STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and TEAMSTERS LOCAL 2010, Petitioner, and STATIONARY ENGINEERS, LOCAL 39, Intervenor.	Case No. SF-RR-965-H Administrative Appeal PERB Order No. Ad-434-H February 29, 2016

Appearances: Renne, Sloan, Holtzman & Sakai by Erich W. Shiners, Attorney, for Regents of the University of California; Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for Teamsters Local 2010.

Before Huguenin, Banks, and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Teamsters Local 2010 (Teamsters) from an administrative determination (attached) in which PERB's Office of the General Counsel voided and refused to count a disputed ballot in a run-off representation election affecting employees in the K-3 or Skilled Crafts Unit at the University of California's (University) Davis campus. The election resulted in a tie vote between representation by Teamsters and no representation.[1]

[1] The administrative determination also denied three election objections in which Teamsters alleged that the University's conduct interfered with employees' right to freely choose a representative, and that conduct by the University and/or PERB constituted serious irregularity in the election. One of Teamsters' objections overlaps with the present appeal by alleging that PERB's refusal to open and count a disputed ballot constitutes serious irregularity in the conduct

We have reviewed the case file its entirety in light of the issues raised in Teamsters' appeal, the University's opposition to the appeal and applicable law. We conclude that the administrative determination was issued in accordance with PERB regulations and Board precedent. Accordingly, we adopt that portion of the administrative determination concerning the disputed ballot as the decision of the Board itself, subject to the discussion below, and deny Teamsters' appeal and its request that PERB count the disputed ballot.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2015, Teamsters filed with PERB a recognition petition seeking to become the exclusive representative of employees in the Skilled Crafts Unit at the University's Davis campus. Stationary Engineers Local 39 (Local 39) filed as an Intervenor. Pursuant to a consent election agreement, from August 10-31, 2015, PERB conducted a three-way, secret mailed-ballot election between Teamsters, Local 39 and no representation.[2] PERB mailed ballots to 315 eligible unit employees identified on a list by the University.

Each mailing from PERB included a blue, postage-paid return envelope with the voter's name and address, and blank lines for the voter to print and sign his or her name; an official ballot; a one-page voter instruction sheet; and a white secret ballot envelope. Voters were instructed to mark their ballot, seal it inside the secret ballot envelope, and seal the secret ballot envelope in the blue return envelope.

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of the election which interfered with the employee's right to freely choose a representative. One of the remaining objections is the subject of unfair practice charges filed by Teamsters and pending before PERB. The third objection concerns the accuracy of information included in the eligible voter list provided by the University. Because the present appeal does not challenge the Office of the General Counsel's denial of Teamsters' election objections, we address only the Office of the General Counsel's refusal to count the disputed ballot.

[2] Pursuant to PERB Regulation 32722, subdivision (c), except in the case of a runoff election held pursuant to PERB Regulation 32736, or in other circumstances not applicable here, "the ballot entry of 'No Representation' shall appear on each ballot in a representation election." (PERB regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

On September 1, 2015, PERB tallied the ballots and determined that, of the 270 eligible votes cast, Teamsters had received 105 votes, no representation had received 99 votes, and Local 39 had received 66 votes, with no challenged ballots. No objections were filed. Although Teamsters received the largest number of votes, because it had not received a majority of all votes cast, a run-off election between Teamsters and no representation was required, pursuant to the Higher Education Employer-Employee Relations Act (HEERA)[3] and PERB regulations.

Pursuant to a second consent election agreement between Teamsters and the University, PERB conducted a run-off election from September 28 to October 19, 2015 using the same secret mailed-ballot procedures as described above. Ballots were mailed to an updated list of 314 eligible unit employees[4] on September 28 and were to be returned by October 19, 2015 and tallied by PERB the following day. Employees who did not receive a ballot could contact PERB on October 7, 2015 to obtain a duplicate ballot.

On October 20, 2015, PERB tallied the ballots received and determined that the run-off election had resulted in a tie: 129 votes for Teamsters and 129 votes for no representation. In

[3] HEERA is codified at Government Code section 3560 et seq. Section 3577, subdivision (a)(1)(C), provides:

> If, at any election, no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

[4] One employee on the initial list was no longer in the unit when the run-off election occurred. Additionally, the administrative determination indicates that the updated list included ten address changes.

addition to the 258 ballots tallied, one ballot was returned to PERB unopened in the original mailing envelope and was therefore voided.[5]

Along with the 259 blue postage-paid envelopes, PERB also received a standard mailing envelope addressed to PERB and marked "UC Davis Skilled [T]rade Election."[6] The envelope contained a second, sealed envelope and a hand-printed cover letter from Gustavo Solorzano (Solorzano), a painter, a classification included in the Skilled Crafts Unit at the University's Davis campus and Solorzano's name appears on the University's list of eligible voters. Solorzano's letter explained that he had requested a duplicate ballot on October 7, 2015, but, because no duplicate ballot had arrived by October 15, he was submitting his own, home-made ballot in the enclosed, sealed envelope.

On October 7, 2015, the date designated in the second consent election agreement for employees to request a duplicate ballot, PERB received seven requests for duplicate ballots from eligible employees and a duplicate ballot was mailed to each of these seven employees. Although PERB had received a request for a duplicate ballot from Solorzano on August 18, 2015, i.e., during the initial election, there is no record of Solorzano contacting PERB to request a duplicate ballot on October 7, 2015 for the second, run-off election.[7]

When the run-off election ballots were tallied on October 20, 2015, Teamsters initially challenged the home-made ballot but then, after the election resulted in a tie, Teamsters

[5] The Office of the General Counsel's decision to void the unopened ballot is not at issue in this appeal.

[6] There is no dispute that PERB received this mailing before the deadline for receipt of ballots and the Office of the General Counsel's determination that the hand-made ballot contained therein was invalid was not based on a determination that it was untimely.

[7] In a sworn declaration (discussed below), Solorzano claims only to have requested a duplicate ballot with respect to the initial election and does not claim to have requested a duplicate ballot on October 7, 2015 with respect to the run-off election.

asserted that the disputed ballot should be opened and counted as valid. The Board agent conducting the election refused to open the home-made ballot and the following day ordered Teamsters to show cause why the disputed home-made ballot should be counted.

In response to the Office of the General Counsel's order to show cause, on October 30, 2015, Teamsters provided a sworn declaration in which Solorzano attested to various facts, including: that he had not received a ballot from PERB in either the initial, three-way election or the run-off election; that he had contacted PERB during the initial election to obtain a duplicate ballot but that he never received a duplicate ballot; that, after receiving no ballot from PERB for the run-off election, Solorzano prepared and mailed to PERB a home-made ballot which, according to Solorzano's declaration, was designed to resemble as closely as possible the official ballot prepared by PERB.[8] Solorzano's home-made ballot included a box each for "[T]eamsters" and "no representation," and Solorzano indicated his preference by placing an "X" in the box for Teamsters.

The home address identified in Solorzano's declaration is different from the home address indicated on the list of eligible employees provided by the University and used by PERB for conducting the mailed ballot elections. It also differs slightly from the address recorded by PERB on August 18, 2015 when Solorzano contacted PERB for a duplicate ballot for the initial election. Specifically, the last two digits of Solorzano's zip code are transposed. It is unclear whether this error occurred when Solorzano provided his address or PERB's transcription of it. Although Solorzano was among the eligible voters identified on the University's list, PERB did not receive a standard PERB-prepared ballot from Solorzano in either the initial or run-off election.

[8] Solorzano's declaration, which was prepared by the law firm representing Teamsters in the present appeal, does not disclose how he knew what an actual PERB ballot looked like, given his assertion that he never received such a ballot from the agency.

THE ADMINISTRATIVE DETERMINATION

The administrative determination addressed two issues: whether Solorzano's home-made ballot should be opened and counted, and, if not, whether any of Teamsters' election objections were sufficient to warrant setting aside the result of the run-off election. The administrative determination answered both questions in the negative.

The Office of the General Counsel relied on the language of PERB Regulation 32722, which provides that "[a]ll elections shall be conducted by secret ballot *under the supervision of the Board*," and that ballots also "shall be prepared *under the supervision of the Board*." (PERB Reg. 32722, subds. (a), (b), emphases added.) According to the administrative determination, neither PERB regulations nor the parties' consent election agreement permit the preparation of ballots by anyone other than PERB and, according to the administrative determination, to the extent Solorzano was disenfranchised in this case, it was the result of his own failure to follow the election procedures established by PERB regulations and the consent election agreement, rather than PERB's refusal to count his hand-made ballot.

While acknowledging that PERB does not always follow private-sector precedent governing representation matters, the Office of the General Counsel also reasoned that voiding the home-made ballot in this case was consistent with decisions by the National Labor Relations Board (NLRB). The administrative determination noted one case, *In re Aesthetic Designs, LLC* (2003) 339 NLRB 395, in which the NLRB had accepted a sample ballot submitted by an employee, because while not an official ballot, it had at least been prepared by the NLRB, was a close facsimile of the official ballot, required no speculation as to the voter's intent and created no concern of ballot-box stuffing or disclosure of the voter's identity. In other cases, however, the NLRB has rejected attempts to vote by way of hand-made ballots

because "a blank sheet of paper is not an official ballot." (*Knapp-Sherrill Co.* (1968) 171 NLRB 1547; *McCormick Lumber Co.* (1973) 206 NLRB 314.)

ISSUES ON APPEAL

Teamsters' appeal argues that the overriding concern in disputed ballot cases should be whether the intent of the voter can be readily discerned without speculation, and that the NLRB cases relied on by the administrative determination (and cited above) teach that the mere fact that an employee's vote is cast on something other than an official ballot is not itself a basis for voiding the ballot. The appeal also notes that other legitimate concerns, such as preserving the confidentiality of a voter's identity and preference or preventing ballot-box stuffing, are inapplicable here, because Solorzano, through his sworn declaration, has voluntarily disclosed his identity and voting preference, and because PERB received no official ballot from Solorzano and thus, there is no dispute that the home-made ballot was his only attempt to vote in the run-off election.

The University does not dispute Teamsters' contention that Solorzano's intent can be readily discerned from the description of his home-made ballot but argues that other considerations justify the Office of the General Counsel's determination that the ballot was invalid and should not be counted. It argues that PERB's election procedures already address the policy concerns underlying the NLRB's *Aesthetic Designs* rule permitting an unofficial but NLRB-prepared sample ballot. It also argues that the "bright line" rule in PERB's regulations requiring that ballots be prepared by or under the supervision of the Board is preferable over accepting employee-prepared ballots on a case-by-case basis.

DISCUSSION

HEERA authorizes PERB to "arrange for and supervise representation elections which shall be conducted by means of secret ballot elections," and to adopt rules and regulations to carry out the provisions and effectuate the purposes and policies of HEERA. (§ 3563, subds. (c), (f).) Pursuant to PERB regulations, all representation elections affecting HEERA units "shall be conducted by secret ballot under the supervision of the Board." (PERB Reg. 32722, subd. (a).) More specifically, the ballots for such elections "shall be prepared under the supervision of the Board." (PERB Reg. 32722, subd. (b).)

In an appeal from an administrative determination, the moving party must demonstrate how and why the decision being challenged departs from Board precedent or regulations. (*County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 5.) Here, Teamsters make a strong case for accepting Solorzano's home-made ballot, as he has voluntarily disclosed his identity and voter preference, his sworn declaration and description of the home-made ballot leave no room for speculation as to his intent, and there are no facts to suggest ballot-box stuffing or other impropriety as even a possibility, if the home-made ballot were accepted and counted in this case.

However, Teamsters concede that no Board decision has directly addressed whether to accept an employee's home-made ballot and thus, the appeal focuses instead entirely on NLRB precedent as persuasive authority, without addressing the above-quoted language of PERB Regulation 32722, subdivision (b), requiring that ballots "shall be prepared under the supervision of the Board." PERB has generally construed its regulations governing representation matters narrowly and declined to look to private-sector authority for guidance when PERB's regulations expressly address the policy concerns underlying the practice and procedure of

private-sector labor boards such as the NLRB or Agricultural Labor Relations Board. (*City of Sacramento* (2014) PERB Decision No. 2354-M, pp. 3-7.)

Because an agency's rules or regulations cannot *expand* the scope of its authority beyond what has been authorized by the enabling statute (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209, pp. 10-11), agency regulations that specify the procedure whereby it will carry out its mission necessarily have the effect of *narrowing* the scope of the agency's authority by requiring it to act according to the procedure specified in its own regulations, as opposed to following other procedures which, while within the broad discretion granted by the statute are not the procedure chosen by the agency. (*City of Torrance* (2009) PERB Decision No. 2004-M, p. 11.) Thus, agency regulations validly enacted pursuant to a legislative grant of authority have the force and effect of law and are binding on the agency that promulgated them. (*Taft Union High School District* (1978) PERB Order No. Ad-50, p.4, fn. 3; *Service v. Dulles* (1957) 354 U.S. 363, 372.) Indeed, a fundamental tenet of administrative law is that an agency must follow its own rules. (*Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.* (1932) 284 U.S. 370, 387; *United States v. Nixon* (1974) 418 U.S. 683, 696; *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 990; *Southern Pacific Transportation Co. v. State Bd. of Equalization* (1987) 191 Cal.App.3d 938, 957.)

Insofar as the Board wishes to modify or repeal its regulations, it may do so only through its rulemaking process at a public meeting with notice and opportunity afforded to the public to present its views, and not through the Board's decisional law. (*Oakland Unified School District* (1980) PERB Order No. Ad-84, p. 4; *UPTE, CWA Local 9119 (Hermanson, et al.)* (2006) PERB Decision No. 1829-H, pp. 3-5; *State of California (Department of Corrections & Rehabilitation)* (2009) PERB Order No. Ad-382-S, pp. 4-5; *Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 36.) However compelling the

facts of this case may be for accepting Solorzano's home-made ballot as valid, because we are not free to disregard the language of our regulations nor modify or repeal the regulations through decisional law, we deny Teamsters' appeal.

ORDER

Teamsters Local 2010's appeal from the administrative determination in Case No. SF-RR-965-H is hereby DENIED.

Members Huguenin and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and TEAMSTERS LOCAL 2010, Petitioner, and STATIONARY ENGINEERS, LOCAL 39 Intervenor.	REPRESENTATION CASE NO. SF-RR-965-H ADMINISTRATIVE DETERMINATION December 7, 2015

This decision addresses a determinative ballot challenge and objections to the conduct of a runoff election. Petitioner, Teamsters Local 2010 (Local 2010), claims that the ballot in question should be counted, and, if not, that certain conduct by the Public Employment Relations Board (PERB or Board) and the employer, the University of California (University) requires the election result to be set aside.

FACTUAL AND PROCEDURAL HISTORY

Local 2010 initiated this case on or about April 17, 2015,[1] by filing a request for recognition with the University, seeking to become the exclusive representative of a unit of skilled crafts employees at the University's Davis campus (UC Davis). Subsequently, Stationary Engineers Local 39 (Local 39) filed a valid intervention petition seeking to represent the same unit.

On July 24, PERB approved a consent election agreement (First CEA) executed by Local 2010, Local 39, and the University. Paragraph 12 of the First CEA described the

[1] All further dates refer to 2015, unless otherwise noted.

balloting process as follows (emphasis in original):

> All eligible voters shall vote by **mailed ballot**. On **August 10, 2015**, PERB will mail a ballot to the home address of each eligible voter. Along with the ballot, the eligible voter will also receive a Secret Ballot Envelope, a postage-paid return envelope addressed to PERB, and instructions for casting the ballot. Ballots must be received by PERB not later than **August 31, 2015**, in order to be counted in the official tally of ballots.
>
> Employees will be informed by the Notices of Election that if they believe they are eligible to vote in the election and they do not receive a ballot by **August 19, 2015**, they may contact PERB and request a duplicate ballot. PERB will accept employee requests for duplicate ballots on **August 19, 2015** only. Requests may be made only by telephone and between the hours of 8:30 a.m. and 4:00 p.m.; the telephone number will be displayed on the Notices of Election. PERB will accept collect calls for this purpose. PERB will accept a request for a ballot only from the voter himself/herself.
>
> Any employee who timely contacts PERB and requests a ballot will be issued a duplicate ballot if the employee's name can be found on the list of eligible voters. If the employee's name is not on the voter list and the employee expresses the belief that s/he is eligible to vote, the employee will be issued a challenged ballot. In order to be counted, a duplicate ballot must be accompanied by a sworn statement signed by the eligible voter to the effect that the duplicate ballot is the only valid ballot cast by the employee in the election. PERB will include such a prepared statement for signature with each duplicate ballot packet of materials issued to an eligible voter.

Pursuant to the First CEA, on July 23, the University provided a list of the 315 eligible voters in the unit. On August 10, PERB mailed ballots to all voters included on the list provided by the University. On September 1, the ballots were tallied at PERB's San Francisco Regional Office, with the following result: 105 votes for Local 2010; 99 votes for no representation; and 66 votes for Local 39.

Because no objections were filed, and no ballot choice received a majority, the matter proceeded to a runoff election between Local 2010 and no representation. On September 21, PERB approved a consent election agreement (Second CEA) executed by Local 2010 and the University. Paragraph 11 of the Second CEA, describing the balloting process for the runoff election, was identical to paragraph 12 of the First CEA, with the exception of the applicable

dates: ballots were to be mailed on September 28, returned by October 19, and requests for duplicate and challenged ballots were to be accepted on October 7.

Paragraph 12 of the Second CEA required the University to update the voter list previously provided by notifying PERB no later than September 22 of: (1) any employees who were no longer employed in the bargaining unit as of that date, and (2) any employees who had notified the University of an address change as of that date. The University did so, notifying PERB of 10 address changes and one employee who was no longer employed in the unit. On September 28, PERB mailed ballots to the 314 employees whose names appeared on the updated list.

During the election period, 259 of 314 ballots were returned to PERB. One ballot was returned to PERB unopened in the original mailing envelope, and was therefore declared void. PERB received an additional piece of mail pertaining to the election, which will be referred to as the "disputed ballot."

The disputed ballot arrived in a generic mailing envelope, rather than a postage-paid return envelope. On the mailing envelope, below PERB's address, is printed, "UC Davis Skilled Trades Election." The mailing envelope contained a second, sealed envelope and a hand-written note. The note reads, verbatim:

> to who it may concern
>
> I [name omitted] requested from P.E.R.B a duplicate ballot on wednesday October 7th 2015. As of today thursday October 15 I have still not received my duplicate ballot. So I am submitting this letter and including a sealed home-made ballot. Please accept this as my vote thank you.
>
> Sincerel[e]y [signature]
>
> University of California Davis
> Skilled trades Bargaining Unit
> Structural Operations/Facilities management
> Painter
> [Employee identification number]

PERB has no record of a request for a duplicate ballot on October 7 from the individual named in the hand-written note. PERB did, however, receive a duplicate ballot request from that same individual on August 18, during the initial election and pursuant to the First CEA.

At the ballot count, held on October 20, the disputed ballot was initially challenged by Local 2010. The count of the remaining ballots resulted in a tie, with 129 votes for each ballot choice. Local 2010 then requested that the disputed ballot be counted. The undersigned Board agent declared an intention to void the disputed ballot, but then determined to continue to treat it as challenged. Accordingly, the envelope containing the disputed ballot has not been opened.

Order to Show Cause and Local 2010's Response

On October 21, the undersigned Board agent issued Local 2010 an Order to Show Cause (OSC) as to why the disputed ballot should be counted. On October 28, Local 2010 filed a response, which included legal argument and a declaration from an individual who claims to have sent the disputed ballot.[2]

The declaration states, in relevant part:

> 3. In August of this year I did not receive a ballot in the mail from PERB in order to vote in the initial election for the Skilled Trades Bargaining unit. I contacted the PERB office to get a duplicate ballot, but a ballot never arrived in the mail. As a result, I did not get to vote in the initial election.
>
> 4. In October of this year I again did not receive a ballot in the mail from PERB, this time in order to vote in the second election for the Skilled Trades Bargaining unit. Because of my bad experience in trying to get a ballot from PERB for the first election, I decided to go ahead and create a ballot so that I could be sure of being able to cast a ballot in this election.
>
> 5. In creating my ballot, I did my best to duplicate what an actual PERB ballot looks like. . . .

[2] Although the individual is identified in Local 2010's response, this decision will not refer to him by name.

6. I put the ballot I created into a blank, sealed envelope, and then put that envelope (with its enclosed ballot) into a second envelope addressed to PERB along with a cover letter with my name and signature, and then mailed this to PERB so that my ballot would be counted in this election.

The declaration also includes the individual's home address, which differs from the home address provided by the University. It also differs from the address recorded by PERB on August 18, when the individual requested a duplicate ballot for the initial election; specifically, the last two digits of the zip code were transposed.[3]

Objections

On October 29, Local 2010 filed objections to the conduct of the election, which were later amended on October 30.

Objection One

Local 2010's first objection concerns John Dysart (Dysart) and Rhejinald Walker (Walker), each of whom is described as a member of the skilled crafts unit, as well as "an outspoken member of the Organizing Committee and strong Union leader." Local 2010 incorporates by reference Dysart's allegations in PERB Unfair Practice Charge (UPC) No. SF-CE-1094-H, which was filed on October 7, and Walker's allegations in UPC No. SF-CE-1095-H, which was filed on September 25.[4] Those allegations are summarized as follows.

Dysart alleges that he appeared in Local 2010 literature that was posted at the UC Davis campus on June 17 and August 3. In each piece of literature, Dysart was one of three unit members depicted. Soon after these postings, Dysart began to suspect that his supervisors were "subjecting his work to increased scrutiny by surveilling him at the jobsite and checking up on his work assignments after completion." These suspicions increased when, on August

[3] It is possible that the address was provided incorrectly, but for purposes of this decision, it will be assumed that PERB committed the error.

[4] Each charge was filed by a Local 2010 attorney.

20, Dysart received an e-mail message from a UC Davis employee stating that "someone from the electrical shop" checked up on one of Dysart's recently completed assignments.

Dysart also alleges that, sometime in early September 2015, he attended a Local 2010 organizing meeting at UC Davis. Chris Voss (Voss), a management employee, confronted Dysart and informed him that he could not attend because he was on work time. Dysart informed Voss that he was still on his lunch break.

Finally, Dysart alleges:

> Fellow Organizing Committee members have reported to Dysart that they too are experiencing increased management surveillance and scrutiny. Aside from the surveillance of Organizing Committee members, Dysart [has] not known management to surveil employees in this manner in the past or present

Walker's charge alleges that he has been an active member of Local 2010's organizing drive, and that he has appeared in Local 2010 literature. In the piece of literature attached to Walker's charge, he is one of four unit members depicted. On August 27, Walker's manager, issued Walker a "Letter of Expectations." According to the charge, the Letter of Expectations "chastised Walker for alleged performance deficiencies that had not previously been discussed with Walker in his eight years of employment." It also included new directives, such as requiring Walker to keep at least 40 hours of sick leave in his leave bank.

Local 2010's objection concludes that from the treatment of Dysart and Walker:

> [m]embers of the bargaining unit received the message that support for Union representation rather than remaining unrepresented leads to adverse employment actions. The University's conduct demonstrated to all members of the bargaining unit that it was not neutral with respect to whether members of the bargaining unit supported and voted for the Union or voted to remain unrepresented.

Objection Two

The second objection overlaps with the issue of the disputed ballot. Local 2010 asserts two administrative irregularities: (1) when the individual who cast the disputed ballot did not

receive a ballot from PERB for the runoff election; and (2) when the undersigned refused to count the disputed ballot. Local 2010 concludes: "Both separately, and taken together, the irregularity in the balloting process interfered with the employee's right to freely choose a representative."

Objection Three

The third objection concerns the voter list provided by the University. Local 2010 asserts that the list included the incorrect address for the individual who cast the disputed ballot, which "compromised" Local 2010's ability to contact the individual. Local 2010 also asserts that PERB "either as a result of its own negligence and/or as a result of the Employer providing an incorrect address for the employee, failed to mail an official PERB ballot to this unit employee, thereby disenfranchising a voter who ultimately represents the determinative vote in this election."

Responses by the University

On November 3, the University filed a timely response to Local 2010's response to the OSC, arguing that the ballot should not be counted. On November 12, the University filed a timely opposition to Local 2010's objections.

DISCUSSION

The first issue to be resolved is whether the disputed ballot should be counted. If not, it must be determined whether any of Local 2010's objections are sufficient to warrant setting aside the election.

I. Whether the Disputed Ballot Should be Counted

PERB's authority to conduct representation elections for employees of the University is conferred by the Higher Education Employer-Employee Relations Act (HEERA).[5]

[5] HEERA is codified at Government Code section 3560 et seq.

Specifically, section 3563(c) authorizes PERB to "arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and to certify the results of the elections." Moreover, HEERA section 3577(a)(1)(C) directs the Board to conduct a runoff election if no choice in an initial election receives a majority of votes.

To implement these statutory directives, the Board has enacted regulations governing the conduct of elections under HEERA. (PERB Regulations 32720-32754.) Relevant here, PERB Regulation 32722 provides:

> (a) All elections shall be conducted by secret ballot under the supervision of the Board.
> (b) Ballots shall be prepared under the supervision of the Board. . . .

From these rules, it necessarily follows that, to be valid, a ballot must be the official secret ballot "prepared under the supervision of the Board." This is also implicit in paragraph 11 of the Second CEA, which provided that *PERB* would mail a ballot to each eligible voter, that *PERB* would mail a duplicate or challenged ballot to those who requested one on October 7, and that ballots must be returned to PERB by October 19. Neither PERB Regulations nor the Second CEA can be read to allow the preparation of ballots by anyone other than PERB. (See *Gilroy Unified School District* (1991) PERB Order No. Ad-226 (*Gilroy*) ["[T]he provisions of a consent election agreement control the terms and conditions of an election"].) The only procedure for an individual who did not initially receive a ballot to obtain one was to request either a duplicate or a challenged ballot on October 7. An admittedly "home-made" ballot is not a valid ballot under PERB Regulations or the Second CEA.

This conclusion is consistent with decisions issued by the National Labor Relations Board (NLRB). The NLRB also conducts secret ballot representation elections, and PERB has turned to it for guidance on election matters. (See, e.g., *Poway Unified School District* (2001)

PERB Order No. Ad-310 [referring to NLRB decisions regarding the interpretation of voter intent from ballot markings]; but see *Sierra Sands Unified School District* (1993) PERB Decision No. 977 [declining to adopt the NLRB's "laboratory conditions" rule].) In at least two cases, the NLRB has held that non-official ballots were invalid. In *Knapp-Sherrill Co.* (1968) 171 NLRB 1547 (*Knapp-Sherrill*), the disputed ballot was "a blank piece of paper, the same size, color, and type used for the ballots in this election, on which the word 'No' is written." The NLRB held that the ballot was invalid on the sole grounds that "a blank sheet of paper is not an official ballot," specifically declining to rely on the ground that the voter's intent was unclear. (*Id.* at p. 1548.) Later, in *McCormick Lumber Co.* (1973) 206 NLRB 314 (*McCormick Lumber*), the NLRB reached the same result on identical facts. Thus, because the disputed ballot in this case is not an official ballot, it is clearly void under *Knapp-Sherrill* and *McCormick Lumber*.

In its response to the OSC, Teamsters Local 2010 argues that *Knapp-Sherrill* and *McCormick Lumber* were overruled by *In re Aesthetic Designs, LLC* (2003) 339 NLRB 395 (*Aesthetic Designs*). In *Aesthetic Designs*, a divided panel of the NLRB decided to count a sample ballot that had been marked and returned. The sample ballot was part of a "mail ballot kit" provided to voters. The *Aesthetic Designs* majority concluded that counting the sample ballot was consistent with the NLRB's policy toward "irregularly marked ballots," which is guided by the following principles:

> First, the Board assumes that "by casting a ballot, a voter evinces an intent to participate in the election process and to register a preference." [Citation.] Second, the Board will give effect to this preference whenever possible. [Citation.] Third, the Board will "avoid speculation or inference regarding the meaning of atypical 'X's, stray marks, or physical alterations." [Citation.]

(*Id.* at p. 395.) The *Aesthetic Designs* majority distinguished *Knapp-Sherrill* and *McCormick Lumber* on the grounds that "the vote at issue was submitted on an official Board form—a

sample ballot—not a blank sheet of paper." (*Ibid.*) It also determined that the possibility that the voter could be identified from the use of the sample ballot was not grounds for voiding the ballot, because there was no suggestion that the secrecy of the voter's identity had been compromised. (*Id.* at p. 396.) Finally, the majority distinguished prohibitions on the use of sample ballots in political elections, finding that those prohibitions are driven by concerns about ballot-box stuffing. That concern is not present in an NLRB election, according to the majority, because the NLRB's use of "yellow return envelopes bearing the key number of the addressee-voter prevents repeated voting." (*Ibid.*)[6] The majority concluded:

> [T]he Board's general preference for the official ballot form must be balanced by policy concerns that voters who wish to participate should not unnecessarily be disenfranchised. Here, the voter evinced an intention to participate in the election and register a preference. That intent was clearly manifested on a sample ballot form, which is a close facsimile of an official ballot, thereby avoiding the need for any speculation concerning that voter's preference. Because ballot-box stuffing is not a concern, and because there is no evidence (nor even a contention) that voter identification occurred here, we find no persuasive reason not to count the sample ballot.

(*Ibid.*, footnote omitted.)

Contrary to Local 2010's argument, *Aesthetic Designs* appears to distinguish *Knapp-Sherrill* and *McCormick Lumber* rather than overrule them expressly; in *Knapp-Sherrill*, *supra*, 171 NLRB at p. 1548, the NLRB relied solely on the grounds that a "a blank sheet of paper is not an official ballot," and specifically declined to rely on the inability to discern voter intent. The *Aesthetic Designs* majority differentiated between a blank sheet of paper and a sample ballot, concluding that the latter is "an official Board form." Under this reading of *Aesthetic Designs*, because the disputed ballot in this case was not on an official PERB form, it is invalid.

[6] Thus, while not expressly stated in the reported decision, it appears that the sample ballot in *Aesthetic Designs* was returned in an otherwise valid official return envelope.

Even if, as Local 2010 asserts, *Aesthetic Designs* overruled the earlier cases, it does not appear to have established a per se rule that any sufficiently clear expression of voter intent must be counted as a ballot. Rather, it appears to have established a balancing test, in which the "general preference for the official ballot form" is weighed against a policy of preventing unnecessary disenfranchisement of "voters who wish to participate." The NLRB identified some factors that weigh in favor of counting an unofficial ballot: (1) the ease of discerning the voter's intent; (2) the absence of concerns about ballot-box stuffing; and (3) the absence of concerns that the voter has been identified to the parties. (*Aesthetic Designs*, *supra*, 339 NLRB at p. 396.)

Whether PERB would apply a similar balancing test is unclear. The Board has not always chosen to adopt the NLRB's election rules. (*Sierra Sands Unified School District*, *supra*, PERB Decision No. 977.) Even assuming the Board would apply *Aesthetic Designs* in the appropriate case, it does not appear that it should apply here. This is because the voter will not "unnecessarily be disenfranchised" if the disputed ballot is not counted. According to the declaration of the voter himself, submitted with Local 2010's OSC Response, and consistent with PERB's election records, he requested a duplicate ballot during the initial election. He does not, however, claim to have requested a duplicate ballot during the *runoff* election, and PERB's election records show that he did not.[7] This appears to be because of his "bad experience" during the initial election, when he failed to receive a duplicate ballot.

Although it is regrettable that this voter did not receive the duplicate ballot he requested for the initial election, this appears to have been the result of, at worst, an inadvertent

[7] The University points out that the declaration is inconsistent with the note included with the disputed ballot, in which the individual specifically claims to have requested a duplicate ballot on October 7. The declaration is signed under penalty of perjury, while the note is not. The undersigned therefore credits the statements in the declaration over those in the note.

typographical error by PERB. The voter's apparent assumption that it would have been futile to request a duplicate ballot again for the runoff election is unreasonable, and cannot excuse the failure to comply with the duplicate ballot procedure. As a result, it is not the refusal to count the disputed ballot that disenfranchises the voter in this case, but the voter's own decision not to follow the established election procedures. Therefore, the premise of *Aesthetic Designs*—preventing unnecessary disenfranchisement—does not apply here.

Even if *Aesthetic Designs* were applied here, the balancing factors identified by the NLRB in that case do not weigh in favor of counting the disputed ballot. It will be assumed, as Local 2010 claims, that voter intent is not in question, which weighs in favor of validity. Both of the remaining factors, however, weigh against validity. First, the disputed ballot was not returned in the official PERB envelope, so there is a possibility of what the NLRB described as "ballot box stuffing." Second, while PERB has not disclosed the voter's identity, Local 2010 has identified the individual it believes cast the disputed ballot, and obtained a declaration in which the individual not only confirms that he cast the disputed ballot, but also reveals that the disputed ballot reflects a vote for Local 2010. Thus, two out of the three *Aesthetic Designs* factors weigh against counting the disputed ballot.

For these reasons, it is concluded that the disputed ballot is void. The result of the election is, therefore, a tie.

II. Whether Local 2010's Objections Are Sufficient to Warrant Setting Aside the Election Result

A. Legal Standard

Under PERB Regulations, the grounds for election objections are limited to the following: "(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." (PERB Regulation 32738(c).) Moreover, objections must be supported by specific facts. (PERB

Regulation 32738(d).[8] Mere conjecture does not suffice. (*Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333 (*Pleasant Valley*).)

The party objecting to an election must make a prima facie factual showing of conduct that constitutes one or both of the grounds set forth in PERB Regulation 32738(c). (*Poway Unified School District* (2000) PERB Order No. Ad-306.) Under the first ground, i.e., interference with employee free choice, this showing may be satisfied by: (1) direct evidence that employee choice was affected; or (2) evidence of conduct that had the natural and probable effect of impacting employee choice. (*Ibid.*; see also *Santa Monica Unified School District and Santa Monica Community College District* (1978) PERB Decision No. 52.)

If this threshold showing is met, PERB must then decide whether to set aside the election result depending "upon the totality of the circumstances raised in each case and, where appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (*Poway Unified School District, supra*, PERB Order No. AD-306.) Even where some impact on voters can be inferred, the election result will not necessarily be set aside. (*Ibid.*)[9] While PERB must ensure that elections are conducted without undue interference from parties, it must also avoid unnecessarily setting aside employees' votes. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S.) Election objection cases involve a balancing of competing interests, and therefore PERB

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[8] PERB Regulation 32738(d) states (emphasis added):

> 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.

[9] As noted, PERB has rejected the rigid application of the NLRB's "laboratory conditions" test. (*Sierra Sands Unified School District, supra*, PERB Decision No. 977.)

carefully weighs whether alleged misconduct was sufficient to affect the election's outcome. (*Ibid.*)

When the second ground—serious irregularity in the conduct of the election—is claimed, PERB must assess "'whether the facts indicate that a reasonable possibility of irregularity inhered in the conduct of the election.'" (*San Diego Unified School District* (1996) PERB Order No. Ad-278, quoting *People's Drug Stores* (1978) 202 NLRB 1145.) The Board seeks to maintain high standards in the conduct of its elections, and "'goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity.'" (*Ibid.*, quoting *Brink's Armored Car. Inc.* (1986) 278 NLRB 141.) But an election "need not be perfect to be fair," and "de minimis errors and omissions will not be found to be" sufficiently serious to warrant setting aside an election result. (*Ibid.*) Again, the ultimate question is whether any mistakes were sufficient to affect the election's outcome. (*Poway Unified School District*, *supra*, PERB Order No. Ad-306.)

The Board agent is required to dismiss objections that fail to satisfy the requirements of PERB Regulation 32738, subdivisions (c) and (d). (PERB Regulation 32738(g).) However, the Board agent *may* require the objecting party to submit additional information supported by declarations under penalty of perjury. (PERB Regulation 32738(f) & 32739(a).) Even if not subject to dismissal under PERB Regulation 32738(g), 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).) Conversely, a Board agent may set aside the election when the investigation reveals that such action is warranted, and no material factual disputes exist. (PERB Regulation 32739(g).)[10]

[10] Where material factual disputes exist, a hearing may be scheduled. (PERB Regulation 32739(h); *Los Angeles Unified School District* (1993) PERB Order No. Ad-250.)

B. Objection One

For its first objection, Local 2010 relies on the allegations in the Dysart and Walker UPCs, claiming that from the alleged conduct, bargaining unit members "received the message that support for Union representation rather than remaining unrepresented leads to adverse employment actions."

At the outset, it is noted that many of the allegations in the Dysart UPC fail to contain the specific facts required by PERB Regulation 32738(d). For instance, Dysart alleges that other Organizing Committee members informed Dysart of management surveillance and scrutiny. However, neither Local 2010's objections, nor the UPC (which, as noted, was filed by a Local 2010 attorney) identify: the Organizing Committee members alleged to have been subjected to surveillance or scrutiny; what actions were taken; the managers or supervisors who took the actions; or the dates these actions took place.

Similarly, the Dysart UPC suggests that his supervisor, Voss, was "surveilling" Dysart's union activities, but neither the UPC nor Local 2010's objections includes any specific facts that might establish unlawful "surveillance" as that term has been defined.[11] In this case, there is no information that establishes that Voss was engaged in unlawful surveillance, as opposed to legitimately determining whether Dysart was attending the organizing meeting on work or non-work time. (Cf. *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S.) In particular, no facts are

[11] PERB has referred to the NLRB's standards for analyzing claims of unlawful surveillance. In *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, PERB relied on NLRB precedent to uphold the dismissal of allegations of unlawful surveillance that failed to include facts showing that the employer photographed, videotaped, or openly engaged in recordkeeping of employees' union activities, citing *F.W. Woolworth Co.* (1993) 310 NLRB 1197 (*Woolworth*) and *National Steel & Shipbuilding Co.* (1997) 324 NLRB 499 (*National Steel*). The NLRB has also found surveillance when an employer observes employees in a way that is "out of the ordinary." (*Aladdin Gaming, LLC* (2005) 345 NLRB 585, 586 (*Aladdin Gaming*).)

alleged regarding what happened after Dysart informed Voss that he was still on his lunch break; presumably, if Dysart had been prevented from attending the meeting or if Voss had engaged in some kind of further coercive conduct, this would have been alleged.[12] As a result, to the extent Teamsters Local 2010 relies on these allegations of surveillance of Dysart and other Organizing Committee members as the basis for its objections, they are rejected.

While the remaining allegations regarding Dysart and Walker contain some specific facts, they still fail to make a threshold showing of conduct interfering with employees' right to choose their representative. (*Poway Unified School District, supra*, PERB Order No. Ad-306.) Local 2010 provides no information whatsoever, much less the specific facts required by PERB Regulation 32738(d), establishing that any unit members other than Dysart or Walker were even aware of their treatment. As a result, there is no direct evidence of interference with employee choice.

Nor are there allegations of conduct serious enough that the natural and probable result was an effect on employee choice. (*Poway Unified School District, supra*, PERB Order No. Ad-306.) First, the actions taken against Dysart and Walker in alleged retaliation for their support of Local 2010—increased scrutiny of Dysart's work, and the Letter of Expectations issued to Walker—were relatively minor as adverse actions go.[13] They were not disciplinary

[12] Even assuming Voss incidentally observed Dysart's or other employees' presence at the organizing meeting, it cannot be presumed that employees in attendance at such a meeting were deterred from supporting Local 2010. (See *Santa Clara Unified School District* (1993) PERB Order No. Ad-244 [claimed surveillance was "witnessed only by members of [union's] organizing committee, whose commitment to the petitioner, one would presume, could withstand such an occurrence"].)

[13] The determination of whether a charge states a prima facie case, and thus whether PERB's Office of the General Counsel should issue a complaint, is separate from the determination of whether conduct is sufficient to warrant setting aside an election. (*Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M.) Therefore, the undersigned assumes, without deciding, that the actions taken against Dysart and Walker are

in nature; even the Letter of Expectations did not threaten future discipline against Walker. Second, these actions directly affected only a small number of employees, just two in a unit of over 314. Third, these actions affected only a small number of the most visible Local 2010 supporters, just two of the several employees who appeared in the three pieces of Local 2010 literature attached to the Dysart and Walker UPCs. No adverse actions are alleged to have befallen any of the employees who appeared alongside Dysart and Walker. Finally, these allegations of retaliation rely on circumstantial, rather than direct evidence. Specifically, Dysart and Walker allege that they were treated differently after they became visible supporters of Local 2010, and that they were treated differently from those who were not visible supporters of Local 2010. Such differences may raise an inference of unlawful motive sufficient to support a prima facie case of retaliation. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) But for other unit members to draw the conclusion that Dysart and Walker were the victims of retaliation for supporting Local 2010, they would have had to be aware not only of the actions taken against Dysart and Walker, but also of all the surrounding circumstances.

The conduct attributed to the University in this objection falls far short of the type that PERB has found to justify setting aside an election. For instance, in *Clovis Unified School District* (1984) PERB Decision No. 389, PERB sustained objections to an election where the employer demonstrated a preference for another employee organization, threatened a union organizer, and subjected employees to a "captive audience" speech within 24 hours of the election. The Board found it "highly probable that this entire course of conduct interfered with employees' opportunity to exercise their free choice in the election." In this case, by contrast, the conduct alleged includes only minor adverse actions directed at two union supporters, with

"adverse actions" for purposes of establishing retaliation. (See *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

only circumstantial evidence of a retaliatory motive. As a result, Local 2010 has failed to meet its burden of establishing that this conduct affected, or can be presumed to have affected, the election result. Therefore, Objection One is dismissed.

C. Objection Two

In its second objection, Local 2010 claims there were two serious irregularities in PERB's conduct of the election: 1) its failure to provide a ballot to the individual who cast the disputed ballot; and (2) its refusal to count the disputed ballot at the tally of ballots. Local 2010 has failed to provide a factual basis for finding a serious irregularity.

With respect to PERB's "failure" to provide the individual a ballot, no irregularity is alleged on PERB's part. There is no claim that PERB's conduct departed from the terms of the Second CEA or PERB Regulations. The Second CEA required PERB to mail ballots to each of the employees on the University-provided list, subject to updates for voters who notified the University of address changes. There is no claim that PERB failed to do so. Local 2010's claim that PERB was "negligent,"[14] because it turns out that one individual's address was incorrect, is not supported by any facts. Neither the Second CEA nor PERB Regulations required PERB to independently verify the addresses before sending the ballots. (See *Gilroy*, *supra*, PERB Order No. Ad-226.)

Even if an irregularity could be attributed to PERB, it is not serious enough to require setting aside the election result, due to the voter's failure to request a duplicate ballot according to the provisions of the Second CEA. This is precisely the type of error that is appropriately addressed through the duplicate ballot process, not through an election objection. The duplicate ballot procedure is a safeguard to decrease the possibility that voters will be disenfranchised by errors that might occur in the preparation of the list, the preparation of

[14] This claim is actually made in Objection 3, but is addressed here as it relates to PERB's conduct.

ballots, the delivery of mail, or the completion of the ballot. An individual voter's decision to eschew the established election procedures is not grounds for setting aside an election. (See *Regents of the University of California (Lawrence Livermore National Laboratory)* (1994) PERB Decision No. 1038-H [dismissing objection that employee was "denied" a challenged ballot, where evidence established that she called PERB's office on the appropriate day, but did not request a ballot]; *Sahuaro Petroleum & Asphalt Co.* (1992) 306 NLRB 586 [the NLRB will not set aside elections where a determinative number of employees are disenfranchised by circumstances outside the control of the parties or the agency]; *Jat Transportation Corp.* (1961) 131 NLRB 122 [refusing to set aside elections where employees who were inadvertently omitted from the eligible voter list could have, but did not, cast challenged ballots].)

The individual affected by the error in this case did not request a duplicate ballot for the runoff election. Thus, any irregularity attributable to PERB cannot be concluded to have prevented the individual from voting. To the extent Local 2010 suggests that it would have been futile for the individual to request a duplicate ballot, based on his experience in the initial election, that claim is based on mere conjecture, and does not meet Local 2010's prima facie burden of establishing an irregularity. (*Pleasant Valley*, *supra*, PERB Order No. Ad-333.)

With respect to the claimed irregularity in PERB's refusal to count the disputed ballot during the tally of ballots, this objection is duplicative of the issue of whether the disputed ballot is valid. Because the disputed ballot is void, it was not a serious irregularity to refuse to count it.

Local 2010 has failed to establish a serious irregularity in PERB's failure to provide a ballot to the affected individual, or its refusal to count the disputed ballot. As a result, Objection Two is dismissed.

D. Objection Three

Local 2010's final objection is that the University provided an inaccurate home address for the individual who cast the disputed ballot. Local 2010 claims that this compromised Local 2010's ability to contact the individual to confirm his receipt of a ballot, and prevented PERB from sending a properly addressed ballot.

Although Local 2010 does not specify which ground of PERB Regulation 32738(c) applies to this objection, PERB has previously considered a claim that voter-list inaccuracies constituted a serious irregularity. In *State of California* (1982) PERB Decision No. 198, the Board affirmed a hearing officer's dismissal of an objection that the employer provided inaccurate addresses for as many as 99 out of 1,727 voters, an error rate of 5.7 percent.[15] The hearing officer looked to NLRB case law regarding errors in what the NLRB calls the "*Excelsior* list."[16] The hearing officer noted that "the NLRB requires substantial but not perfect compliance," citing cases where the NLRB found substantial compliance despite error rates of up to 13 percent. Ultimately, the hearing officer concluded that the error rate in that case demonstrated substantial compliance, and dismissed the objection.[17]

[15] The hearing officer incorrectly described the error rate as .057 percent.

[16] In *Excelsior Underwear, Inc.* (1966) 156 NLRB 1236, the NLRB held that when a representation election is directed, the employer is required to provide the union with a list of names and home addresses of eligible voters. This rule was approved by the United States Supreme Court in *NLRB v. Wyman-Gordon Co.* (1969) 394 U.S. 759.

[17] Since *State of California, supra*, PERB Decision No. 198, NLRB case law on voter list inaccuracies has continued to develop. In *Woodman's Food Market* (2000) 332 NLRB 503, the NLRB set aside an election where the number of employees omitted from the *Excelsior* list exceeded the vote margin, finding that such a list does not substantially comply with the *Excelsior* rule. This rule is inapposite in this case, which presents an address inaccuracy rather than the omission of an employee's name altogether. (See *Washington Fruit & Produce Co.* (2004) 343 NLRB 1215.)

The error rate in this case is even smaller than in *State of California, supra*, PERB Decision No. 198. Local 2010 claims there was a single incorrect address on a list of 314 voters, an error rate of less than a third of a percent. And Local 2010 does not provide any information establishing that this mistake was due to anything other than inadvertence. In his declaration, the individual states only his current address. He does not state whether the listed address is a former address, and if so, whether he informed the University of his new address. Nor—despite being on notice after the initial election that the University-provided list was incorrect—does the individual claim to have contacted the University to correct his address prior to the runoff election. Thus, it appears that the University substantially complied with the voter list requirement.

Even if the University fell short of substantial compliance, Local 2010 has not shown that this mistake was sufficient to affect the outcome of the election. As discussed above, the individual for whom the University provided an incorrect address did not take the basic step of requesting a duplicate ballot for the runoff election. This likely would have resulted in his receiving a valid ballot.

Local 2010's claim that its ability to contact this individual was "compromised" does not change this analysis. Local 2010 provides no factual information regarding its efforts to contact the individual. It is not even clear from Local 2010's objections whether it was unable to contact the individual, or merely had a more difficult time contacting him. It is noted that Local 2010 had this incorrect information since at least July 23, more than two months before the duplicate ballot deadline for the runoff election. And Local 2010 does not claim that it brought the voter-list inaccuracy to the attention of PERB or the University at any time prior to filing its objections.

In addition, a critical distinction between HEERA and the National Labor Relations Act (NLRA) makes the University's error unlikely to have affected the result of the election. Under the NLRA, non-employee union representatives generally have no right of access to the workplace. (See *NLRB.* v. *The Babcock & Wilcox Company* (1956) 351 U.S. 105.) Ensuring the union's ability to communicate with voters is one of the primary purposes of the *Excelsior* rule. (*Excelsior*, *supra*, 156 NLRB at pp. 1240-1241.) Unlike under the NLRA, employee organizations subject to HEERA, such as Local 2010, have a "presumptive right of access" to employees at their workplaces, as well as to a variety of institutional means of communication. (Gov. Code, § 3568; *Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H; see also *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H ["[T]he access presumption [in section 3568] avoids the wholesale adoption of private sector precedent to public higher education employment relations"].) Because there is no evidence that Local 2010 was prevented from contacting voters through these means of communication, the single voter-list inaccuracy is not grounds for setting aside the election.

Under these circumstances, Local 2010 has not established that the University's error in providing a single inaccurate home address was a serious irregularity that affected the outcome of the election. Objection Three is therefore dismissed.

CONCLUSION

For the foregoing reasons, the disputed ballot is deemed VOID, and Local 2010's objections to the conduct of the election are DISMISSED.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five 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 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, § 32360, subd. (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, § 32370.)

If a timely appeal is filed, any other party may file with the Board an original and five copies of a response to the appeal within ten calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 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, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered, or when deposited in the mail or with a delivery service properly addressed, or when sent by facsimile transmission in accordance with the requirements of California Code of Regulations, title 8, sections 32090 and 32135, subdivision (d).

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, § 32132.)

Joseph Eckhart
Regional Attorney