STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Employer, and CALIFORNIA UNION OF SAFETY EMPLOYEES, Exclusive Representative, and CALIFORNIA STATE SAFETY EMPLOYEES COUNCIL/CALIFORNIA STATE PEACE OFFICERS ASSOCIATION/LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Employee Organization.	Case No. S-D-131-S (S-SR-7) Administrative Appeal PERB Order No. Ad-246-S May 18, 1993

Appearances: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for California Union of Safety Employees; Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for California State Safety Employees Council/California State Peace Officers Association/Laborers' International Union of North America.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) of a Board agent's administrative determination. The Board agent concluded that the home addresses of the employees in 14 employee classifications in State Bargaining Unit 7, for which CAUSE is the exclusive representative, must be released to the California State Safety

Employees Council/California State Peace Officers Association/Laborers' International Union of North America (CSSEC) prior to the decertification election sought by CSSEC.

The Board has reviewed the entire record in this case and hereby reverses the decision of the Board agent in accordance with the discussion below.

BACKGROUND

In November 1990, CSSEC filed a decertification petition with PERB, seeking to decertify CAUSE as the exclusive representative of State Bargaining Unit 7 - Protective Services and Public Safety. A mail ballot election was conducted by PERB between April 1 and April 29, 1991. The ballots were counted on May 2, 1991. A tally of the ballots showed that a majority of the valid ballots plus the challenged ballots were cast for CAUSE.

CSSEC subsequently filed objections to the election and, after an extensive hearing, the PERB administrative law judge (ALJ) issued a proposed decision on February 14, 1992. The ALJ concluded that the election results should not be certified because seasonal lifeguards were excluded from the voting list and thus were not permitted to vote in the election. Although it did not impact the election result, the ALJ also addressed the issue of release of employee home addresses. The ALJ developed a test to determine whether employees in specified employee classifications participated in "law enforcement-related

functions" pursuant to Government Code section 6254.3.[1] A finding that a classification was law enforcement-related would result in withholding the home addresses of employees in the classification from the employee organizations. The parties appealed the ALJ's decision and on August 6, 1992, the Board itself adopted the decision of the ALJ and ordered that a new election be conducted. (State of California (Department of Personnel Administration) (1992) PERB Decision No. 948-S (948-S).)

There are approximately 140 job classifications included in Unit 7. The parties agreed in 948-S that the application of the

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[1]Government Code section 6254.3 states, in pertinent part:

> (a) The home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:
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> (3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and telephone numbers of employees performing law enforcement-related functions shall not be disclosed.
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> (b) Upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

law enforcement-related test would apply only to those classifications for which evidence was presented. Sixty-one classifications[2] were identified as law enforcement-related for which all home addresses must be excluded from the voter list. The ALJ determined that 14 classes[3] were not comprised of employees performing law enforcement-related functions and thus the home addresses of these employees could be released to the competing employee organizations.

In preparation for the new election, the Board agent requested that the parties submit written positions concerning the application of the law enforcement-related test to the remaining 65 classifications. In response, CAUSE asserted that all of the remaining 65 classifications should be deemed law enforcement-related and the home addresses should be withheld pursuant to section 6254.3. Under another theory, CAUSE asserted that <u>all</u> classifications in Unit 7 should have home addresses withheld under the "likely to be harmful" standard contained in PERB Regulation 32726(b).[4]

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[2]This number includes classes stipulated by the parties as law enforcement-related during the course of the hearing.

[3]The 14 classifications are identified as: Brand Inspector; Senior Brand Inspector; Conservationist I and II, California Conservation Corps; Dairy Foods Specialist; Deputy Registrar of Contractors I and II; Fire Fighter; Inspector, Department of Motor Vehicles; Licensing-Registration Examiner, Department of Motor Vehicles; Seasonal Lifeguard I and II; Motor Carrier Specialist I, California Highway Patrol; and Program Representative I, Bureau of Automotive Repair.

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32726 states, in pertinent part:

Following further meetings and discussions, the parties agreed that the remaining 65 classifications should be designated law enforcement-related to prohibit release of the home addresses. The sole issue remaining in dispute was whether the home addresses of the employees in the 14 classifications found not to be law enforcement-related in 948-S, should otherwise be withheld because their release is "likely to be harmful" to such employees pursuant to PERB Regulation 32726(b).

BOARD AGENT'S DETERMINATION

In recognition of the fact that the "likely to be harmful" standard in PERB Regulation 32726 has never been interpreted or applied by the Board itself, the Board agent provided an extensive review of the history of the regulation.

> (a) At a date established by the Board, the employer shall file with the regional office a list of names of all employees included in the voting unit as of the cutoff date for voter eligibility.
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> (b) A list of eligible voters which meets the requirements of subsection (a) above but which contains in lieu of the home address a mailing address for each eligible voter shall be concurrently served by the employer on each other party to the election. Proof of service shall be filed with the regional office. For purposes of this subsection, mailing address means the home address of each eligible voter, except in the case where the release of the home address of the employee is prohibited by law, or if the Board shall determine that the release of home addresses is likely to be harmful to the employees.
> (Emphasis added.)

Prior to December 1979, PERB had no regulation which required the disclosure of employee home addresses to employee organizations. The practice of the agency, however, had been to require disclosure of home addresses in accordance with the "Excelsior" rule of the National Labor Relations Board.[5]

The Board proposed Regulation 32726 in December 1979 in preparation for the initial representation elections in the state bargaining units established under the provisions of the State Employer-Employee Relations Act (SEERA).[6] As originally proposed, Regulation 32726 provided for disclosure of home addresses to campaigning employee organizations "unless prohibited by law." At that time, there was no specific statute which limited the disclosure of the addresses of peace officers or law enforcement personnel to employee organizations. The only applicable statutory provision which provided restrictions on employee address disclosure was contained in Civil Code section 1798.62,[7] which prohibited disclosure only if an employee had specifically requested that his or her address not be released.

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[5]See Excelsior Underwear, Inc. (1966) 156 NLRB 1236, 61 LRRM 1217; NLRB v. Wyman-Gordon Co. (1969) 394 U.S. 759, 70 LRRM 3345.

[6]SEERA, later retitled the Ralph C. Dills Act, is found at Government Code section 3512 et seq.

[7]Civil Code section 1798.62 states:

> Upon written request of any individual, any agency which maintains a mailing list shall remove the individual's name and address from such list, except that such agency need not remove the individual's name if such name is exclusively used by the agency to directly contact the individual.

In response to concerns from law enforcement representatives, the Board added the "likely to be harmful" provision to Regulation 32726, providing the Board with discretion to determine on a case-by-case basis whether release of certain home addresses to parties in a representation election would be harmful.

In 1984, Government Code section 6254.3 was enacted to prohibit the release of home addresses of "employees performing law enforcement-related functions" and those of employees who request that their addresses not be released to employee organizations. In 1985, PERB adopted Regulation 40165[8] which

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[8]PERB Regulation 40165 states:

> (a) Except as prohibited by law, the state employer shall release to an exclusive representative a mailing list of home addresses of state employees it represents pursuant to a written request by the exclusive representative. The mechanics of such release, including but not limited to (1) timing, frequency, and manner of disclosure, (2) maintenance of names or the mailing list, and (3) cost of production shall be subject to the collective bargaining process.
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> (b) Except as prohibited by law, the state employer shall not be precluded from releasing a mailing list of home addresses of state employees as defined in Government Code section 3513(c) or section 3522.1, who are not in units represented by an exclusive representative to an employee organization as defined in Government Code section 3513(a). The mechanics of such release, including but not limited to (1) timing, frequency, and manner of disclosure, (2) maintenance of names or the mailing list, and (3) cost of production shall be determined by the state employer.

governed the release of home addresses to employee organizations for purposes other than representation elections. In comparing the two regulations, the Board agent noted that Regulation 40165 limits release only "as prohibited by law," but does not also contain the "likely to be harmful" provision.

In consideration of the history of PERB Regulation 32726 and the fact that Regulation 40165 did not contain the likelihood of harm language, the Board agent concluded that the "likely to be harmful" provision applies only to employees who are either in law enforcement-related positions or who request nondisclosure of their home addresses. Since the 14 classifications at issue had previously been determined not to be law enforcement-related, the Board agent concluded that except for individual employees who requested nondisclosure of their home addresses, the addresses of all of the employees of the 14 specified classifications must be released.

Following issuance of the administrative determination the Board agent issued a directed election order. The directed election order, among other things, set a new election date and directed the state employer to provide a list of eligible voters, including either a home or work address for each employee,

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(c) As provided by Government Code section 6254.3, and upon written request of a state employee, the state employer shall remove the state employee's home address from the mailing lists referenced in subsection (a) and (b) prior to the release of such lists.

consistent with the conclusion of the administrative determination.

CAUSE'S APPEAL

CAUSE initially asserts that by considering the appeal of the Board agent's administrative determination, PERB is acting pursuant to an improperly adopted regulation. CAUSE explains that in 948-S the Board found that determinations regarding release of home addresses constituted the "mechanics" of an election, and as such are not subject to appeal. By changing positions now and allowing this appeal, CAUSE contends PERB is "proceeding by way of some 'underground' regulation."

CAUSE also argues that the Board agent ignored the plain language of PERB Regulation 32726(b) by concluding that the likelihood of harm consideration may be applied only to those employees whose home addresses are already prohibited from disclosure either because they are law enforcement-related or employees requesting nondisclosure. CAUSE argues that the Board agent failed to properly apply Regulation 32726(b), as both these limitations are prohibited by law under section 6254.3.

Further, CAUSE asserts that the Board agent failed to take into account the language in Regulation 32726(b) which grants the Board discretion to determine likelihood of harm. The Board agent's conclusion eliminates any Board discretion by applying it only to circumstances already prohibited by law.

Addressing the "likely to be harmful" standard, CAUSE contends that the possibility of harm to even one employee

justifies withholding employee addresses for the employees in all classifications. Because of the nature of the job functions performed by Unit 7 employees, CAUSE argues that the release of home addresses is likely to be harmful to those employees. CAUSE reasons that many of the classifications have access to confidential or sensitive information which the criminal element desires, and disclosure of home addresses would subject these employees to pressure to force information from them. CAUSE asserts Regulation 32726(b) is designed to protect against precisely this type of possible retaliation or harassment.

CAUSE also states that these classifications enforce licensing statutes and regulations which necessarily involve denial or revocation of various licenses or permits. CAUSE insists that the enforcement of regulations subjects these employees to the same potential for harassment or retaliation as employees in peace officer classifications. Further, CAUSE maintains that there is a strong community of interest among all of the classifications in Unit 7, a perception characterized by the designation of the unit as the "protective services and public safety" unit.

CSSEC'S RESPONSE

CSSEC believes CAUSE should be barred from challenging the home address issue now because it did not raise the issue prior to the original election. CSSEC also asserts, under the doctrine of res judicata, that a party cannot relitigate an issue, and that this matter was previously resolved by the Board in 948-S.

CSSEC otherwise supports the conclusions of the administrative determination. However, if the Board disagrees with the findings of the Board agent, CSSEC proposes a standard by which to measure the "likely to be harmful" requirement in Regulation 32726(b). CSSEC argues that there must be actual evidence from which the likelihood of harm can be ascertained. This will only be found in unique circumstances, such as, threats made during the course of an election against individuals supporting rival organizations. Under these circumstances, CSSEC argues that PERB could determine that harm could likely result from release of an employee's home address.

DISCUSSION

On appeal, CSSEC argues that CAUSE should be barred from contesting the release of the home addresses now because it did not raise the issue prior to the original election. In a related argument, CAUSE argues that PERB has improperly changed its procedures by allowing an appeal of the Board agent's determination of the home address issue prior to the second election. CAUSE contends that in 948-S the Board found that determinations regarding release of home addresses constituted the mechanics of an election, and as such are not subject to appeal.

PERB Regulation 32350[9] defines an appealable administrative

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[9]PERB Regulation 32350 states:

> (a) An administrative decision is any determination made by a Board agent other than:

decision as a determination by a Board agent which contains "a statement of the issues, fact, law and rationale used in reaching the determination." In contrast, a directed election order provides the mechanics of conducting an election. PERB Regulation 32380[10] prohibits an appeal of an administrative determination regarding the mechanics of an election. In 948-S, the Board stated that:

> Neither a directed election order nor a home address list are administrative determinations that may be challenged under PERB regulations. Election mechanics, which certainly includes the preparation of a home address list, are specifically not appealable to the Board. [Footnotes omitted.]

> (1) a refusal to issue a complaint in an unfair practice case pursuant to section 32630,
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> (2) a dismissal of an unfair practice charge,
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> (3) a determination of a public notice complaint, or
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> (4) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to section 32215.
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> (b) An administrative decision shall contain a statement of the issues, fact, law and rationale used in reaching the determination.

[10]PERB Regulation 32380 states, in pertinent part:

> The following administrative decisions shall not be appealable:
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> (a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

Prior to the original election, PERB issued a directed election order pursuant to PERB Regulation 32724[11] which directed the mechanics of the representation election. Specific instructions concerning the conduct of the election, such as the date of the election, the method of the mailed ballots, and voter eligibility and address lists were set by the directed election order.

The matter presently before the Board involves the appeal of a Board agent's administrative determination in which he fully sets out the facts, issues, law and rational in determining which employee home addresses are subject to release under the law. The directed election order issued prior to the original election simply directed that the home addresses of the employees in Unit 7 classifications not be disclosed. As the directed election order was not an appealable administrative determination, both parties were barred from appealing the directed election order prior to the original election, prohibiting any challenge at that time to the release of home addresses. CSSEC's argument is therefore rejected.

CAUSE's argument that PERB improperly changed its procedures by allowing this appeal of the administrative determination prior to the second election is also without merit. The distinction

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[11]PERB Regulation 32724 states, in pertinent part:

> (a) When the Board has determined that an election is required, the Board shall serve on the employer and the parties a Directed Election Order containing specific instructions regarding the conduct of the election.

between the directed election order and the administrative determination which is the subject of this appeal, clearly establishes that PERB has properly applied its own regulations in this case.

CSSEC contends the issue of the release of employee home addresses was resolved by the Board in 948-S and under the doctrine of res judicata a party cannot relitigate an issue.

The doctrine of res judicata involves two general concepts addressing the relitigation of prior decisions. "Claim preclusion" is considered the primary aspect of res judicata. Collateral estoppel is a subsection of res judicata and involves "issue preclusion." Under the rule of issue preclusion, a prior decision "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (Todhunter v. Smith (1934) 219 Cal. 690, 695 [28 P.2d 916].)[12]

In deciding whether employee home addresses must be released, the Board in 948-S considered whether employees in 14 specified employee classifications participated in "law enforcement-related functions" pursuant to Government Code section 6254.3. The Board established a test and applied it against the classifications for which evidence had been presented. Having resolved that issue, the Board is presented with a new issue in this appeal, requiring application of a

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[12]State of California (Department of Personnel Administration) (1991) PERB Decision No. 871-S.

different standard set out in PERB Regulation 32726(b), to determine whether the release of home addresses is likely to be harmful to the employees in the 14 classifications. Because the Board is faced with a new legal question, the doctrine of res judicata does not apply.

On the merits of the appeal, CAUSE contends that the Board agent ignored the plain language of PERB Regulation 32726(b) by concluding that the likelihood of harm consideration may be applied only to those employees whose home addresses are already prohibited from disclosure either because they are law enforcement-related or they requested nondisclosure.

It is appropriate to apply the rules of statutory construction to determine the meaning of regulations (State of California (Department of Personnel Administration) (1991) PERB Order No. Ad-221-S), and when the meaning of terms are ambiguous (Hacienda La Puente Unified School District (1988) PERB Decision No. 685).

Government Code section 6254.3 prohibits release of employee addresses when the employee: 1) performs law enforcement-related functions; or 2) requests nondisclosure of his or her home address. The clear and unambiguous meaning of these two provisions constitute circumstances when release of an employee's home address is prohibited by law. PERB Regulation 32726(b) prohibits release of home addresses to parties in a representation election in two distinct circumstances: 1) when release is prohibited by law; and 2) when the Board determines

that release is likely to be harmful to the employees. Since section 6254.3 describes situations in which release of employee home addresses is prohibited by law, the second element of Regulation 32726(b), the likelihood of harm consideration, must encompass other circumstances related to release of employee home addresses in representation elections.

This finding is further supported by the language in Regulation 32726(b) which grants the Board discretion to determine likelihood of harm. A contrary conclusion would eliminate the Board's discretion by applying it only to circumstances already prohibited by law.

In reaching his conclusion, the Board agent reviewed Regulation 40165 which permits release of employee home addresses to an exclusive representative for purposes other than representation elections. Regulation 40165 contains a limitation on address disclosure as "prohibited by law," but does not also contain the "likely to be harmful" requirement. The Board agent concluded that it must have been intended that Regulations 32726 and 40165 be applied in the same manner by prohibiting release of only law enforcement-related employee addresses and employee nondisclosure requests.

The Board finds a different result. Regulation 40165 allows for release of employee home addresses to the exclusive representative, unless otherwise prohibited by law, for purposes other than representation elections. This permits an exclusive

representative to contact its members in the course of conducting its business and keep its members informed of its activities.

Regulation 32726 provides for release of employee home addresses within the unique circumstances of a representation election. An additional basis for nondisclosure of employee home addresses was included in this regulation to, among other reasons, allow the Board broad discretion in dealing with events which could arise in the sometimes highly charged atmosphere of representation elections. Thus, Regulation 32726(b) grants the Board the authority to determine on a case-by-case basis whether release of employee home addresses is likely to be harmful within a specific election context.

CAUSE suggests that the possible harm to even one employee justifies a finding that release of all employee addresses in the unit is likely to be harmful.[13] CSSEC contends that the Board may prohibit disclosure only when presented with evidence of actual harm, such as threats or violence occurring during the course of the election.

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[13]Citing Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 656-657, CAUSE argues that by permitting the disclosure of the home addresses to the employee organizations, the confidentiality of these addresses is destroyed, making them available for inspection by the general public. This case is inapposite here. The Public Records Act section interpreted by the court in this case permits discretionary release of information otherwise exempt from public inspection. The provisions in question here, Government Code section 6254.3 and PERB Regulation 32726, provide no similar discretion. These provisions only provide the Board with discretion to withhold the release of additional employee addresses.

In exercising its discretion in this area, the Board must consider all of the circumstances surrounding the specific representation election to determine the potential for harm. The fervor of a contested election may cause intense debate and disagreement among the members of the unit, and as a result, concern for employee safety may arise during the course of an election. Under these circumstances harm may be demonstrated in a physical sense, such as with violence or threats of harm, prompting the Board to conclude that nondisclosure of some or all employee home addresses is appropriate.

But harm other than physical harm may occur in the context of a representation election. An example of non-physical harm would be the inconsistent or unequal treatment of an employee or group of employees without clear and distinguishable grounds to do so. To compromise the consistent, equitable treatment of all employees, particularly in a contested election situation, is to increase the likelihood of harm to those employees.

The present case involves a contested election in which the parties have agreed by stipulation that, with the exception of the 14 classifications in dispute, the home addresses of all employees in Unit 7's approximately 140 job classifications will be withheld from disclosure because they are law enforcement-related classes. The Board has determined that in this situation the parties have created inconsistent and unequal treatment for the employees in the 14 classifications,[14] since the home

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[14]See Footnote 3, ante.

addresses of employees in similar classifications will be withheld from disclosure under the stipulated agreements. For example, home addresses will be withheld for employees in the classifications of Pool Lifeguard (Seasonal); Fluid Milk Testing Coordinator; Cosmetology Examiner; Examiner in Barbering; Inspector I, Department of Consumer Affairs; and Conservationist II, Nursery, California Conservation Corps. However, employees in some of the 14 classifications who undertake very similar duties, such as Lifeguard (Seasonal); Dairy Foods Specialist; Brand Inspector; Inspector, Department of Motor Vehicles; and Conservationist II, California Conservation Corps, could have their home addresses released.

Under these specific circumstances, the inconsistent and unequal treatment of a number of Unit 7 employees is sufficient for the Board to conclude under Regulation 32726(b) that it is likely to be harmful to these employees to release their home addresses. Therefore, the Board concludes, in this case, that the home addresses of the employees in the 14 classifications identified in Attachment A may not be released to the employee organizations.

The Board emphasizes, however, that the finding in this case does not preclude a different result concerning the release of the home addresses of employees under other circumstances. The Board will consider the circumstances presented in each election setting on a case-by-case basis.

ORDER

Based on the foregoing, the Board hereby ORDERS the Regional Director to amend the Directed Election Order issued on April 30, 1993, to prohibit disclosure of the home addresses of the employees in the 14 employee classifications identified in Attachment A.

Chair Blair joined in this Decision.

Member Carlyle's concurrence begins on page 21.

Carlyle, Member, concurring: While I agree with the reasoning and conclusion of the majority decision, I write this concurrence to specifically set forth and address the inherent conflicts which I find in this case and thus the need to weigh competing goals in arriving at a decision. The analysis utilized in defining the "likely to be harmful" standard is, admittedly, a departure from a more traditional test of physical harm or the threat thereof. While I am not completely comfortable with such an approach, I view it as a necessary tool in order to achieve a more important goal.

In applying such a definition, I am aware of the potential mixed signal sent to the parties who have reached agreement on 65 employee classifications, thus leaving the 14 now before the Public Employment Relations Board (PERB or Board). It is my view that the reasoning and conclusion of the Board in this case should not be seen as a disincentive to meet and resolve differences for the reason that the unique circumstances of this case warrant such action. Likewise, such reasoning and conclusion should not be viewed by the parties as having the ability to necessarily dictate the process utilized or the decision arrived at by the Board.

This case represents another chapter in a 30 month saga to have a valid and final election held so employees may determine who should be their exclusive representative. Nothing could be more germane and relevant, or go to the heart of what PERB does or should do, than to see that the rights of employees to pick their exclusive representative are not undermined by unnecessary

delay. Accordingly, for me, the goal of conducting an election which had its origins in November of 1990 weighs in favor of adopting and utilizing the analysis and reasoning of the majority decision and its necessary conclusion.

ATTACHMENT A

UNIT 7 - CLASSIFICATIONS DETERMINED
NON-"LAW ENFORCEMENT-RELATED"

Title	Schem Code	Class Code
Brand Inspector	AP50	0303
Conservationist I, California Conservation Corps	BZ96	1029
Conservationist II, California Conservation Corps	BZ93	1003
Dairy Foods Specialist	AY35	0625
Deputy Registrar of Contractors I	VS90	8793
Deputy Registrar of Contractors II	VS80	8792
Fire Fighter	VZ30	8979
Inspector, Department of Motor Vehicles	VW15	8829
Licensing-Registration Examiner, Department of Motor Vehicles	VS50	8758
Lifeguard I (Seasonal)	BS50	0993
Lifeguard II (Seasonal)	BS35	0990
Motor Carrier Specialist I, California Highway Patrol	IH80	3930
Program Representative I, Bureau of Automotive Repair	VU35	6840
Senior Brand Inspector	AP30	4429