

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

POWAY UNIFIED SCHOOL DISTRICT,

Employer,

and

POWAY COUNCIL OF CLASSIFIED
EMPLOYEES, CFT/AFT,

Petitioner,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION,

Exclusive Representative.

Case No. LA-DP-333-E

Administrative Appeal

PERB Order No. Ad-310

October 10, 2001

Appearances: Geffner & Bush by Steven K. Ury, Attorney, for Poway Council of Classified Employees, CFT/AFT, AFL-CIO; California School Employees Association by David J. Dolloff, Attorney, for California School Employees Association and its Poway Chapter 80.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Poway Council of Classified Employee (PCCE) to an administrative determination (attached) by a Board agent. The administrative determination found that the election objections filed by PCCE and the California School Employees

Association and its Poway Chapter 80 do not warrant setting aside the election results and dismissed them.

After reviewing the entire record, the Board finds the administrative determination to be free from prejudicial error and adopts it as the decision of the Board itself.¹

ORDER

The election objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO and California School Employees Association and its Poway Chapter 80 are DISMISSED and the election results shall be certified.

Members Baker and Whitehead joined in this Decision.

¹ The Board notes an apparent typographical error which appears on page 10 of the administrative determination. At the end of the last full paragraph on that page, the word “not” was omitted. The sentence should read:

This election flyer does not render an employee unable to ascertain the truth.

POWAY UNIFIED SCHOOL DISTRICT,

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and

POWAY COUNCIL OF CLASSIFIED
EMPLOYEES, CFT/AFT,

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ASSOCIATION,

Exclusive Representative.

REPRESENTATION
CASE NO. LA-DP-333-E

ADMINISTRATIVE
DETERMINATION
April 17, 2001

This administrative determination finds that the objections filed by the Poway Council of Classified Employees, CFT/AFT, AFL-CIO (PCCE) and California School Employees Association and its Poway Chapter #80 (CSEA) do not warrant setting aside the election results.

BACKGROUND

First Election

On April 28, 2000, PCCE filed a decertification petition to replace CSEA as the exclusive representative of the office-technical and paraprofessional unit in the Poway Unified School District (District). An election was held pursuant to a consent election agreement that the parties reached in June 2000. Two ballot counts were conducted and following the filing of election objections on July 20, 2000, a third tally issued which reflected the following results:

Approximate number of eligible voters	1,107
Void Ballots	6
Votes cast for CSEA.....	353
Votes cast for PCCE.....	309
Votes cast for No Representation	34
Valid votes counted	696
Challenged ballots	2
Valid votes counted plus challenged ballots	698

The results demonstrated that CSEA had obtained a majority of the valid votes counted.

Following a review of election objections filed by PCCE the Regional Director determined based on serious irregularities in the manner in which the Public Employment Relations Board (PERB) monitored and counted the votes in the mailed ballot election, the election results should be set aside and a new election should be held. On December 22, 2000, the Board itself upheld the Regional Director's recommendations and ordered a new election. (Poway Unified School District (2000) PERB Order No. Ad-306.)

Second Election

Pursuant to a Consent Election Agreement, PERB mailed ballots to eligible voters on January 29, 2001; in order to be counted, valid ballots were due back to PERB by February 16, 2001. On February 20, 2001,¹ a tally of ballots was conducted. The results of the initial tally were:

Approximate number of eligible voters	1,079
Void Ballots	12
Votes cast for CSEA.....	347
Votes cast for PCCE.....	313
Votes cast for No Representation	34
Valid votes counted	694
Challenged ballots	0
Valid votes counted plus challenged ballots	694

¹ All dates referenced hereinafter indicate 2001.

Twelve ballots were voided in the initial tally as a result of the voters failing to sign the back of the return envelopes as directed in the voting instructions. The parties were asked, both prior to the tally and following the counting of ballots, whether they would waive the signature requirement so that those ballots could also be counted.² There was no agreement to waive the signature requirement. The results of this tally would have required a runoff election as no party received a majority of ballots cast.

However, upon further review of the twelve envelopes, it was determined that one of the envelopes had the printed name of the eligible voter on the back of the return envelope. CSEA challenged the Board agent's decision to void this one ballot. The Regional Director revised the tally to reflect that there were eleven void ballots and one challenged ballot. The revised tally read as follows:

Approximate number of eligible voters	1,079
Void Ballots	11
Votes cast for CSEA.....	347
Votes cast for PCCE.....	313
Votes cast for No Representation	34
Valid votes counted	694
Challenged ballots	1
Valid votes counted plus challenged ballots	695

This alteration resulted in a change in the outcome. Rather than a runoff election being required, the challenged ballot became outcome determinative.

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² PERB has a policy that allows parties to an election to waive the requirement that a mailed ballot return envelope be signed by the eligible voter, so long as PERB is able to ascertain from whom the ballot is received and it is the only ballot received from that voter.

INITIAL OBJECTIONS

PCCE and CSEA filed timely objections to the February 20 tally pursuant to PERB Regulation 32738.³

³ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32738 provides:

(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 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 Chapter 1, Subchapter 4, Article 2 of these regulations.

PCCE's Objections

The statement of objections filed by PCCE alleges misrepresentations by CSEA during the election campaign and interference with employees at their work places during work hours.

As evidence of the alleged misrepresentations PCCE provides:

1. An election flyer on CSEA letterhead that states:

We are pleased to announce the results of the Ratification vote. Chapter 313 members voted to ACCEPT the Tentative Agreement. In order to insure that the Tentative Agreement (8.25% salary increase) will be implemented, VOTE for CSEA in the representational election.
2. A letter from a classified employee, Sandy Dunigan, to other classified employees urging them to get full information before voting for CSEA or PCCE.
3. A letter to CSEA Chapter President, Candace Frankfather, from an Executive Board member who resigned her post due to employees "being told that if they do not vote for CSEA, they will lose their 8.25% raise."
4. A memo from Emily Shieh of Poway Federation of Teachers to the District's Director of Human Resources, Rita Beyers, in which it is urged that the District issue a statement that the 8.25% raise would occur regardless of the outcome of the representational election.
5. A memo from a representative of Poway Federation of Teachers to a District Administrator asking that the District provide a statement of clarification as to the salary settlement for classified employees.

As evidence of interference, PCCE submitted a copy of a letter from Rita Beyers to CSEA Labor Relations Representative Scott Hendries in which the District calls attention to reports of CSEA representatives meeting and discussing the election with employees during working hours. The letter reports two incidents on January 30 and February 7 where CSEA organization representatives allegedly engaged employees in conversation while they were

working. There is no indication how many employees were present or who the "CSEA representatives" were.

CSEA's Objections

CSEA's objections relate to the Regional Director's ruling on one ballot upon which there were markings which CSEA believed invalidated the ballot. The ballot had an "x" marked in the box assigned to PCCE with a circle drawn around the name of PCCE. In the space for no representation the ballot had one diagonal slash mark (one half of an "x") below which appeared the hand-printed words "no rep. mistake" with an error pointing to the single slash mark. The ballot was held to be a valid ballot for PCCE. CSEA cites Government Code section 3544.7⁴ in arguing that the Board agent erred in counting a ballot that had more than one mark on it.

CHALLENGED BALLOT

The undersigned began an investigation of the challenged ballot by contacting the voter. This interview revealed that the eligible voter, Gayle E. Andrus, deposited her ballot in the mail in time to be counted in the tally. She was unable to remember whether she printed or signed her name on the back of the return envelope. She indicated that she sometimes prints her name as an authorized signature. Based upon a comparison of writing samples obtained from District records, from a declaration Ms. Andrus submitted, and the name printed on the envelope, it was determined that the printed name was that of Ms. Andrus. Because there was no evidence of tampering and the ballot was received before the deadline for receipt, it was

⁴ Government Code section 3544.7 provides in relevant part:

No voter shall record more than one choice on his or her ballot. Any ballot upon which there is recorded more than one choice shall be void and shall not be counted for any purpose.

determined that Ms. Andrus' envelope should be opened and the ballot counted. The results of that recount resulted in the following:

Approximate number of eligible voters	1079
Void Ballots	11
Votes cast for CSEA	348
Votes cast for PCCE	313
Votes cast for No Representation	34
Valid votes counted	695
Challenged ballots	0
Valid votes counted plus challenged ballots	695

Based upon the revised tally of ballots CSEA obtained a majority of the valid votes cast.

FOLLOW-UP OBJECTIONS BY PCCE

PCCE filed timely objections to the third tally of ballots in which it argued that the challenged ballot should not have been counted due to the fact that there was not a proper signature on the return envelope as required in the voting instructions and pursuant to precedential decisions of the National Labor Relations Board (NLRB). Further, PCCE asserts that if the ballot cast by Andrus in an unsigned envelope was to be counted, the Board agent should have broadened the investigation to include the remaining eleven unsigned and voided ballots. PCCE asserts that if those ballots were determined to have been deposited in the U.S. mail by eligible voters, those ballots should also be counted.

POSITIONS OF THE PARTIES

All parties were afforded an opportunity to respond to all election objections. On March 27, both CSEA and PCCE filed timely responses to the objections raised by the other. Neither response provided declarations or documentary evidence in support of its claims.

CSEA's Position

As to PCCE's claim of voter interference by CSEA, CSEA asserts that it did not engage in any misconduct during the election campaign and that it did not interfere with employee free choice. CSEA cites Pasadena Unified School District (1985) PERB Decision No. 530 (Pasadena) as the standard by which PERB judges allegations of election misrepresentations. Further, CSEA contends that PCCE fails to provide specific facts as required by Regulation 32738(d). Finally, CSEA raises an argument in its response that "unclean hands" by PCCE during the election campaign should prevent PCCE's objections from being reviewed.⁵

CSEA disputes the PCCE objection related to the unsigned envelope and argues that the Board agent acted properly in reversing a voided ballot and in counting Andrus' ballot based on PERB's investigation.

PCCE's Position

PCCE argues that the Board agent acted properly in resolving the intent of a voter who had made more than one mark on his or her ballot. However, PCCE continues to assert misconduct by CSEA and Board agent error in resolving the challenged ballot.

ISSUES

1. Did CSEA misrepresent the facts through campaign flyers, speeches and communiqués so as to interfere with employee free choice?
2. Did CSEA interfere with employee free choice by visiting eligible employees during working hours to discuss the election?

⁵ A response to another party's objections is not an appropriate vehicle for filing election objections. Accordingly, this allegation will not be reviewed as an election objection.

3. Did the Board Agent improperly determine the selection of a ballot choice on one voter's ballot?
4. Did the Board Agent improperly determine that a timely received ballot in an unsigned but printed return envelope should be counted?

DISCUSSION

Pursuant to Regulation 32738, objections to the conduct of an election are entertained by 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 a natural and probable effect on 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; Pasadena⁶

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 (1984) PERB Decision No. 389; State of California (Department of

⁶ PERB looks for guidance, inter alia, to federal labor law decisions, including National Labor Relations Board (NLRB) precedent, in election objection cases. See, e.g., State of California (1982) PERB Decision No. 198-S.) However, it does not always follow NLRB per se rules in the area of election objections. (San Diego Unified School District (1996) PERB Order No. Ad-278.

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.

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

PCCE's Objection Alleging CSEA Misrepresentation and Interference

In Pasadena, PERB adopted the NLRB standard set forth in Midland National Life Insurance Co. (1982) 163 NLRB 127 [110 LRRM 1489], in which the NLRB stated it would:

. . . no longer probe into the truth or falsity of the party's campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is . . .

The campaign flyer on CSEA letterhead which urges employees to vote for CSEA "to ensure that the Tentative Agreement will be implemented" does not rise to the level of a misrepresentation under the Pasadena standard. (See also Santa Clara Unified School District (1993) PERB Order No. Ad-244.) There is no evidence of fraud but rather an opinion as to what might happen if CSEA does not win the election. This election flyer does render an employee unable to ascertain the truth.

PCCE submitted a memo from classified employee Sandy Dunigan to her coworkers (Attachment D) as part of the evidence to establish misrepresentation by CSEA. This memo

effectively refutes PCCE's argument that employees were misled. If Ms. Dunigan were able to see this as campaign propaganda, arguably other employees would also. For this reason, this objection is dismissed.

The copy of the letter from the District to CSEA, pointing out what the District felt were indiscretions by CSEA representatives, does not substantiate a claim that employees' rights to freely choose a representative were interfered with. The letter from the District to a CSEA representative only contends that employees were engaged in conversations with CSEA representatives during working hours on two occasions.. There is no contention that CSEA caused any interference with employee rights. An allegation of unlawful interference in an election setting can not be assumed. (See Jefferson Elementary School District (1981) PERB Decision No. 164.) The reported incidents were apparently isolated and there was no information provided by PCCE as to what probable impact these two incidents may have had on a unit of over 1,000 members. Therefore, the PCCE initial objections do not warrant setting aside the results of the February 20 tally.

CSEA's Objection That Ballot With More than One Mark Should Have Been Voided

Since its inception, the Board's policy and practice has been to maintain and protect the integrity and neutrality of its election processes with an eye towards maintaining high standards to avoid any taint in the balloting process. (Tamalpais Union High School District (1976) EERB Decision No. 1.)⁷ In order for the Board to succeed in its mission the parties must have confidence in the Board's processes. As the NLRB noted:

The commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside

⁷ Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

the election. (Athbro Precision Engineering Corp., 166 NLRB No. 116 [65 LRRM 1699].)

Election objections regarding the integrity of the election process require assessment of whether a reasonable possibility of irregularity exists. Since this is paramount, "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." (San Diego USD, supra.)

As to CSEA's objections that the Board agent abused her discretion by deciding a ballot that had more than one mark in it should be counted, there is no evidence that the intent of the voter was misrepresented by the Board agent's count. CSEA attempts to portray NLRB decisions in mismarked ballot cases as divided. However, the NLRB has clearly stated that it will "count a ballot where, despite an irregularity in the manner in which it has been marked, it clearly expresses the voter's intent." (See Brooks Brothers 316 NLRB 176 (1995); also Mediplex 319 NLRB 281 (1995) (counting a ballot marked as a "no" vote where the "yes" box was marked but had eraser marks and "no" vote was marked with a double line).)

CSEA argues that more than one mark on a ballot demonstrates a second choice and the ballot should be voided. CSEA relies on the language of Government Code section 3544.7(a) that states: " Any ballot upon which there is recorded more than one choice shall be void and not be counted." However, it is possible for a voter to make more than one mark on a ballot and not make two choices. For example, if a voter were to underline California in California School Employees Association and place an "x" in the No Representation box it is reasonable to assume that the "x" is the choice of the voter and that the underline of California was not a choice.

Based on the Board agent's review of the ballot and the due discretion applied to the marks on the ballot, the Board agent acted properly in counting the ballot as valid. The statutory language relied upon by CSEA does not eliminate the responsibility of the Board agent to ascertain the intent of a voter who has made more than one mark on a ballot.

CSEA's objection does not demonstrate that the Board agent erred in counting a completed "x" in one box and deciding a "\ " in another box was not another choice, given the written comments of the voter.

PCCE's Objection to Counting Ballot in Unsigned Envelope

PCCE references the integrity of the mail ballot system in its follow-up objection and in support of its argument that the Board agent should not have counted the challenged ballot. PCCE cites Thompson Roofing 291 NLRB 743 (1980) as the rule PERB should follow. That decision held that the Board agent acted properly in not counting a mailed ballot that had a printed name rather than a written name of the voter.⁸

PCCE argues that if PERB decides voters need not follow voting instructions, it will have difficulty enforcing any of its voting procedures in mail ballot elections in the future. PCCE questions the credibility and integrity of the PERB election process in light of the earlier errors in counting ballots and the subsequent ruling in this matter, an election decided by one vote.

PERB's election instructions in this election, as in all mailed ballot elections, advised voters to read the entire ballot; to mark an x with a pen or pencil in one box only; to not sign the ballot; to not fold the ballot; to place their ballot in the secret ballot envelope; to place their secret ballot envelope into the postage paid return envelope and seal the envelope; to print and sign their name in the spaces provided on the back of the envelope and to place it in the U.S. mail in time to be received by the deadline.

In this case, as in all other PERB run mailed ballot elections, the parties were asked if they wanted to waive the signature requirement based on PERB's assurance that ballots received were

⁸ The NLRB's election guidelines for mailed ballots do not require both a voter's printed and signed name on the returned ballot. The signature is all that is required. (See NLRB Casehandling Manual (Part Two) Representation Proceedings, section 11336 et seq.)

identifiable as those from eligible voters. CSEA and the District agreed to waive the signature requirement, but PCCE was not willing to waive the requirement.

Based on PCCE's refusal to agree to the signature waiver, 11 ballots were voided. At the meeting to discuss the challenged ballot, PCCE attempted to, in effect, de-void the ballots by requesting CSEA and the District to sign a waiver. CSEA refused to sign a waiver and indicated those ballots should not affect the outcome. PCCE's attempt to characterize PERB's counting of a ballot from a voter who did not sign in cursive as the start of a slippery slope that will undercut the parties' view of the sanctity of PERB run elections is undercut by PERB's long standing policy to allow the parties to waive the signature requirement. PCCE's own eleventh hour attempt to get the parties to agree to a waiver undercuts its argument that an unsigned ballot is not properly cast.

PERB does require a voter to confirm, by placing their name on a returned ballot envelope, that he/she cast the ballot. That process was completed here. The eligible voter further confirmed, through a declaration and in phone conversations with the Board agent, that she did place the ballot in the mail and that she either printed or signed her name on the back of the returned envelope. The requirement that the voter affirm that he/she was in control of the ballot was met in this case. There was no evidence to the contrary.

PCCE's argument that PERB should have conducted the same type of investigation with the other unsigned ballots is meritless due to the fact that those ballots were voided at the initial tally and were not challenged by any party and therefore not subject to further investigation. The objection that the challenged ballot should not be counted is dismissed.

CONCLUSIONS OF LAW

Based upon the reasons stated above, both CSEA's and PCCE's election objections are DISMISSED and the election results shall be certified.

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. (Cal. Code Regs., tit. 8, sec. 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:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, sec. 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 (Cal. Code Regs., tit. 8, sec. 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 (Cal. Code Regs., tit. 8, sec. 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, sec. 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, sec. 32132).

Roger Smith
Labor Relations Specialist