STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PROTECTIVE SERVICE OFFICERS ASSOCIATION, Petitioner, and REGENTS OF THE UNIVERSITY OF CALIFORNIA (LAWRENCE LIVERMORE NATIONAL LABORATORY), Employer.	)	Case No. SF-OB-6-H (SF-R-724-H) PERB Decision No. 1038-H March 4, 1994

Appearances; Law Offices of Daniel Ray Bacon by Daniel Ray Bacon, Attorney, for Protective Service Officers Association; Hanson, Bridgett, Marcus, Vlahos & Rudy by Jerrold C. Schaefer, Attorney, for Regents of the University of California (Lawrence Livermore National Laboratory).

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Regents of the University of California (University) to a proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ found that the election objections raised by the University were insufficient to void the election for exclusive representation of Protective Service Officers (PSOs) employed by the University at its Lawrence Livermore National Laboratory. The election was won by the Protective Service Officers Association (Association) by one vote over no representation.

The Board has reviewed the entire record, and finds the ALJ's findings of fact and conclusions of law to be free of

prejudicial error and therefore adopts them as the decision of the Board itself. However, the Board responds to the University's exceptions as set forth below.

UNIVERSITY'S EXCEPTIONS

On appeal to the Board, the University puts forth essentially the same arguments that were raised during the formal hearing. First and foremost, the University argues that the ALJ's proposed decision is undermined by the inability of the ALJ to consider testimony from PERB Regional Director Anita Martinez (Martinez). The University argues that Martinez's testimony was necessary as she had first hand accounts of allegedly improper comments made by the Association's representative to voters during the voting. Further, the University states that Martinez's testimony was required to provide an explanation as to how the Board handles requests for challenged ballots which were at issue in this case.

The University also contends that the electioneering by the Association's representative during the balloting constituted objectionable conduct and last minute electioneering as proscribed in the National Labor Relations Board case of Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395]. Further, it is also argued that Protective Service Officer Christine Ramirez (Ramirez), who had called the PERB Regional office on the date prescribed for obtaining a ballot, was denied one, thus, potentially altering the outcome of the election. Finally, the University alleges that the ALJ incorrectly concluded that a

protective service officer did not seem to harbor any fear or concern about a death threat made against him or that he was coerced in any way as to how to vote.

DISCUSSION

PERB Regulation 32738[1] sets out two grounds for objections to the conduct of an election: (1) The conduct complained of interfered with employee's right to freely choose a representative; or (2) serious irregularity in the conduct of the election.

The Board has found in the past that for an election objection to be sustained, some effect on the election result should either be shown or logically inferred. (Tamalpais Union High School District (1976) EERB Decision No. I.[2]) The Board has also found that the demonstration of unlawful conduct in the election environment is but "a threshold question." (State of California (Department of Personnel Administration, et al.) (1986) PERB Decision No. 601-S.) Thus, it is not in every situation where unlawful conduct has been demonstrated that the election will be rerun. Rather, the basic question is whether the various unlawful activities establish a "probable impact on the employee's vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.)

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[1]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2]Prior to January 2, 1978, PERB was known as the Educational Employment Relations Board (EERB).

In reviewing election objections, the Board will look "upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (Clovis Unified School District (1984) PERB Decision No. 389.)

Denial of Witness Testimony

The University asserts that its case was harmed when in a previous determination the Board denied the University's request to have Martinez testify. The Board's denial was issued in a letter from Deputy General Counsel Bob Thompson to the University dated July 14, 1993 (attached hereto). At the time of denial, the Board carefully evaluated the University's argument for Martinez to appear at the hearing. However, after this review, the Board concluded that the University had failed to meet the standard of PERB Regulation 32150(e).[3] The Board stands by its initial determination that the University failed to meet its burden of proof to demonstrate that the appearance of Martinez was essential to the resolution of this case and that no rational decision could be reached without such testimony.

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[3]PERB Regulation 32150 states, in pertinent part:

> (e) Upon a finding of the Board itself that a Board agent is essential to the resolution of a case and that no rational decision of the Board can be reached without such agent, the Board itself shall produce the agent if subpoenaed to do so by any party to the dispute.

On-Site Electioneering

As to the election objection concerning the remarks made by the Association's representative, the Board finds the ALJ correctly concluded that the comments made could not be viewed as an attempt to sway voters nor encourage them to find other protective service officers to vote. Only three statements were made. All were brief and occurred with no other voters around. The conduct in this case does not rise to a level of demonstrating serious irregularity. (See Jefferson, supra.)

In the case cited by the University, Milchem. supra, an officer of a union stood for several minutes where employees were waiting in line to vote. The officer engaged several employees in conversation. However, the facts presented in this case do not rise to the level of Milchem. supra. Here, there is no dispute that no other voters were present at the time of each remark and the statements were extremely short. Further, some of the brief comments were not even initiated by the Association's representative. Clearly, this is a situation where remarks made were by "chance, isolated, innocuous comments" and therefore, will not void an election. (Milchem. supra.)

Challenged Ballots

Concerning the University's claim that Ramirez was improperly denied a challenged ballot, the University's argument must be rejected. Officer Ramirez testified that on the day prescribed to obtain a ballot she called the Regional Attorney, who was out of the office. Ramirez testified that she left a

message to have her call returned, but did not specifically ask for a ballot. Further, Ramirez also testified that she had the opportunity of voting in person but decided on her own volition not to do so. The University's argument that it would not have accepted into the count, the five challenged ballots if it was known that Ramirez had not voted, is without foundation. The University has failed to provided any evidence to support such an argument. This exception is rejected.

Threats

Finally, relative to the threats made to Officer Casimer Szyper (Szyper), the ALJ concluded that neither party appeared to be coerced or intimidated based upon the testimony and demeanor of the witnesses during the hearing on this issue.

While the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented, it will afford deference to the ALJ's findings of fact which incorporate credibility determinations. (Santa Clara Unified School District (1979) PERB Decision No. 104; Los Angeles Unified School District (Villar) (1988) PERB Decision No. 659.) Here, it does not appear that the threats had their intended effect. Officer Szyper voted in the election and further, the record is sufficient to support the ALJ's findings that Szyper and a fellow officer appeared neither to be coerced nor threatened to vote in a manner contrary to their own choice.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Board ORDERS that the election objections in Case No. SF-OB-6-H (SF-R-724-H) be DISMISSED. The Board further ORDERS that the San Francisco Regional Director certify the results of the election tallied on May 27, 1993 and take all other action necessary to carry out this Decision.

Chair Blair and Member Garcia joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PROTECTIVE SERVICE OFFICERS' ASSOCIATION, Petitioner, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (LAWRENCE LIVERMORE NATIONAL LABORATORY), Employer.	)	Representation Case No. SF-R-724-H PROPOSED DECISION (8/27/93)

Appearances: Law Offices of Daniel Ray Bacon, by Daniel Ray Bacon, Attorney, for the Protective Service Officers' Association; Hanson, Bridgett, Marcus, Vlahos & Rudy, by Jerrold C. Schaefer, Attorney, for The Regents of the University of California (Lawrence Livermore National Laboratory); Donn Ginoza, Regional Attorney, for the Public Employment Relations Board.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The Regents of the University of California (University) seeks to set aside an election for exclusive representation won by the Protective Service Officers' Association (PSOA) in a bargaining unit consisting of Protective Service Officers employed by the University at its Lawrence Livermore National Laboratory (LLNL).

The election was conducted on May 27, 1993, by a combination of mail ballot and on-site voting. Ballots were counted on that date. The tally of ballots produced the following result:

Void ballots	1
Votes for PSOA	74
Votes for no Representation	73
Valid votes counted	147
Challenged ballots	0

In objections to the election, filed on June 7, 1993, the University contends that: (1) serious irregularities occurred in the conduct of the election; and (2) pre-election conduct interfered with employee exercise of free choice.

A formal hearing was conducted by the undersigned in San Francisco, California on July 15, 1993. With the receipt of briefs on August 19, 1993, the case was submitted.

FINDINGS OF FACT

Objection No. 1: On-site Electioneering

The election was conducted on May 27, 1993, at two polling locations: Lawrence Livermore National Laboratory and Site 300. Polling hours for both locations were from 7:30 a.m. to 9:30 a.m. and from 2:30 p.m. to 4:00 p.m. This objection involves conduct at the LLNL site during the morning and afternoon on May 27.[1]

The University's observer at the LLNL site was Bruce Gallegos (Gallegos), a Protective Service Officer. The PSOA observer was Richard Bochover (Bochover), also a Protective Service Officer, and president of PSOA. The voting at this site was supervised by PERB Regional Director Anita Martinez (Martinez).

On the morning of May 27, prior to the opening of the poll, Martinez, Bochover and Gallegos met to discuss observer responsibilities and conduct during the voting. Martinez instructed both observers that they were free to exchange cordialities with voters, but they were not free to answer

[1]Unless otherwise stated, all dates refer to 1993.

questions about the voting or otherwise assist voters. All questions and requests for assistance were to be directed to Martinez. Also, a written copy of election observer responsibilities was provided to Bochover and Gallegos at the election table at the beginning of the voting.

The election was conducted in an auditorium. Both observers sat at a table located at centerstage, while Martinez usually stood at the right side of the stage. Voters entered through a doorway, walked down an aisle on the right side of the auditorium to the stage, identified themselves to Martinez, and received a ballot from her. Observers confirmed the identification of voters, and checked off voter names on the voter eligibility list. Voters then proceeded to the left side of the stage, where the voting booth was located. After casting their ballots, some voters exited via the aisle on the left side of the auditorium, while others retraced their steps across the front of the stage and exited via the aisle on the right side of the auditorium.

During the morning session, according to Gallegos, a voter asked Bochover "how the vote was going?" Bochover responded "so far so good." Martinez immediately instructed Bochover not to respond to voters. Gallegos could not recall the name of the voter who asked the question. There were no other voters present when this exchange occurred. Although Bochover denied making this particular statement, he admitted that Martinez admonished him on three occasions during the course of the voting for

similar statements. Hence, Gallegos testimony on this point is credited.

Midway through the afternoon session, Gallegos testified, a voter asked Bochover if a particular voter had "showed up" and Bochover responded "I haven't seen him yet." Gallegos could not recall the name of the person who asked the question. Bochover, on the other hand, testified that he could not recall being asked the question by a voter, but he said it could have happened. In any event, Martinez again instructed Bochover not to respond to voters. There were no other voters present when this exchange occurred.

Near the end of the afternoon session, according to Gallegos, Bochover said to a voter "go get them." The voter did not reply. Once again, Gallegos could not recall the name of the voter. In response, Bochover testified that he may have said "go get 'em" or words to that effect, because it is a phrase he frequently uses. However, he said he meant it as a "pleasantry." After this comment, Martinez said to Bochover "I warned you about that."

Bochover admitted that, in total, he was warned by Martinez on three occasions during the course of the voting. However, Martinez also admonished Gallegos on two occasions for similar comments to voters.

Objection No. 2: Election Irregularities

On March 19, the parties executed a consent election agreement which provided for both on site and mail ballot voting.

Pursuant to that agreement, James Cain (Cain), staff relations representative for the LLNL, on April 23 sent a list of eligible voters to PERB. The list included a separate list of employees who were eligible to vote by mail ballot. These employees are: Bonnie Alarcon, Deborah Harris, and David Geer (Geer).

The mail ballot provision of the consent election agreement states:

> Mailed Ballots: All protective service officers who are on scheduled vacation, official Laboratory business off-site, or on disability or extended sick leave will receive mailed ballots. Ballots will be mailed by PERB to the home address of each eligible voter on May 10, 1993. Voters will be informed by the Notices of Election that, if they have not received a ballot by May 17, 1993, they may contact PERB in San Francisco at (415) 557-1350 and request a duplicate ballot. Collect calls will be accepted.
>
> Requests for duplicate ballots will be accepted by PERB on May 17, 1993 ONLY between the hours of 8:30 a.m. and 4:30 p.m. PERB will accept requests for ballots only from the employee him/herself.
>
> Any employee who contacts PERB and requests a ballot will be issued a duplicate ballot if the employee's name can be found on the list of Mailed ballot eligible voters. If the employee's name is not found, 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 voter 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 issued to a voter.
>
> Ballots must be received not later than 3:00 p.m. on May 26. 1993 in order to be counted. (Emphasis in original.)

Cain's understanding, based on discussions at the March 19 meeting, was that no exceptions would be made to permit voters not on the official mail ballot list to cast a mail ballot.

According to PERB records, on May 17 Geer requested and received a duplicate mail ballot, which he cast in the election. In addition, PERB records indicate, Michael Stephan (Stephan), who was not on the list of voters eligible to cast a mail ballot, on May 17 requested and received a challenged ballot. Stephan cast a challenged ballot in the election.[2] Stephan was not on the mail ballot list because Cain was not informed that he would be on vacation.

Protective Service Officer Christine Ramirez (Ramirez) was eligible to vote in the election. She was not on the mail ballot list because Cain was not informed that she would be on leave.

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[2]Cain testified that on or about May 4 he called Martinez to determine if officers on emergency assignment to Los Angeles (to provide security after the verdict in the Rodney King trial) could vote by mail ballot. Martinez informed Cain that there were no exceptions, and only those on the mail ballot list would be permitted to cast a ballot by mail. Asked on direct examination if any officers were sent to Los Angeles during the election, Cain responded "to the best of my knowledge, there were, but I don't know how many." On cross examination, however, Cain admitted that he did not know if any officers were sent to Los Angeles, even though that information was available to him. Based on this testimony, I conclude that no officers were denied the opportunity to vote because they were in Los Angeles at the time of the election. If any officers were denied the opportunity to vote because they were on emergency assignment in Los Angeles, the University had the burden of producing evidence to support this claim. It has not done so. Therefore, even assuming that Martinez' comment to Cain that no exceptions would be made for officers in this status constituted an election irregularity, it had no impact on the election.

Ramirez was on sick leave from April 30 to June 14 and from June 21 to June 24. She had surgery on May 3.

After the mail ballot list was submitted to PERB, but prior to the election, Bochover said he discussed Ramirez' situation with Martinez. He felt Ramirez' leave status should have been known and thus she should have been placed on the list of employees eligible to cast a mail ballot. However, Martinez responded that no exceptions would be made for Ramirez. Bochover then contacted Ramirez and explained to her that, pursuant to the consent election agreement, she was required to call the PERB office on May 17 to request a challenged ballot. Otherwise, she would have to vote in person.

In May, Ramirez placed two calls to Anita Martinez at the PERB Regional Office in San Francisco. The first call was on May 17.[3] In response to questions by University counsel on direct examination, Ramirez testified that she called the PERB office to "see what the motions were to go through to obtain a ballot." Also on direct examination, she testified that she told a PERB secretary she was calling "about an absentee ballot." However, on cross-examination, Ramirez was asked if she asked specifically for a ballot and she responded "I just asked for her (Martinez)". Upon learning that Martinez was not available, Ramirez left her residence telephone number.

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[3]On direct examination, Ramirez testified that she could not remember when she placed the call to PERB. On cross-examination, however, counsel for PSOA introduced a copy of Ramirez' home telephone records indicating that she called PERB on May 17 at 1:16 p.m.

Martinez returned Ramirez' call during the afternoon of May 17 and left a message on an answering machine. Ramirez described the message as follows: ". . .if I'd like to get hold of her, get hold of her before five o'clock that day." Ramirez had left her residence for a medical appointment and did not receive the message until about 6:30 p.m.

On May 25, Ramirez placed a second call to Martinez. During this call, Ramirez testified, she expressly asked Martinez for a mail ballot. Martinez informed Ramirez that she could not vote by mail ballot, and the only way to cast a vote in the election was to do so at one of the two sites.

After talking to Martinez on May 25, Ramirez testified that it was her choice not to vote: "I didn't have any intentions on voting because there were so many different things going in my life at that time."

The election was conducted two days later, on May 27. After voting ended but prior to the official tally of ballots, Martinez explained to the respective parties (Cain and Bochover) that there were five challenged ballots. She explained the circumstances surrounding each ballot. With respect to Stephan, Martinez told Bochover and Cain that, in her view, he (Stephan) was on an approved vacation and his ballot should not have been challenged.

Both parties were given the opportunity to challenge any or all of the challenged ballots but neither party raised any challenge. Both parties agreed to count the five challenged

ballots. One of the these was the challenged ballot cast by Michael Stephan.

Objection No. 3: The Death Threat

At about 5:30 a.m. on May 26, the day before the election, Casimer Szyper (Szyper), a Protective Service Officer eligible to vote in the election, distributed a flyer to Protective Service Officers. The flyer urged a vote against PSOA. Later that day, Szyper and Protective Service Officer Paul Waschkowsky (Waschkowsky) were on duty at the East Gate when two telephone calls were received.

Waschkowsky received the first call at approximately 1:00 a.m. Answering for Szyper, Waschkowsky testified, "I picked the phone up answered the phone and said Szyper. . . . And there was no answer back. And I said Szyper. And then the person on the opposite end of the phone said, 'fuck you,' and hung up."[4] Waschkowsky then relayed the message to Szyper, who "just kind of shrugged and didn't know what to say." Waschkowsky said the voice sounded like a male who was trying to disguise his voice. Waschkowsky could not identify the voice of the caller.

Telephone calls which originate outside the LLNL ring twice in rapid succession. Telephone calls which originate within the LLNL have a normal ringing pattern. The call received by Waschkowsky had the normal ringing pattern and thus originated from within the LLNL.

[4]Szyper's testimony is slightly different. He said Waschkowsky, upon answering the phone, turned to him (Szyper) and said someone had told him (Waschkowsky) to "fuck off."

Approximately thirty minutes later, Szyper received a second telephone call from within the LLNL. Upon answering, Szyper testified, he heard a voice say "vote yes or die," then the caller hung up. Szyper immediately told Waschkowsky, "dude, someone threatened my life." Waschkowsky's response was that the caller was "pretty stupid." Waschkowsky was not threatened by the call, he said, because it was not directed at him.

Szyper was not able to identify the voice of the caller, although he assumed it was from a PSOA supporter. He testified the caller sounded like a male who was trying to disguise his voice.

Later that day, Waschkowsky reported the call received by Szyper to Sergeant Vincent Curran, a supervisory Protective Service Officer.

DISCUSSION

Introduction

PERB regulations set out two grounds for objections to the conduct of an election:[5]

> 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.

It is well established that for election objections to be sustained, some effect on the election result either be shown or logically inferred.

[5]See California Code of Regulations, title 8, section 32738.

> In the absence of evidence that voters were discouraged from voting, we would sustain . . . objections only on [a] finding that those events had the natural and probable effect of discouraging voter participation in the representation election.[6]

In subsequent cases, the Board has held that even the demonstration of unlawful conduct in the election environment is but "a threshold question." (State of California (Department of Personnel Administration et al.) (1986) PERB Decision No. 601-S.) The Board will not in every situation where unlawful conduct has been demonstrated, order that the election be rerun. The basic question is whether the various unlawful activities establish a "probable impact on the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.)

In deciding whether to set aside the election result, the Board will look "upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (Clovis Unified School District (1984) PERB Decision No. 389.)

It is against these standards that LLNL's contentions must be tested.

On-site Electioneering

The University's objections in this area boil down to three isolated comments made by Bochover to unidentified voters at the polling place. Asked "how the vote was going," Bochover

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Tamalpais Union High School District (1976) EERB Decision No. 1. Prior to 1978, the Public Employment Relations Board was known as the Educational Employment Relations Board.

responded "so far so good." Asked if a particular voter had "showed up," Bochover responded "I haven't seen him yet." Near the end of the afternoon session, Bochover said to a voter "go get them" or "go get 'em." Under PERB case law, these comments, standing alone or viewed in their totality, do not represent the kind of conduct sufficient to set aside an election. Two cases are particularly instructive here.

In Tamalpais Union High School District, supra, the losing employee organization objected to poll monitoring by the rival employee organization. In Tamalpais, contrary to PERB's pre-election directions prohibiting poll monitoring, representatives of an employee organization sat in chairs adjacent to the polling place and monitored the vote. Despite being admonished by a PERB election officer, these union representatives did not cease their conduct. They simply continued monitoring voters from other locations near the polling place. The Board concluded that this conduct did not have the "natural and probable effect of discouraging voter participation in the representation election." (Tamalpais Union High School District, supra, p. 9.)

In Jefferson Elementary School District, supra, the Board rejected two objections concerning conduct similar to Bochover's comments here. First, despite a pre-election agreement prohibiting campaigning within 25 feet of the polling area, a union member, upon entering the voting area, said "here's five more votes for AFT." The comment was heard by the rival union's election observer. The Board concluded that these comments, in

themselves, were not of such a nature as to persuade potential voters how they should cast their ballot. Second, the association objected to two federation representatives escorting approximately four voters through the 25 foot area adjacent to the voting booths where campaigning was off limits pursuant to the pre-election agreement. The federation representatives addressed voters as they walked. The Board concluded that any comments made during the time it took to walk the 25 feet involved "chance and innocuous encounters" and, as such, did not rise to the type of conduct meriting disruption of the election results. (Jefferson Elementary School District, supra, pp. 8-9.)

Viewed objectively, the comments made by Bochover in this case are far less objectionable than the conduct in Jefferson and Tamalpais. Made in the absence of other voters, they were truly chance and innocuous comments, extremely brief, and plainly not designed to influence voters. The comment made during the morning session was not initiated by Bochover, but rather was made only in response to a harmless question ("how's the vote going?") put to him by another voter. The response ("so far so good") was equally bland. Since the vote was by secret ballot, Bochover's response under objective standards could not possibly have been construed as anything more than an observation that the election was proceeding in accordance with PERB procedures.

The comments made during the afternoon session were similarly unremarkable. Once again, a voter, not Bochover, initiated the first exchange. Bochover merely responded that he

had not yet seen a particular voter. This isolated response cannot reasonably be construed as an attempt to monitor voting, nor is it otherwise objectionable. Finally, the "go get them" comment made near the end of the afternoon carries no direct or indirect message designed to influence employee choice. Having viewed Bochover on the witness stand, I conclude that he said either "go get them" or "go get 'em," but it was an off the cuff comment meant as a mere pleasantry and plainly not an exhortation to vote for PSOA.

While the Board observed in Jefferson Elementary School District, supra, p. 7-8 that "prolonged" last minute electioneering is antithetical to free and untrammeled election choice, it also pointed out that, absent a showing of serious irregularity, the results of an election should not be lightly disturbed. The Board noted that evaluation of last minute electioneering claims must be "informed by a sense of realism." (Id.; See also Michem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395].) Following this approach, it cannot realistically be concluded that the election day comments made by Bochover were the kind of prolonged conversations with waiting voters which would have the natural and probable effect of discouraging employee free choice.

Mail Ballot Election Irregularities

This objection involves primarily the issuing of a mail ballot to Stephan and the refusal to issue a mail ballot to Ramirez. To address this objection, the conduct of these employees and the requirements set forth in the consent-election

agreement are of paramount importance, for it is well established that "the parties to a validly approved consent-election agreement are bound by its terms." (See Tamalpais Union High School District, supra, p. 4; Gilroy Unified School District (1991) PERB Order No. Ad-226.)

In this case, the consent election agreement provided, in relevant part,

> Any employee who contacts PERB and requests a ballot will be issued a duplicate ballot if the employee's name can be found on the list of Mailed ballot eligible voters. If the employee's name is not found, the employee will be issued a challenged ballot.

In addition, the election agreement provided that requests would only be received on May 17 between the hours of 8:30 a.m. and 4:30 p.m., and only requests by employees would be accepted. Hence, under standard election practice and the express terms of the agreement, the burden to secure a mail ballot is placed squarely on the shoulders of individual employees to make the appropriate request in a timely manner.

Of crucial importance here is the plain language of the agreement which provides that "any" employee was free to request a ballot on May 17. If the requestor's name was on the list of voters eligible to vote by mail, that employee would receive a duplicate ballot. If the requestor's name was not on the mail ballot list, the agreement provided that the employee would be issued a challenged ballot. Thus, under this consent agreement, neither Ramirez nor Stephan was precluded from requesting a ballot on May 17, even though they were not on the mail ballot

list submitted to PERB by Cain on April 23. The remaining question is whether these employees made an appropriate request on that date.

It is clear that Ramirez called the PERB office on May 17 at 1:16 p.m. Whether she met her burden of actually requesting a ballot is less clear. On direct examination she said she called the PERB office to "see what the motions were to go through to obtain a ballot." She also said she told a PERB secretary that she was calling "about an absentee ballot." This testimony is not a model of clarity for purposes of determining whether Ramirez actually requested a ballot. A call to "see what the motions were to go through" to obtain a ballot or a call "about" an absentee ballot is not precisely the same as a call which expressly requests a ballot, as required by the terms of the agreement. Thus, I find her testimony on direct examination is less than convincing and falls short of establishing that she actually requested a mail ballot. Any ambiguity in her direct testimony is dispelled, however, when her testimony on cross-examination is examined. When pressed on cross examination if she specifically asked for a ballot, she frankly admitted that "I just asked for her (Martinez)." Martinez returned Ramirez' call in a timely fashion during the afternoon of May 17 and informed her that she needed to contact the PERB office by 5:00 p.m. that day, but Ramirez did not do so until May 25.

In addition, Ramirez' testimony, viewed as part of the totality of her actions, points to the conclusion that she was not serious about obtaining a ballot or voting in the election, and thus tends to support the conclusion reached immediately above. It cannot be overlooked here that ultimately Ramirez admitted it was her decision not to vote. Further, earlier events similarly suggest no real intent to obtain a ballot or vote. For example, she called the PERB office on May 17 at Bochover's urging, but was less than clear about her purpose. She did not expressly, request a ballot, and asked only to speak to Martinez. She left her home telephone number, but then departed and did not return until 6:30 p.m., fully aware that mail ballot requests had to be submitted on that date. In effect, she precluded receipt of a return call from Martinez during the crucial afternoon period of May 17, and there is no evidence that she made any effort to call the PERB office again on that date from her doctor's office or elsewhere. Thereafter, she waited until May 25 to call Martinez again. She claimed she expressly asked for a mail ballot on that date. But by this time she was well aware that it was too late.

All of this occurred against the background of a plainly worded consent election agreement which expressly provided that requests for mail ballots had to be made by individual employees on May 17, and Bochover's earlier advice to Ramirez that it was her responsibility to contact the PERB office on May 17 to request a ballot.

Based on the foregoing, it is concluded that Ramirez did not request a ballot as required pursuant to the consent election agreement on May 17. Her call to the PERB office asking for Martinez, her subsequent failure to timely return Martinez' message, and her tardy May 25 request for a mail ballot do not constitute compliance with the terms of the agreement. Therefore, the failure to provide Ramirez with a mail ballot does not constitute an irregularity in the conduct of the election.

Officer Stephan, on the other hand, called the PERB office on May 17, requested and received a challenged ballot, and cast the ballot. Stephan's conduct was in strict accord with the ground rules set forth in the consent election agreement. Nevertheless, Stephan's vote was automatically a challenged ballot under the terms of the agreement. But the University affirmatively waived its right to do so at the post-election ballot count. At that time, Cain considered Martinez' view that Stephan should not have voted a challenged ballot because he was on leave and nevertheless agreed to count all challenged ballots.

Based on the foregoing, it is concluded that no election irregularity occurred with respect to the ballot cast by Stephan.[7]

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[7]The University's reliance on Gilroy Unified School District, supra. as authority to set aside this election is misplaced. In Gilroy, employees not eligible to cast a mail ballot under the terms of a directed election order were permitted to do so for, among other things, convenience. The consent election agreement in this case is different in material respects. Unlike Gilroy, the consent election agreement here permitted employees who were on the mail ballot list, as well as employees who were not on the list, to request a mail ballot.

Death Threats

Relying on private sector case law,[8] the Board has recently-stated that the test for determining whether an election should be set aside based on threats is

> whether the election was held with a general atmosphere among the employees of confusion violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, and to render impossible a rational uncoerced expression of choice as to bargaining representative. (State of California (Department of Personnel Administration) (1992) PERB Decision No. 948-S, adopting decision of administrative law judge at 16 PERC Para. 23037, p. 113.)

The test is objective and not determinative upon the effect of the particular statement upon an individual employee or employees. The PERB looks to see whether the particular threat "may reasonably tend to coerce or intimidate employees in the exercise of their rights." (State of California (Department of Personnel Administration), supra, adopting decision of administrative law judge at 16 PERC Para. 23037, p. 113.)

Applying this test here, I conclude for the following reasons that the threat received by Officer Szyper is insufficient to overturn the election. There is no credible evidence or a general atmosphere of coercion during the election or during the period leading up to the election. The threat was made by an anonymous caller and there is no concrete evidence tying the call to PSOA or PSOA supporters. The threat was

[8]See Hardin, The Developing Labor Law, BNA, 1992, Vol. 1, pp. 363-365, and cases cited therein.

immediately relayed to Officer Waschkowsky, who understandably testified that he was not intimidated and merely viewed the call as "pretty stupid."

Finally, I have viewed both Szyper and Waschkowsky on the witness stand. Neither witness seemed to harbor any fear or concern about the threat, nor did either witness convincingly indicate they were coerced in any way. In fact, there is no evidence that Szyper took any steps to launch a formal investigation of the call. He merely hung up the receiver and proceeded with his duties at East Gate.

In any event, since this was a secret ballot election, the threat to Szyper cannot be viewed as a legitimate threat which carried a coercive message. There was no way that the person who delivered the threat could know how Szyper voted. Thus, the ultimatum to "vote yes or die" was in reality an empty one.

Based on the foregoing, it cannot realistically be concluded under an objective standard that employees were coerced as a result of the calls received at East Gate on May 26. Both calls were ill advised, but in my view amounted to no more than a foolish prank. Plainly, the calls were not made in a general atmosphere of "threats of violence," could not "reasonably be expected to generate anxiety and fear of reprisal," and did not "render impossible a rational uncoerced expression of choice as to bargaining representative." (State of California, Department of Personnel Administration, supra.)

CONCLUSION

Based on the foregoing findings of fact, conclusions of law and the entire record in this matter, the election objections in case number SF-R-724-H are hereby dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Fred D'Orazio

Fred D'Orazio
Administrative Law Judge

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3198

July 14, 1993

Jerrold C. Schaefer
Hanson, Bridgett, Marcus, Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105-2173

Re: Regents of the University of California and Protective Service Officers' Association
Case No. SF-R-724-H

Dear Mr. Schaefer:

Your request of July 7, 1993 to Executive Director Del Pierce was forwarded to the Board. After a review of the information presented in your request, the Board found that you have not met the standard described in PERB Regulation 32150(e). Accordingly, Regional Director Anita Martinez will not be produced to testify at the hearing in the above-referenced case.

If you have any questions, please contact me.

Sincerely,

Robert Thompson
Deputy General Counsel

cc: Daniel Ray Bacon, Esq.
Fred D'Orazio