STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF STAFF, ADMINISTRATIVE AND FINANCIAL EMPLOYEES, Employee Organization, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Employee Organization, and STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Employer.	)	Case No. S-D-88-S (S-SR-1) PERB Decision No. 532-S October 30, 1985

Appearance; Lemaire & Faunce by Edward L. Faunce for the Association of Staff, Administrative and Financial Employees.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: In the instant case, the Association of Staff, Administrative and Financial Employees (SAFE) appeals the decision dismissing its decertification petition. In accordance with the following discussion, we adopt the attached decision of the Chief, Division of Representation (Chief) of the Public Employment Relations Board (PERB or Board), and find that SAFE's petition was accompanied by an inadequate showing of support.

DISCUSSION

In order for SAFE to have initiated an election to decertify the exclusive representative, the California State Employees' Association (CSEA), SAFE was required to present a 30-percent showing of support.[1] The question here concerns the adequacy of SAFE's 5,945 valid signatures and turns on the size of the established unit.[2] In its decertification petition filed on March 29, 1985, SAFE contended that Unit 1 consisted of 21,000 employees. The State of California (Department of Personnel Administration) (DPA) filed a list of Unit 1 employees with the Board that numbered 23,229 employees.

SAFE's appeal challenges DPA's unit size and is based on the unit placement of permanent-intermittent employees and temporary-intermittent employees. However, as noted by the Chief in her discussion, there is no dispute that both permanent-intermittent employees and temporary-intermittent employees are members of Unit 1. Both groups of intermittent employees are employed in the job classifications listed in

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[1]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32770 requires that a petition for an election to decertify an existing exclusive representative be accompanied by proof that at least 30 percent of the employees in the established unit either no longer desire to be represented by the incumbent exclusive representative or wish to be represented by another employee organization.

[2]Unit Determination for the State of California (1979) PERB Decision No. 110-S established, inter alia, that Unit 1 is comprised of administrative, financial and staff services employees.

that unit by PERB in Unit Determination for the State of California, supra. Names of intermittent employees were included on the eligible voter lists during the initial representation elections conducted in 1981. In addition, the names of intermittent employees have been included on proof-of-support lists and voter lists in runoff elections, agency fee elections and decertification elections conducted in some 13 elections since the initial elections were run. Moreover, the current agreement between CSEA and the employer contains provisions which apply to intermittent employees. Based on these facts, we are hesitant to conclude that the "established unit" referenced in the showing-of-support regulation means something other than Unit 1 composed as it consistently has been since 1981.

SAFE, in the instant appeal, posits two reasons to diverge from the unit configuration established to date. The first is that, by agreement between CSEA and DPA, temporary-intermittent employees will be excluded from the agreement when and if CSEA ratifies a 1985 contract. SAFE cites to Norris-Thermador Corp. (1958) 119 NLRB 1301 [41 LRRM 1283] where the NLRB indicated that, where the parties to a representation proceeding enter into a written and signed agreement which expressly resolves disputes concerning the eligibility of voters, such decisions are considered final eligibility determinations unless contrary to the National Labor Relations Act or National Labor Relations Board policy.

We agree with CSEA's position that Norris-Thermador is inapposite. Unlike the Norris-Thermador case, here the agreement between DPA and CSEA is an effort to modify the unit and, by its terms, is not a stipulation concerning eligibility nor was it executed in the context of a representation proceeding. Moreover, the agreement reached by CSEA and DPA represents a unit modification not submitted for Board approval. That is, the agreement to exclude the temporary-intermittent employees was not submitted pursuant to PERB Regulation 32781 which permits petitions based on a showing that the deleted classifications no longer exist or based on changed circumstances. (See Regulation 32781(b)(1).) Rather, in exchange for withdrawing from Board review unit modification requests, the parties have agreed as to how they will view the unit at some future date, not at the time the petition was submitted. Inasmuch as SAFE is not a party to that agreement, and inasmuch as that agreement has yet to become effective, SAFE's argument that the Board should determine unit size exclusive of all temporary-intermittent employees is unpersuasive.

SAFE's remaining contention is that all permanent-intermittent employees not employed on February 28 should be deleted from the unit.[3] In support of this argument, SAFE relies on NLRB v. New England Lithographic Company

[3]Applying PERB Regulation 32774, February 28 was the last date of the payroll period immediately preceding the date the decertification petition was filed.

(1st Cir. 1978) 589 P.2d 29 [100 LRRM 2001]. In that case, the court was faced with the task of determining the standard for voter eligibility of temporary employees and adopted a "date certain" test.

> Under that test, an employee may be fully aware that his or her employment will be short-lived, but, as long as no definite termination date is known and the employee was employed on the eligibility and election dates, he or she will be eligible to vote.

The stated purpose of the date certain test was to dispense with the difficult task of assessing an employee's reasonable expectation of continued employment. In contrast to the situation in New England Lithographic Company, the employees here are not temporary employees whose expectations of continuing employment are at issue but, rather, they are permanent, albeit intermittent, employees.

Moreover, SAFE misreads the court's test. Borrowing only the "date certain" language, it relies on the court's decision to support its contention that an employee must be employed on a date certain, here February 28, in order to be counted among eligible voters. Correctly read, the court's test affords no such support to SAFE's argument. The "date certain" it references is a definite termination date. It renders an otherwise eligible temporary employee ineligible if he or she has a definite termination date. New England Lithographic is, therefore, inapposite.

ORDER

Based on the foregoing, we AFFIRM the Chief's dismissal of SAFE's decertification petition based on an insufficient showing of support.

Chairperson Hesse and Member Burt joined in this Decision.

STATE OP CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF STAFF, ADMINISTRATIVE AND FINANCIAL EMPLOYEES,	)	
Employee Organization,	)	Case No. S-D-88-S (S-SR-1)
and	)	
CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	DISMISSAL
Employee Organization,	)	August 9, 1985
and	)	
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	
Employer.	)	

BACKGROUND

On May 10, 1985, the Association of Staff, Administrative and Financial Employees (hereafter SAFE or petitioner) was requested to Show Cause as to why its petition for decertification in the above-referenced case should not be dismissed for failure to demonstrate at least 30 percent proof of employee support in the established unit. SAFE'S response to the Show Cause Order was filed with the Public Employment Relations Board (hereafter PERB or Board) on May 23, 1985. On May 24, 1985, the State of California (hereafter state, DPA or Employer) and the California State Employees' Association (hereafter CSEA) were granted an opportunity to file a response to SAFE'S submission. CSEA filed such a response on June 3,

1985. DPA filed no response. On June 12, 1985, SAFE submitted a response to CSEA's response.[1]

DISCUSSION

Effect of the Tentative CSEA-DPA Agreement Regarding Temporary Intermittent Employees

SAFE has provided no new facts or persuasive argument in support of its contention that all temporary intermittent employees should be stricken from the eligibility list used by PERB to verify SAFE'S proof of support by virtue of a tentative meet and confer agreement between CSEA and DPA. SAFE'S reliance on the Norris Thermador case is misplaced. In Norris-Thermador, the NLRB establishes the principle that it will generally honor a binding, signed written agreement of all parties to an election which resolves voter eligibility issues. In the instant case, no such binding signed written agreement exists, and in fact, the issue of voter eligibility cannot even be reached unless it is first established that the decertifying petitioner possesses the support of at least 30 percent of the employees in the unit.

For the reasons outlined in the May 10, 1985 Order To Show Cause (see attached, at pp. 2-5), the tentative CSEA-DPA agreement does not bar inclusion of the names of temporary

[1]See the May 10, 1985 ORDER TO SHOW CAUSE (copy attached and incorporated by reference) for additional background information.

intermittent employees on the February 28, 1985 list provided by the Employer.[2]

Definition of "Employed"

SAFE contends that PERB's request for a list of all persons "employed . . . as of February 28, 1985" should mean, or be limited to, all employees "working" on February 28. More specifically, SAFE contends that an individual, to be included on the list, must be working or must satisfy one of the exemptions specified in PERB's voter eligibility regulation 32728.[3] SAFE cites a number of National Labor Relations Board (NLRB) cases in support of its position. NLRB precedent in this area is multi-faceted and deserves a closer look.

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[2]It should be noted that SAFE erroneously contends, in its May 23, 1985 submission, that an agreement between CSEA and DPA to exclude certain temporary intermittent classes from the bargaining unit has been "accepted by the PERB." PERB has not ruled on any such unit modification request, nor is any such request pending before PERB.

[3]PERB Regulations are codified at Cal. Admin. Code, title 8, section 31001 et seq. Regulation 32728 provides:

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

It is true that several NLRB cases do spell out that an eligible voter must be "employed and working."[4] These rulings, however, were not made in the context of intermittent employment. Instead, they look at such issues as whether a person already hired by the company had begun working at the actual plant or department where employees were voting (General Chemical Works; Airport Shuttle-Cincinnati v. NLRB) or whether an employee who quit the day before the election should be allowed to vote because he received pay in his termination check for two holidays due him (Roy N. Lotspeich Publishing Co.). (NLRB case law regarding intermittent and temporary employees is discussed below.)

SAFE attempts to limit any exceptions to the "working" requirement to categories spelled out in PERB Regulation 32728, but offers no valid support for this argument. Complete voter eligibility requirements are traditionally set forth in an election order, both at PERB and the NLRB.[5] Regulation 32728

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[4]See General Chemical Works, 67 NLRB 174 (1946); Roy N. Lotspeich Publishing Co., 204 NLRB 517 (1973); Airport Shuttle-Cincinnati v. NLRB, 112 LRRM 3169 (1983).

[5]In Lotspeich, supra, the NLRB, quoting Ra-Rich Manufacturing Corporation, 120 NLRB 1444, 1447 (1958), reiterates its principle validating voter eligibility when the voter is "absent for one of the reasons set out in the Direction of Election." PERB Directed Election Orders under SEERA have consistently defined voter eligibility by including the definition that "employed" means on paid or unpaid status as of the cutoff date in question. See, e.g., Directed Election Orders in previous SEERA cases S-OS-50-S, Unit 1; S-D-64-S, Unit 6; S-D-70, Unit 12; S-D-71-S, Unit 10.

does not in any way limit the number or type of voter eligibility provisions which the Board agent can invoke when ordering an election. On the contrary, the regulation prefaces all substance with the proviso "unless otherwise directed by the Board."

In the instant case, no Directed Election Order has been issued, as the validity of the decertification petition has not been established. As stated in the May 10, 1985 Order to Show Cause, however, PERB has consistently applied its voter eligibility standards to proof of support lists as well.

The main issue here, however, is not Board agent discretion under Regulation 32728, for even if a Board agent, were to be limited, as SAFE would have it, to the exact language of 32728, the controversy is not resolved. The validity of PERB's established definition of "employed" as used in that regulation (i.e., "employed" means on paid or unpaid status) remains the central issue.

SAFE contends that its definition of "employed" is consistent with State law. I disagree. Government Code section 18526 defines "employee" as "a person legally holding a position in the State civil service." Government Code section 18522 defines "position" as "any office or employment in the 'state civil service' as the phrase is defined in section 4 of Article VII of the Constitution." Government Code section 18552 defines "intermittent" position or appointment as "a

position or appointment in which the employee is to work periodically or for a fluctuating portion of the full-time work schedule." Section 35l3(c) of the State Employer-Employee Relations Act (SEERA)[6] defines "state employee" as "any civil service employee of the state" and goes on to list exclusions, none of which refer to any employee's time base. Nothing in these definitions leads to a conclusion that a person with a continuing employment relationship with the state is "employed" only on those days s/he performs work for the state.

Consistent with the Government Code definitions of the term "employee," PERB has defined "employed" to mean a person's status vis a vis the State of California (i.e., does the person have a continuing, albeit intermittent, employment relationship with the state or not). PERB therefore requests voter lists and proof of support lists from the employer which require the employer to list every individual who is registered as an "employee" in the job classifications in the unit in question.

PERB, as does the NLRB, possesses a wide degree of discretion in establishing election-related procedures to safeguard the rights of all parties, with the overall goal of effectuating the purpose of SEERA.[7] PERB's definition of

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[6]SEERA is codified at Government Code section 3512 et seq.

[7]See NLRB v. New England Lithographic Co., 100 LRRM 2003 (1978); Government Code sections 3512, 3520.5(b), 3541.3(1) and (n).

employed, as outlined herein and specified in SEERA Directed Election Orders (see footnote 5, infra) is clearly in concert with applicable statutes and precedent.

For the reasons stated herein, and those outlined in the May 10, 1985 Order to Show Cause, pp. 6-8, SAFE'S position that "employed" means actually working or satisfying one of the exceptions in regulation 32728 is rejected.

Temporary Employees

In order to determine whether temporary employees are eligible to vote, the NLRB has established a "date certain" test.[8] Essentially, under this test, temporary employees are disqualified from voting if they have been hired for a set term with a definite termination date.[9] Applying the test, the NLRB has allowed authorization cards and voter eligibility in each case where no actual termination date for the employee had been specified, regardless of employee awareness or other evidence that the term of employment was expected to be short-lived.[10]

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[8]See NLRB v. New England Lithographic Co., supra.

[9]SAFE misconstrues the NLRB "date certain" test. This test does not relate to the establishment date of a proof of support or voter list. SAFE correctly contends that "to be considered in determining the showing of interest, persons must have been employed on a "date certain" and that the "date certain for determining eligibility is February 28,1985." SAFE, however, incorrectly cites NLRB v. New England Lithographic, supra, as support for this concept.

[10]See NLRB v. New England Lithographic Co., supra; Trustee of the Stevens Institute, 222 NLRB No. 13 (1976) ; M.J. Pirolli & Sons, Inc., 194 NLRB No. 37 (1972).

The PERB has not adopted the NLRB approach to temporary employees. On the contrary, PERB has generally included temporary employees in bargaining units with regular employees.[11] Additionally, PERB has never placed special restrictions on temporary employees' voter eligibility.

In the instant case, temporary employees as a group are not at issue. There are, in State service, three time bases for employees: full time, part time and intermittent. In addition, there are three tenure statuses: permanent, limited term (LT) and TAU.[12] Each employee in State service has both a time base and a tenure status.

It is undisputed that full time and part time temporary employees (LT and TAU) are included in Unit 1 and properly included on the proof of support list, provided they were employed as of February 28, 1985. At issue in this case are only such temporary employees who may also be intermittent.

Intermittent Employees

As determined above, to be "employed" by the state on

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[11]See Belmont Elementary School District (12/30/76) PERB Decision No. 7, Grossmont Union High School District (3/9/77) PERB Decision No. 11, Shasta-Tehama-Trinity Joint Community College District (9/22/77) PERB Decision No. 31, Dixie Elementary School District (8/11/81) PERB Decision No. 171, California State University (9/22/81) PERB Decision No. 173, University of California (3/4/83) PERB Decision No. 290-H, University of California (3/23/83) PERB Decision No. 247b-H, Davis Joint Unified School District (12/31/84) PERB Decision No. 474.

[12]LT and TAU are separate types of temporary employment.

February 28, 1985, a person need only have a continuing employment relationship with the state on that date. It is not necessary that s/he performed work for the state on that precise date. Under this determination all intermittent employees (whether permanent or temporary) on the list supplied by the state were "employed" February 28, 1985. The Legislature found sufficient ties between all intermittent employees and the state employer to consider them "employed." This is clear from the broad definition the Legislature gave that term in the Government Code. For PERB to follow suit, deeming the same employees to have an employment tie sufficient to make them eligible for election participation, is not an abuse of discretion. Nonetheless, a review of decisions relating to similarly situated groups of employees is informative.

The NLRB standard for determining voter eligibility of intermittent employees requires that such employees possess a sufficient continuing interest in their conditions of employment. The NLRB has stated that: "Selection of an eligibility formula . . . depends upon a careful balancing of the factors of length, regularity and currency of employment giving due regard to the industry involved." (Daniel Ornamental Iron Co., Inc., 195 NLRB 334 (1972); see also Daniel Construction Company, Inc., 133 NLRB 264 (1961); Artcraft Displays, Inc., 262 NLRB 1233 (1982).) Other state PERB's have

also established "sufficient interest" formulas for election participation of employees with non-regular work schedules (see Dane County (Exposition Center-Memorial Coliseum) (Wisc. 1979), Dec. No. 16946; Philadelphia School District (Pa. 1975) 5 PPER 113.)

The California PERB has decided two cases which involved a voter eligibility determination regarding irregular employees based on "established interest in employment relations with the District." In Palo Alto Unified School District and Jefferson Union High School District (1/9/79) PERB Decision No. 84, the Board placed all substitute teachers in a bargaining unit, but determined that only those substitutes on the current substitute teacher list who had taught at least 10 percent of pupil school days in the current or previous school years would be eligible to vote in the election.

In light of the Board's action in Palo Alto/Jefferson, supra, it might be appropriate to apply in the instant case a similar "established interest" formula. In doing so, care must be taken to develop a standard which is both based firmly on Board precedent and administratively feasible for the very large and multi-operational State of California.

A formula which meets these tests would allow intermittent (both permanent and temporary) employee names to be included on a proof of support list provided such employees had actually been compensated for at least 10 percent of full-time state

employee hours (a total of 208 hours) during the one year period immediately preceding the filing of the petition. The one year period, although less than the time period allowed for substitutes in Palo Alto/Jefferson, is most reasonable because (1) proof of support signatures are only valid for one year prior to the filing of a petition, and (2) State of California computer records of employee hours of compensation are not regularly available for a period of much greater than one year prior to the date requested.

Concluding that application of such a formula might be appropriate, I requested necessary data from the Employer. Applying the above-described formula, the size of the new employer list was 20,973 employees. (The size of the original list was 23,229 employees.) The number of signatures (at least 30 percent) needed by SAFE to qualify its decertification petition would therefore have been 6,292. When SAFE'S proof of support was checked against this new list, however, their number of valid signatures became 5,716.[13]

CONCLUSION

The size of Unit 1 is 23,229 employees as of the date in question: February 28, 1985. PERB regulations provide that at least 30 percent of the employees in the unit must support a

[13]Even checked against the old list of 23,229 names, SAFE only possessed 5,945 valid signatures — still far short of the reduced 30 percent figure of 6,292 names.

decertification petition. The reason for such a requirement is obvious. On the one hand, employees must have the opportunity to remove or replace an exclusive representative. On the other hand, the decertifying petitioner must prove that it has the support of a sufficient percentage of employees in the unit to justify the time and money expended by PERB and other parties on the conduct of an election. The question of the size of the unit is therefore a critical one. No party can be allowed to artificially alter the size of a unit to serve its own purposes.

As described herein, and in the May 10, 1985 Order to Show Cause, the inclusion of all employees employed in classifications included in Unit 1 is fully justified, given applicable state law, and is consistent with past practice under SEERA. In view of the Palo Alto/Jefferson decision and the Board's reliance on NLRB precedent therein, it is arguable that a 10 percent "sufficient interest" formula should be applied to determine intermittent employee eligibility for inclusion in the proof of support concept. Even under that standard, however, SAFE does not meet the 30 percent requirement.

Based on the foregoing, and the entire record in this matter, the decertification petition filed by SAFE is hereby dismissed.

An appeal to this decision pursuant to PERB Regulations 32350 through 32380 may be made within 10 calendar days

following the date of service of this decision by filing a statement of facts upon which the appeal is based with the Board itself at 1031 18th Street, Suite 200, Sacramento, California 95814. Copies of any appeal must be concurrently served upon all other parties and the Sacramento Regional Office. Proof of service pursuant to Regulation 32140 is required.

JANE Janet E. CARAWAY
Chief, Division of Representation

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF STAFF, ADMINISTRATIVE AND FINANCIAL EMPLOYEES. Employee Organization, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION. Employee Organization, and STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION). Employer.	)	Case No. S-D-88-S (S-SR-1) ORDER TO SHOW CAUSE May 10. 1985

The Association of Staff. Administrative and Financial Employees (hereafter SAFE or petitioner) is hereby requested to SHOW CAUSE as to why its petition for decertification in the above-referenced case should not be dismissed for failure to demonstrate at least 30 percent proof of employee support in the established unit.

BACKGROUND

On March 29. 1985. SAFE filed a petition to decertify the California State Employees' Association (hereafter CSEA) in state Unit #1 (Administrative, Financial and Staff Services). SAFE indicated in its petition that the size of Unit #1 was approximately 21.000 employees. On April 18. 1985. the State

of California (hereafter DPA or employer) filed with the Public Employment Relations Board (hereafter PERB) Sacramento Regional Office a list of all persons employed in Unit #1 as of February 28. 1985. The list contained 23,229 names.

On April 26. 1985. SAFE, in a letter to PERB, clarified its position regarding what the composition of Unit #1 should be for the purpose of verifying SAFE'S proof of support. Essentially. SAFE maintains that (1) all "other intermittent" employees (also referred to as temporary intermittent, TAU or limited term employees) should be excluded, and (2) all permanent intermittent personnel who were not actually working on February 28. 1985 should also be excluded. SAFE estimates that each of these two exclusions would eliminate approximately 2.000 people and thus takes the position that the correct unit size for purposes of verifying proof of support is 19.200 employees.

On May 3, 1985. CSEA filed with PERB a list of names and a position statement which indicated that there may be as many as 3.994 additional employee names left off the employer's April 18 list in error.

DISCUSSION

PERB Regulation 32770[1] provides that an employee organization may file a petition to decertify an exclusive

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[1]PERB Regulations are codified at Cal. Admin. Code„

representative in an established unit. This regulation also requires the decertifying petitioner to file proof that at least 30 percent of the employees in the established unit support its petition. It is of initial importance, therefore, to clarify the composition of the established unit.

It is undisputed that both permanent intermittent employees and temporary or "other" intermittent employees are members of Unit #1. These employees are employed in job classifications placed in Unit #1 by the PERB in 1980. (See Unit Determination for the State of California (11/7/79) PERB Decision No. 110-S.) I specifically discussed with the employer the

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title 8, section 31001 et seq. Regulation 32770 provides, in pertinent part:

> 32770. Petition.
>
> (a) A petition for an election to decertify an existing exclusive representative in an established unit may be filed by a group of employees within the unit or an employee organization. The petition shall be filed with the regional office utilizing forms provided by the Board.
>
> (b) The petition shall be accompanied by proof that at least 30 percent of the employees in the established unit either:
>
> (1) No longer desire to be represented by the incumbent exclusive representative; or
>
> (2) Wish to be represented by another employee organization. (Emphasis added.)

inclusion of intermittent employees on the lists of eligible voters in the initial state representation elections held in 1981. In addition to the 1981 voter lists, their names have also been included both on proof of support lists and voter lists in all runoff, agency fee and decertification elections.[2] The current written agreement between CSEA and the employer (term July 1, 1984 through June 30, 1985) contains provisions which apply to intermittent employees.

SAFE argues that CSEA and the employer, on March 4, 1985. jointly agreed to remove certain temporary intermittent personnel from Unit 1, and that therefore the names of these employees should not appear on any list used to determine adequacy of SAFE'S proof of support. What SAFE fails to note, however, in its position statement of April 26, is that this stipulation by CSEA and DPA takes effect when and if CSEA ratifies a 1985 contractual agreement negotiated between the employer and CSEA. No such agreement is yet in existence.

On March 29. 1985, the date of the filing of SAFE'S petition, the intermittent employees in question were all

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[2]Subsequent to the 20 initial elections. PERB has conducted the following elections covering state employees:

3 runoff elections in units 6. 18 and 19

2 decertification elections in units 6 and 10

8 agency fee elections in units 1. 4. 10 (2), 11. 16. 19 and 20

included in the established Unit #1. PERB regulations clearly require that any decertification petition must be filed for the established unit and that proof of support for any such petition must comprise at least 30 percent of the established unit. PERB had no choice but to request the employer to include the names of these intermittent employees on the February 28 list of Unit #1 employees used to check SAFE'S proof of support. Assuming that SAFE is correct in estimating the number of these employees at 2.000. the addition of their names increases SAFE'S unit size estimate from 19.200 to 21,200.[3] SAFE does not have a sufficient number of valid proof of support signatures to comprise at least 30 percent of a unit of 21.200 employees.[4]

SAFE also takes issue, in regard to the permanent intermittent employees, with the basis on which the employer chose to place names on its proof of support list of employees submitted to PERB on April 18.

PERB Regulation 32774 provides, in pertinent part:

> (a) Within 20 days of the date the decertification petition is filed with the

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[3]PERB. at this writing, does not possess information as to the exact number of employees in the classifications in question.

[4]At least 30 percent of a unit of 21.200 employees equals 6,360 valid signatures.

> regional office, the employer shall file with the regional office an alphabetical list, including job titles or classifications, of employees in the established unit as of the last date of the payroll period immediately preceding the date the decertification petition was filed, unless otherwise directed by the Board.

Based on this regulation, the PERB Sacramento Regional Office requested that DPA "[f]ile with this office . • . a list of names of all persons employed in the unit in question as of February 28, 1985." (Emphasis in original.)

SAFE argues that "employed . . . as of February 28. 1985" means "working" on that date and estimates that the list, which includes all permanent intermittent employees of the state, therefore contains approximately 2.000 names which should be deleted because these employees did not work February 28. 1985. SAFE offers no basis for its figure of 2,000 names.

The definition of "employed" has never meant "working" in PERB's entire history of representation case handling under the State Employer Employee Relations Act (SEERA).[5] Not only has this definition not been limited to "working," it has included employees not working who were on both paid and unpaid status.

PERB Regulation 32728 provides:

> Voter Eligibility. Unless otherwise directed by the Board, to be eligible to vote in an election, employees must be employed in the voting unit as of the cutoff

[5]SEERA is codified at Government Code section 3512 et seq.

> date for voter eligibility, and still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off. and employees who are in the military service of the United States shall be eligible to vote. Mailed ballots may be utilized to maximize the opportunity of such voters to cast their ballots.

PERB has consistently applied these voter eligibility standards to lists it has requested from employers in order to verify proof of support.

Under SEERA, from the initial proof of support lists and voter lists requested by PERB in advance of the 1981 elections through each subsequent list utilized in conjunction with runoff elections, decertification elections and agency fee elections, "employed" has included all employees employed in classifications contained in the unit in question.[6] "Employed" has consistently defined a person's status vis a vis the State of California (i.e. an employee v. not an employee), rather than distinguishing whether or not the individual was

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[6]See. for example. September 1981 Notice of Runoff Elections, which provided:

> All civil service employees of the state who are employed in the job classifications listed on this Notice as INCLUDED in Unit 6. Unit 18 or unit 19 are eligible to vote in the runoff election. . . .

The Notice goes on to enumerate the specific exceptions, among which are the various statutory exclusions and conditions relating to persons holding more than one appointment. The Notice also spells out the conditions of PERB Regulation 32728. cited above.

actually working, was on paid status but not working or was on unpaid status as of the date in question.[7] Thus, an employee included on a PERB-requested proof of support or voter list might have been at work on a particular cutoff day. or might have been on paid vacation or sick leave, or might have been on various sorts of unpaid status (e.g. maternity leave, medical leave, intermittent status-currently not working, etc.).

Specifically with regard to intermittent employees, then, the consistent past practice under SEERA has been to include all such employee names on any proof of support list or voter list provided by the state employer to PERB. The employer therefore acted correctly in including the names of all intermittent employees on the proof of support list requested by PERB in the instant case. This practice is a sound one and is based solidly on PERB regulations and past practice under other statutes.[8] No adequate justification for deviation from this practice in the instant case has been presented.

Let us assume for the sake of argument, however, that PERB were to look at intermittent employees as a group in this case.

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[7]See Directed Election Orders in previous SEERA cases (e.g.. S-OS-5O-S. Unit 1; S-D-70-S. Unit 12: S-D-71-S. Unit 10) a l of which specify that "employed" means on paid or unpaid status as of the cutoff date in question.

[8]PERB also administers the Educational Employment Relations Act (EERA), codified at Government Code section 3540 et seq.: and the Higher Education Employer Employee Relations Act (HEERA), codified at Government Code section 3560 et seq.

setting up and applying criteria to determine which of these employees demonstrated an established interest in employment relations with the State of California.[9] Perhaps we would conclude that all intermittent employees who had not worked at least several days in either the last year or each of the last two years immediately preceding the filing of the petition do not show this established interest and should therefore not be included on a list used to verify proof of support. Perhaps we would decide upon even more stringent requirements. Certainly, however. PERB would not conclude so narrowly as to find that any intermittent employee who had not worked in February 1985. regardless of his or her work history and expectancy of future work, should be excluded from the list.

It is helpful that DPA has provided PERB with the information PERB would need if all intermittent employees who did not work in February 1985. were to be eliminated from the list. As of February 28. 1985 there were 2,872 permanent

[9]The National Labor Relations Board has distinguished eligibility to vote in a representation election from membership in a particular unit based on a determination as to which employees possess a sufficient continuing interest in working conditions to entitle them to vote. (See Daniel Construction Co. Inc. (1961) 133 NLRB 264. 48 LRRM 1636. in which all employees who worked in the qualifying payroll period plus those who worked 30 days within the last 12 months or 45 days within 24 months including some within the last 12 months were eligible to vote; Juliard School (1974) 208 NLRB 153, 85 LRRM 1129, in which all stagehands who worked at least five days in a two year period were eligible to vote.

intermittent and 2,057 other intermittent employees employed by the State of California in job classifications included in Unit 1. Of these. 956 permanent intermittent and 782 other intermittent employees (total 1738) did not work in February 1985. If the names of all 1738 were to be subtracted from the proof of support list, the size of the list would be reduced to 21,491 names. SAFE does not have a sufficient number of valid proof of support signatures to comprise at least 30 percent of these 21,491 names.[10]

Because SAFE'S proof of support falls short even when an unrealistically narrow standard which eliminates large numbers of intermittent employees from the list is applied, there appears to be no need in this case to reach the issue of whether some intermittent employees should be eliminated due to their lack of an established interest in their employment relations with the State of California. Because of the facts of this case, it also appears unnecessary to reach the unit composition issues raised by CSEA.

In light of the above. SAFE is directed to SHOW CAUSE as to why its petition for decertification should not be dismissed. Factual assertions by SAFE must be supported by declarations under penalty by perjury, by witnesses with personal knowledge of the facts asserted therein. All declarations submitted

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[10]At least 30 percent of this "unit" of 21,491 employees equals 6448 valid signatures.

should include facts showing the basis of the witness's personal knowledge, and should indicate that the witness, if called to testify, could competently testify about the acts asserted. If the facts asserted are reliant on a writing, a copy of the writing must be attached to the declaration and authenticated therein. SAFE'S statement and supporting materials must be filed with PERB's Sacramento Regional Office 1031 18th Street, Suite 102, Sacramento, California 95814, no later than Friday, May 24, 1985. Service and proof of service on all parties pursuant to PERB Regulation 32140 are required.

By: _____
JANET E. CARAWAY
Chief, Division of Representation