

October 2, 2019

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Honorable Eric Banks
Honorable Erich Shiners
Honorable Arthur A. Krantz
Honorable Lou Paulson
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

Via Electronic Mail to Kristina.gonzalez@perb.ca.gov

Re: Proposed Regulatory Packages to be Considered on October 10, 2019

Dear Honorable Board Members:

I am writing to provide comments on the proposed regulatory packages being considered by the Public Employment Relations Board (PERB) at its meeting on October 10, 2019. With respect to the E-File regulations, I have no objections to PERB's allowance of electronic signatures for proof of support. However, I have strong objections to 1) allowing an employee organization to submit a list of names without submitting the actual proof of support, and 2) allowing proof of support that lacks an employee's signature. As set forth below, I believe these latter changes do not sufficiently protect employee choice and the integrity of the representation process.

With respect to the continuance regulations, I am in support of substituting the "good cause" standard in lieu of the current "unusual circumstances" standard for continuing a formal hearing. However, I have concerns about introducing yet another standard—"extraordinary circumstances"—and would urge the Board to only utilize only the "good cause" standard. Finally, with respect to the recusal regulations I only iterate some prior comments made to the Board.

I hope you find my comments helpful. I appreciate the Board taking the time to request and consider these comments.

Comments on Revised E-File Regulation

32700. Proof of Support

1. Potential Ambiguity Regarding Local Rules

One of the unique features of the Meyers-Milias-Brown Act is that local agencies have the right to adopt reasonable rules and regulations regarding the recognition of employee organizations. (Gov. Code, § 3507.) Under the current regulations, PERB will generally defer to

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an agency's local rules if it has adopted them. (Cal. Code Regs., tit. 8, §61000.) Specifically, PERB Regulation provides that:

Except as otherwise ordered pursuant to Chapter 1, or as provided for by Public Utilities Code, Division 10, Part 16, Chapter 5 (section 105140 et seq.), the Board will conduct representation proceedings and/or agency fee rescission elections under MMBA in accordance with the applicable provisions of this Chapter only where a public agency has not adopted local rules in accordance with MMBA section 3507.

In proposed PERB Regulation 32700, the Board has added subsection (a)(3) which provides that, "This section governs proof of employee support under all statutes that the Board enforces." One of the statutes enforced by the Board is the MMBA. Further, PERB Regulation 32700 falls under Chapter 1 as referenced by PERB Regulation 61000. Thus, I fear that proposed subsection (a)(3) could be misinterpreted to provide that PERB Regulation 32700 *supersedes* all local rules regarding proof of support. I assume this was not the Board's intent. If so, I would urge the Board to clarify in subsection (a)(3) that there is not an intent to supersede a local agency's adopted rules and regulations. For example, the proposed subsection could be amended to state:

"(3) This section governs proof of employee support **in all representational proceedings conducted by the Board.**~~under all statutes that the Board enforces. ...~~"

2. Concerns Regarding New Forms of Proof of Support

I wish to thank the Board for responding to stakeholder concerns regarding the initial proposed regulations on proof of support. In the revised proposed regulation, the Board has made express reference to the Uniform Electronic Transactions Act as a method to demonstrate proof of support using electronic means. I support this change.

However, I have concerns regarding other changes to the proof of support regulation. First, subsection (d)(4) refers to electronically signed "proofs of support." I believe this reference is intended to refer to the forms of proof of support provided in subsections (d)(1), (d)(2), and (d)(3). If so, to avoid any ambiguity, I propose that this subsection be amended to state:

"A list of employees who are not exclusively represented by an employee organization and who have signed or electronically signed proofs of support **pursuant to subsection (d)(1), (d)(2), or (d)(3)**, or provided a pdf, screenshot, or image demonstrating their signatures on such proofs of support, indicating the employees' desire to be represented by an employee organization...."

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Second, I have strong objections to an employee organization being able to submit a “list” of employees for whom the employee organization purportedly has proof of support without providing the actual proof of support. I understand that in this electronic era, the distinction between an “original” and a “copy” is often blurred or entirely missing. However, I see no reason why an employee organization should not be required to submit the copy, pdf, screenshot, or image of the proof of support. I would have no objection to the submission of such proof of support electronically. This should be a basic requirement to protect employee choice. This is especially true where “card check” applies and there may not be an election. In addition, ensuring the validity of proof of support is all the more critical since the employer is not entitled to view the submitted proof of support.

Third, I have strong objections to subsection (d)(4)(C). As an initial matter, I am somewhat unclear as to the purpose and intent of this subsection. My assumption is that this subsection is meant to apply to a situation, for example, where an employee organization emails a membership form to an employee and the employee emails a response stating, “sign me up!” but does not actually return a signed form. If so, I object to such purported proof of support being allowed under PERB’s Regulations. Given that these regulations will allow—for the first time—electronic signatures I see no reason why an employee shouldn’t be required to “sign” one of the forms of proof of support in subsection (d)(1), (d)(2), and (d)(3). Applying one’s signature to a document is a universally accepted way to express one’s agreement with the document. This is critical to protecting employee choice and is simply not that onerous.

However, instead of requiring a universally accepted “signature,” the proposed regulation opens the door to potentially vague and ambiguous forms of purported support. For example, what if in response to an email containing a membership form the employee responds, “Thanks. Looks great.” Is that enough to constitute proof of support from that employee? The proposed regulation appears to allow an employee organization to list the employee in this example in its proof of support. Indeed, the regulation appears to open the door to even text messages. Imagine an employee organization texting an employee, “Union, yes?” and the employee responds with an emoji, 👍. Would that be considered sufficient proof of support? To protect employee choice such vague expressions of “support” should not be allowed as a substitute for a simple signature.

Even if, *arguendo*, such expressions of support were allowed it would be critical to require the employee organization to submit such purported support to PERB. The examples above illustrate why it is critical for a Board agent to examine all such purported support, and not just a sample. By only requiring a sample and allowing the employee organization discretion to select the sample, this proposed regulation fails to fully and properly protect employee choice and the integrity of the representation process.

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Comments on Proposed Continuance Regulation

§ 32205. Request to Continue a Formal Hearing.

PERB Regulation 32205 currently provides that a continuance of a formal hearing shall only be granted under “unusual circumstances.” The term “unusual circumstances” is not defined and the term does not appear anywhere else in PERB’s Regulations. Moreover, there appear to be almost no PERB cases interpreting the meaning of “unusual circumstances.” Accordingly, I support the Board’s substitution of “good cause”—as set forth in subsection (a) of the proposed regulation—in lieu of “unusual circumstances.” “Good cause” is a term used elsewhere in PERB’s Regulations and is also a term used by the courts. For example, Rule 3.1332 of the California Rules of Court provides that a continuance of a trial should only be granted for “good cause.” That rule provides a list of factors to be considered by a court in considering whether good cause exists.

However, while I support the requirement of “good cause” as used in subsection (a) of the proposed regulation, I am opposed to the introduction of a new standard—“extraordinary circumstances”—in subsection (b) of the proposed regulation. The term “extraordinary circumstances” appears only one other place in PERB’s Regulations, PERB Regulation 32410 regarding requests for reconsideration. But that regulation provides express grounds for requesting reconsideration. Those grounds appear to be inapplicable to a request to continue a formal hearing and the term “extraordinary circumstances” is not otherwise defined. By replacing one undefined term with another, the Board risks introducing unnecessary confusion into its regulatory scheme.

In my opinion, the concept of “good cause” is flexible enough to be the standard under both subsections (a) and (b). Almost by definition, a request for a continuance close to the time of hearing requires more of a showing than a request made earlier. Further, the regulation requires the balancing of any purported good cause against prejudice to the other party. Again, almost by definition a continuance close to the time of hearing will constitute more prejudice to the other party than a request made earlier. Thus, I believe utilizing the standard of “good cause” in subsection (b) will achieve the goals of PERB to avoid unnecessary delay while avoiding confusion by the introduction of a new standard.

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Comments on Revised Recusal Regulation

§ 32155. Recusal

I have no objections to the changes made to proposed PERB Regulation 32155 since June 2019. However, I iterate the concern I raised in my comments submitted on June 4, 2019, that the language of the proposed regulation does not require notice to the parties when a Board member has recused himself or herself from a case. Presumably, the Board could adopt such a practice even absent a requirement in the regulations. Nevertheless, I would prefer language in the regulations expressly requiring notice to the parties.

In conclusion, I hope that the Board will consider my strong objections to parts of proposed Regulation 32700. I believe that the change to allow electronic signatures will address the concerns raised by employee organizations to modernize the proof of support process. I see no need to open the door to “lesser” forms of proof of support, especially where employee choice is potentially threatened.

Again, I want to express my appreciation to the Board and the staff at PERB for the time and effort put into developing these proposed regulatory packages.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Yeung', with a long horizontal flourish extending to the right.

Timothy G. Yeung