think you

need an absentee ballot." The form did not require the employee to state a reason for needing such a ballot.

The District forwarded List II to PERB for issuance of mailed notices and ballots, but inadvertently did so after the deadline. PERB received List II on May 13 and mailed notices and ballots to the employees on May 14. List II was not properly served on CFT, but a representative of CFT did obtain a copy of the list from the District on May 10.

Of the 83 employees on List II, 11 employees were not on duty at their regular assignments on June 5: 5 employees were released to attend an in-service in Gilroy from 8:00 a.m. to 3:30 p.m., 1 employee was on personal necessity leave, and 5 employees were on sick leave. On May 6, the date the mailed ballot list was due to be filed, the District was aware of the in-service training scheduled for the five employees, and knew that one of the five employees on sick leave would be on leave on June 5.[8]

As noted above, of the 448 eligible voters, 399 valid ballots and 1 challenged ballot were cast, resulting in an 89 percent turnout. The turnout among those voters who voted by mail was only slightly lower: 71 percent of the employees on List I voted,[9] and 83 percent of the employees on List II voted.[10]

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[8]That employee is on a long-term leave of absence.

[9]Of the 28 employees, 17 voted by mail and another 3 voted on-site.

[10]Of the 83 employees, 67 cast valid mail ballots, and 2 employees voted on-site. One mailed ballot was voided for reasons unrelated to the objections.

CTA's overall margin of victory was 12 votes over CFT.[11] However, CTA's margin of victory among just those employees who cast mailed ballots was significantly higher: Of the 83 valid mailed ballots cast, CTA received 69 votes and CFT only 14.[12] Thus, the mailed ballot margin for CTA was 55 votes. Even if the 17 mailed ballots from List I are assumed to have been cast for CTA, it is reasonable to conclude that CTA's margin of victory was provided by the mailed ballots cast by employees on List II.

The Ballot Party

In support of its second objection, Petitioner submitted only the Declaration of Richard Hemann, who asserts that CTA offered to put stamps on envelopes for voters and "offered refreshments" to individuals. Hemann admits, however, that he was not at the "ballot party," does not know what was offered or given to individuals, and does not even know how many employees attended the function.

CTA admits, through the Declaration of S. Judy Mason, that a campaign dinner was held on May 21, that 25 employees in the voting unit attended, that 9 of these employees were on List II, that 6 of these latter employees brought their ballots to the dinner. CTA denies that any employee marked his or her ballot at

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[11]CTA had only 3 votes more than the minimum required to avoid a runoff election. This margin might have been 4 votes, depending on how the challenged ballot was resolved.

[12]As is customary in combination on-site/mailed ballot elections, PERB issued ballots in different colors for on-site voting and mailed ballot voting. All mailed ballots were of the same color, however, so it is not possible to distinguish between the ballots of employees on the two lists.

the dinner, or that CTA offered any inducement or benefit in exchange for a favorable vote.

DISCUSSION

Pursuant to PERB regulation 32738, objections to the conduct of an election are entertained by the PERB on only two grounds:

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

2) Serious irregularity in the conduct of the election.

A party objecting to an election result must first present a prima facie showing of conduct that constitutes one of the two grounds. This includes a factual showing that employee choice was affected or that the conduct complained of had the natural and probable effect of impacting employee choice. (Santa Monica Unified School District and Community College District (1978) PERB Decision No. 52; San Ramon Valley Unified School District (1979) PERB Decision No. 111; Jefferson Elementary School District (1981) PERB Decision No. 164; Pasadena Unified School District (1985) PERB Decision No. 530.)[13]

After this threshold showing is met, PERB will decide whether to set aside the election result depending "upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (Clovis Unified School District

[13]PERB looks for guidance, inter alia, to federal labor law decisions, including National Labor Relations Board (NLRB) precedent, in election objections cases. (See, e.g., State of California (1982) PERB Decision No. 198-S.)

(1984) PERB Decision No. 389; State of California (Department of Personnel Administration) (1986) PERB Decision No. 601-S.) Thus, even where some impact on voters can be inferred, the election result will not always be set aside.

PERB regulations require the Board agent to dismiss election objections which do not "satisfy the requirements of subsections (a) through (d)" of PERB regulation 32738. Even if not subject to dismissal under PERB regulation 32738, objections are to be dismissed by the Board agent if, after investigation, the objections "do not warrant setting aside the election." (PERB regulation 32739(f).) Alternatively, the Board agent may set aside the election if the results of the investigation warrant such action. (PERB regulation 32739(g).)

It is against these standards that Petitioner's objections have been tested.

The Ballot Party

The "factual" submission by the Petitioner on this point amounts to the assertion of its belief that improper inducements were offered to voters at the May 21 dinner by CTA. In its brief, CFT argues that this objection should be sustained based on CTA's admission that food and beverages were provided at the dinner.

This element of the objections fails to state a prima facie case as required under PERB regulation 32738(d), and must be dismissed for that reason. Even if the threshold test was met on this point, the application of relevant precedent would not

support a finding which would warrant setting aside the election. As noted in the court's decision in Kux Manufacturing Co. v. NLRB (CA 6, 1989) 132 LRRM 2935, "supplying food and soft drinks is commonplace in American elections and is not equivalent to buying votes." There is no evidence here, or really even any hint, that the refreshments offered by CTA on May 21 were of such a value or type (especially alcoholic) as has warranted findings in favor of setting aside election results. (See, for example, NLRB v. Labor Services, Inc., 721 F2d 13, 114 LRRM 3259 (CA 1, 1983), *denying enforcement to* 265 NLRB 463, 111 LRRM 1650 (1982); Owens-Illinois, Inc., 271 NLRB 1235, 117 LRRM 1104 (1984).)

Mailed Ballot Irregularities

An "objection relating to the integrity of the election process requires an assessment of whether the facts indicate that a reasonable possibility of irregularity inhered in the conduct of the election." (People's Drug Stores, 202 NLRB 1145, 82 LRRM 1763 (1973); footnote omitted.) Likewise, "[i]n assuring the integrity of the election process the Board goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity." (Brink's Armored Car, Inc., 278 NLRB 141, 121 LRRM 1129 (1986); citations omitted.)

To the extent that CFT's case for setting aside this election rests on the untimely submission of List II, and the other errors of late service and mailing of notices related thereto, its case is unpersuasive. Both PERB and the NLRB have

long recognized that an election need not be perfect to be fair. The Board has adopted the policy of the NLRB in this area, and ruled that de minimis errors and omissions will not be found to be "serious" irregularities sufficient to sustain election objections. (See State of California (1982) PERB Decision No. 198-S, and cases cited therein; State of California (Department of Personnel Administration) (1986) PERB Decision No. 601-S; and Polymers, Inc., 174 NLRB 282, 70 LRRM 1148, *enfd.* 414 F2d 999, 71 LRRM 3107 (CA 2, 1969), *cert. denied* 396 U.S. 1010, 73 LRRM 2121.) The errors here were not of sufficient weight or "seriousness" to sustain the objections, nor is it reasonable to infer that the errors had any natural or probable impact on employee choice.

The relevant question is whether the submission of List II and the issuance by PERB of mailed ballots to those 83 employees constitutes grounds for setting aside the election. As recited above, the facts indicate that, at most, 11 of the 83 employees on the list were eligible to vote by mail pursuant to the DEO, and a more reasonable interpretation indicates that only 1 was so eligible (the employee on long-term leave). Moreover, the list was the result of a flyer circulated by CTA which mischaracterized the eligibility requirement for a mailed ballot. In addition, there is no escaping the reality that it was the lopsided margin for CTA from the mailed ballots which tipped the scales in CTA's favor in this election.

CTA argues that issuance of mailed ballots to the employees on List II did not constitute serious irregularity in the conduct of the election, and attempts to distinguish PERB's processes, regulations and precedent from those of the NLRB concerning use of mailed ballots. CTA notes that NLRB policy does not allow for the use of mail ballots, in a "mixed" mail and on-site election, for employees "who are ill, . . . on vacation, or are on leave of absence due to their own decision or condition." (NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11336.1; emphasis added.) But it does not follow that, because NLRB policy is more rigid in this area, PERB has no relevant policy, regulations or standards which must be observed. PERB regulation 32738 provides as follows:

> 32728. Voter Eligibility. Unless otherwise directed by the Board, to be eligible to vote in an election, employees must be employed in the voting unit as of the cutoff date for voter eligibility, and still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote. Mailed ballots may be utilized to maximize the opportunity of such voters to cast their ballots. (Emphasis added.)

PERB will, where circumstances justify it, conduct an entire election by mail or will, in an on-site election, designate a class of employees (e.g., those on leave of absence) to vote by mail, pursuant to regulation 32728. Neither PERB regulations nor PERB's election procedures provide for an "absentee" ballot

mechanism, whereby an individual employee may, for convenience sake or otherwise, request and receive a mailed ballot.

In this case, the DEO issued for this election contained a very specific definition of which eligible voters would be eligible to vote by mail, limiting the opportunity to those who were "on leave of absence, off-track teachers not teaching on the election date and eligible voters who are required to be out of the District on the election date." (Section 14; emphasis added.) As noted above, it is undisputed that all parties agreed to this provision of the election order. The Board has held that the provisions of a consent election agreement control the terms and conditions of an election, including voter eligibility. (State of California (Department of Personnel Administration) (1991) PERB Order No. Ad-221-S; see, also, Tamalpais Union High School District (1976) EERB[14] Decision No. 1 and Los Angeles Unified School District (1980) PERB Decision No. 113.) The same rule must be held to apply to the provisions of a directed election order, especially where the relevant provisions are in fact the result of the parties' agreement.

The reasoning applied in the courts in reviewing an NLRB decision in a similar case is quite appropriately relied upon here:

> A party to an agreement authorizing a consent election "is entitled to expect that other parties and agents of the Board will diligently uphold provisions of the agreement

[14]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

> that are consistent with Board policy and are calculated to promote fairness in the election." (KCRA-TV v. NLRB (1984) 271 NLRB 1288, 1289, quoting Summa Corp. v. NLRB, 625 F2d 293, 295 (9th Cir. 1980). *Accord*: NLRB v. Granite State Minerals, 674 F2d 101, 102 (1st Cir. 1982).)

In KCRA-TV, the court ruled that the election should be overturned "only if the breach is material or prejudicial, in the sense that the conduct causing the breach significantly impairs the fairness of the election process." After applying this test, the court held that the election's fairness had been "materially breached" because the Board agent had issued, at one party's request, mailed ballots to two employees not eligible to vote by mail. (KCRA-TV, supra.)

As discussed in another NLRB case,

> The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.
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> . . . . . .
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> In considering whether there has been a breach of security in an election, or a reasonable possibility of such a breach, we are examining into questions of fact and inference. To answer these questions, we look at all the facts. (Polymers, Inc., supra.)

Having considered all the facts in this case, including the specific definition agreed to by the parties governing which voters would be eligible to vote by mail, the large number of voters who did not meet this definition and yet were permitted to vote by mail, the circumstances under which this list was

compiled and the significant margin of mailed ballot votes cast for CTA (considered in light of the overall voting pattern), the only reasonable conclusion is that a material breach of the election process did occur. Further, this material breach calls into question the fairness and validity of the election, and warrants setting it aside.

CONCLUSION AND ORDER

For the reasons discussed above, and based on the foregoing findings of fact, the discussion, and the entire record of this proceeding, the election objections filed by the Gilroy Federation of Teachers CFT/AFT, Local 1921 concerning the issuance of mailed ballots to voters who were not eligible to vote by mail are held to warrant setting aside the election in Case No. SF-D-188. The San Francisco Regional Director is ORDERED not to certify the results of the election tallied on June 5, and to conduct a new election.

The election objections concerning the ballot party and all other irregularities in the mailed ballot voting procedures are hereby DISMISSED.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision (PERB regulation 32360). To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

MEMBERS, PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street, Suite 200
Sacramento, CA 95814-4174

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (regulation 32135). Code of Civil Procedure section 1013 shall apply.

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when

personally delivered or deposited in the first-class mail postage paid and properly addressed.

Dated: 9-26-91

Les Chisholm
Regional Director