STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA, Employer, and IT BARGAINING UNIT 22, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000, CSEA, Exclusive Representative.	Case No. SA-SV-165-S Administrative Appeal PERB Order No. Ad-367-S November 6, 2007

Appearances: Lyle Hintz, Unit Representative, for IT Bargaining Unit 22; Anne M. Giese, Attorney, for Service Employees International Union Local 1000, CSEA.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

RYSTROM, Member: This case is an appeal to the Public Employment Relations Board (PERB or Board) by the Information Technology (IT) Bargaining Unit 22 (Unit 22) challenging the Board agent's dismissal of Unit 22's severance petition under the Ralph C. Dills Acts (Dills Act).[1]

Unit 22's severance petition was dismissed upon an administrative ruling that the proof of support was insufficient to meet the requirements of PERB Regulation 40220.[2] In

[1]Dills Act is codified at Government Code section 3512, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

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

determining the sufficiency of support the Board agent used signature revocation cards submitted by Service Employees International Union Local 1000, CSEA (SEIU 1000) to offset authorization signatures on the severance petition. His acceptance of these authorization revocation cards was based on Antelope Valley Health Care District (2006) PERB Decision No. l8l6-M (Antelope Valley).

Unit 22 contends on appeal that Antelope Valley is not applicable to a Dills Act severance petition. Upon a review of the relevant record, we agree and grant the appeal for the reasons stated below. The Board agent's decision is vacated and the case is remanded for a determination of the sufficiency of Unit 22's proof of support without the acceptance of SEIU 1000's signature revocation cards.

BACKGROUND

On June 15, 2006, Unit 22 filed a severance petition for a unit of IT employees consisting of 33 categories currently included in State Bargaining Unit 1 represented by SEIU 1000.

SEIU 1000 filed a motion to dismiss the severance petition on June 20, 2006 arguing, inter alia, that Unit 22 had failed to submit proof of support from a majority of the employees in the proposed unit. SEIU i000 claimed Unit 22 had submitted signatures "from fewer than 3400 workers" contrary to the 3,812 signatures necessary for majority support. SEIU 1000 also submitted 185 original signature revocation cards with this motion claiming that they indicated a desire by the signing employees to remove their signatures from Unit 22's severance petition.

On July 11, 2006, SEIU 1000 filed objections to the severance petition which included the claim that SEIU 1000 had submitted over 300 revocation cards from individuals "who have specifically and intentionally withdrawn their support for severance."

The State of California (Department of Personnel Administration) (DPA) also filed objections to the severance petition on July 11, 2006, requesting that it be dismissed for reasons other than the sufficiency of proof of support.

Unit 22 filed its response to SEIU 1000's and DPA's oppositions to the severance petition on August 3, 2006. This response included a challenge by Unit 22 to SEIU 1000's revocation cards on the basis that they were improperly collected and a request to withdraw nine classifications from the proposed unit.

SEIU 1000 responded on August 14, 2006 contending, inter alia, that the requested classifications could not be withdrawn.

BOARD AGENT'S DETERMINATION

The Board agent's decision addressed the eight disputes raised by both SEIU 1000 and DPA regarding the severance petition. On appeal Unit 22 only challenges the Board agent's decision that proof of support was insufficient. Below we limit our summary of the Board agent's holdings to that issue.

Finding that the size of the proposed unit as amended by Unit 22 on August 3, 2006 was 7,605, the Board agent determined that Unit 22 had to present 3,803 valid signatures to demonstrate sufficient proof of support pursuant to PERB Regulation 40220.

The Board agent held that SEIU 1000's revocation cards would be accepted in calculating whether sufficient proof of support had been submitted by Unit 22.[3] In so doing he considered the language of PERB Regulation 40200 as well as the Dills Act section 3512 and the 1999 Case Handling Manual of the National Labor Relations Board (Representation Proceedings). However, in the end he found PERB's recognition of a right to revoke authorization cards in Antelope Valley to be controlling.

The Board agent opined that PERB "has directed that revocations be accepted so long as the cards are clear as to the intent of the employee, equivalent to the intent requirements set forth for proof of support in PERB Regulation 32700." He went on to conclude that the revocation slips submitted by SEIU 1000 met this requirement. The Board agent held that based on the proof of support submitted by Unit 22 and Antelope Valley the support is insufficient to meet the requirements of PERB Regulation 40220 resulting in the dismissal of the petition.

UNIT 22'S APPEAL

Unit 22 filed a timely appeal on September 25, 2006, in which it contends the Board agent erred in using "an inappropriate case (Antelope Valley$_L$ decided under the Meyers-

[3]SEIU 1000 argued as follows to the Board agent that, SEIU 1000's revocation cards should be considered:

> SEIU Local 1000 submitted over 360 revocation cards which should be used in determining the sufficiency of the proof of support, particularly here, where there was evidence of confusion and possible misrepresentation by Petitioner. Relying on Antelope Valley Health Care District (2006) PERB Decision No. 1816-M, SEIU Local 1000 urges that PERB consider the cards submitted to offset any valid signatures submitted. (Board agent's determination, p. 2.)

Milias-Brown Act (MMBA)" to justify the acceptance of the revocation cards and denial of the severance petition.[4]

Unit 22 argues that Antelope Valley is not applicable to a Dills Act severance petition because: (1) the employees in Antelope Valley were covered by the Meyers-Milias-Brown Act (MMBA);[5] (2) the authorization cards revoked in Antelope Valley would have directly resulted in the recognition of a new exclusive representative while the authorization signatures in this case were for an election to determine an exclusive representative; (3) the employees signing the revocations in this case did not have any reasonable basis to believe that the revocation cards would eliminate the ability for the IT employees to decide by election the exclusive representative; and (4) the employees in Antelope Valley were not professional employees while the IT employees are a highly educated professional group.

SEIU 1000's OPPOSITION TO UNIT 22'S APPEAL

SEIU 1000 opposes Unit 22's argument that the revocation cards were improperly considered by contending that Antelope Valley applies to this case and SEIU 1000's revocation slips met the standard enunciated therein.[6]

According to SEIU 1000, Antelope Valley indicates PERB understood that the purpose behind proof of support is to determine the desire of the affected employees to be represented

[4]Unit 22 also contended in its appeal that: (1) the revocation cards submitted by SEIU 1000 were defective because the intent of the employee signing them was unclear; (2) SEIU 1000 gathered the revocation cards under fraudulent and misleading conditions; (3) the revocation cards were subject to a lower standard of documentation than that for signatures on the severance petition; and (4) acceptance of revocation cards is not reasonable because it poses an insurmountable hurdle and gives an unfair advantage to the incumbent union.

[5]MMBA is codified at Government Code section 3500, et seq.

[6]6SEiU also addressed each of Unit 22's contentions itemized in footnote 4 above.

by a particular union. In support of its position SEIU 1000 cites two of the National Labor Relations Board (NLRB) decisions reviewed by PERB in Antelope Valley for the proposition that statements signed by individuals indicating a desire to withdraw support from or revoke a prior signature supporting a union should be accepted.[7]

DISCUSSION

In deciding Unit 22's challenge to the Board agent's acceptance of SEIU 1000's revocation slips we must address two issues: (1) Does the ruling in Antelope Valley regarding an employee's right to revoke a proof of support apply to a severance petition filed under the Dills Act; and (2) Are there procedural provisions in the Dills Act or regulations enacted there under which allow for the acceptance of signature revocation cards to offset severance petition signatures. Additionally, we review the two NLRB cases cited by SEIU 1000 to determine if their reasoning provides guidance as to the acceptance of signature revocations in the present case.

1. Does Antelope Valley's holding that authorization cards and other proofs of support may be revoked as long as the employees clearly demonstrate the desire not to be represented by that employee organization apply to petitions for severance submitted under the Dills Act?

Antelope Valley involved an appeal of the administrative law judge's (ALJ) decision that the Antelope Valley Health Care District (District) had committed an unfair practice under the MMBA by refusing to recognize a union8" after a card check.

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[7]These cases are Struther-Dunn, Inc. v. NLRB (3rd Cir. 1978) 574 F.2d 796 (98 LRRM 2385) (Struther-Dunn) and Blue Grass Industries, Inc. (1987) 287 NLRB 274 (130 LRRM 1131) (Blue Grass).

8"This union was the Service Employees International Union Local 399 (SEIU 399).

The relevant facts in Antelope Valley are as follow:[9]

1. SEIU 399 collected authorization cards which it subsequently presented as proof of support for recognition as the exclusive representative. At the same time, some District employees collected "No Union" cards and the District by email informed all employees that they had a right to revoke their authorization cards and how to do it.

2. A neutral third party tallied the cards which resulted in 569 valid SEIU 399 authorization cards, five valid revocation letters (pursuant to the District's email instructions) and 280 "No Union" cards (collected by employees). Included in the tally was the fact that 84 employees had signed both SEIU 399 authorization cards and "No Union" cards. This tally led to SEIU 399's request for recognition as the exclusive representative under MMBA's section 3507.1(c).

3. The District refused to recognize SEIU 399 as the exclusive representative based on its finding that the 84 "No Union" cards were revocations of the matching 84 SEIU 399 authorization cards thus SEIU 399 had failed to obtain a majority.

4. SEIU 399 filed a charge against the District claiming that its failure to recognize SEIU 399 on the basis of the card check tally was an unfair labor practice. After a hearing, the ALJ found that the "No Union" cards were not valid revocations because they did not follow the District's instructions. He also held that this finding made it unnecessary to reach the issue of whether signature revocation cards could be accepted under the MMBA. The ALJ findings were appealed to PERB resulting in the following Antelope Valley ruling relied on by the Board agent in the present case:

[9]We discuss Antelope Valley in detail herein so that the context of our decision as to its applicability is readily understood. The Board hereby takes official notice of the entire record in Antelope Valley.

> We therefore recognize the right to revoke authorization cards or other proof of support so long as the employee clearly demonstrates the desire NOT to be represented by the employee organization for the purposes of meeting and conferring on wages, hours and other terms and conditions of employment.

This Antelope Valley ruling does not apply to the Dills Act severance petition in the instant case because it is limited to the facts before PERB in Antelope Valley. For the reasons stated below, those facts are not present in Unit 22's case; therefore, an error of law occurred when SEIU 1000's revocation cards were accepted and used to offset corresponding signatures on Unit 22's severance petition based on Antelope Valley.

None of the parties in Antelope Valley disputed using revocation cards to offset union authorization cards. The effect was an acceptance among the parties in Antelope Valley that signature revocation cards could be used in that card check. SEIU 399 did not dispute either the public agency's directive to its employees that they had a right to revoke their signature cards or the signature revocations which were submitted pursuant to this directive. The contested issue before PERB in Antelope Valley was not whether signature revocations were permissible under the MMBA, but rather what requirements had to be met for signature card revocations to e cons!ere..b'dd[10]

During the time period when SEIU 399 was collecting authorization cards, the District emailed all of its employees informing them that they had a right to revoke their authorization cards and how to do it. The pertinent part of this email stated:

> QUESTION: Can I revoke an authorization card that I have already signed for the SEIU?

[10]This explains why the Antelope Valley opinion contains no analysis of the applicable provisions of the MMBA or District's Local Rules to determine if they provide for a right to revoke signature cards. It also explains why the entire opinion regarding revocations is concentrated on what constitutes a valid signature revocation.

> ANSWER: Yes, an employee does have the right to revoke an authorization card signed for a union. The decision of whether or not to revoke your card is strictly yours to make. The Hospital simply wants to be sure you know about, and understand, your rights and privileges. (The District went on to describe the procedures to be followed to revoke an authorization card.)
> (Antelope Valley, SEIU 399 Ex. B.)

The record before PERB in Antelope Valley indicated that at no time did SEIU 399 challenge this email as an unfair labor practice under MMBA or the District's Local Rules. SEIU 399 did not complain of the District's email in the unfair practice charge SEIU 399 filed against the District. Additionally, at the hearing on its unfair labor practice charge before the ALJ, SEIU 399 made no objection to the acceptance of the five revocations which followed the District's email procedure. At that hearing, the only signature revocations which SEIU 399 objected to were the "No Union" slips. SEIU 1000's objection to these slips was not based on the assertion that by law there could be no authorization revocations but rather on the argument that the revocations did not evince the necessary intent to revoke.

In SEIU 399's final briefing to the ALJ (its reply brief), SEIU 399 acknowledged that the District was contending that 89 of SEIU 399's authorization cards were revoked or negated. In response to this contention, SEIU 399 in effect agreed that the five revocations following the District's revocation procedure were valid stating, "[t]he revocation of an authorization card is invalid unless communicated directly to a Union. ... Accordingly, the 84 slips of paper, supposedly collected by Leo Ward and others are not valid revocations, because they were not timely communicated to the Union." This failure to challenge the assertion that employees have a right to revoke their authorization cards under the MMBA continued in the conclusion of SEIU 399's reply brief where SEIU 399 stated:

> The evidence in this case clearly demonstrates that, at least, 84 of the 89 employees did not properly revoke their Union authorization cards. As such, the 84 "No Union" slips of paper cannot serve as a basis for the District to refuse to recognize the Union.[11]

SEIU 399's failure to dispute an employee's right to revoke their signature authorization in a card check continued in their brief before PERB in response to the District's appeal. At no time did SEIU 399 contend that authorization revocations were not allowed under the MMBA. In its opposition, SEIU 399 argued: "The issue is *not* whether the SEIU authorization cards are revocable, especially since the ALJ found that, assuming *arguendo*, Section 3507.l(c) permits revocations, the 'No Union' slips of papers (sic) are simply not *proper* revocations." SEIU 399 went on to contend that the record clearly demonstrated that the 84 "No Union" slips were not proper revocations.

Because the right to revoke authorization cards was not disputed in Antelope Valley, it was not necessary for PERB to rule on whether the Legislature had intended that authorization signatures could be revoked in all MMBA card checks. PERB's holding in Antelope Valley

[11] Prior to the reply brief, SEIU 399 appeared to vacillate on what its position was regarding the right to revoke. SEIU 399's opening brief to the ALJ made the following admissions. In the pre-card check election which led to the card check (because SEIU 399 did not obtain a majority) SEIU 399 submitted authorization revocation cards. After that, during a meeting before the District regarding card check procedures, SEIU 399 took the position that District employees participating in the card check could revoke their authorization cards. Sometime later SEIU 399 states it changed its position and said revocations in the card check should not be honored. However, SEIU 399's opening brief did not dispute the District's contentions that there could be authorization revocations under MMBA. Instead, SEIU 399 argued only that the ALJ need not reach the issue of whether employees have a right to revoke their authorizations because the five revocations submitted according to the District's email were not determinative and the "No Union" revocations (which were determinative) should not be counted. But, as noted above, in its final brief, SEIU 399 went back to accepting the five revocations which followed the District's instructions on how employees should exercise their right to revoke.

that the right to revoke authorization cards exists is limited to MMBA card checks in which the interested parties do not dispute the right to revoke or in effect by their acts acquiesce to such a right.

We need not determine if the ruling in Antelope Valley, as to an MMBA card check, would also apply to a Dills Act severance petition because there is no such acquiescence by all interested parties in the present case. Unit 22 has unequivocally disputed SEIU 1000's presentation of revocation cards to offset corresponding signatures on Unit 22's severance petition. We therefore hold that Antelope Valley does not authorize the acceptance of signature authorizations in this case and that using SEIU 1000's signature revocation cards based on Antelope Valley was an error of law.

2. Are there procedural provisions in the Dills Act or its regulations allowing for the acceptance of signature revocation cards to offset severance petition signatures?

The inapplicability of Antelope Valley to this case does not end our inquiry into whether it was an error to accept SEIU 1000's revocation cards to offset authorization signatures on Unit 22's separation petition. We also need to determine whether there are procedures in the Dills Act which provide for the use of SEIU 1000's signature cards.

The Dills Act does not contain any provisions which expressly provide for severance petitions or procedures governing such petitions. Instead the Dills Act mandates that PERB "shall establish reasonable procedures for petitions." (Dills Act sec. 3520.5(b).)

Pursuant to this authority PERB has enacted a series of regulations allowing for severance petitions and the procedures to be followed. (PERB Regs. 40200 through 40260.) PERB Regulation 40200 provides that an appropriate unit of employees who are already members of a larger established unit which is their exclusive representative may establish an employee organization which seeks to become the exclusive representative for that unit.

Under PERB's severance petition rules, the first step to establish such a unit of employees is to file a severance petition which is accompanied by proof of majority support in the unit claimed to be appropriate. (PERB Reg. 40200(a) and (b).) This proof of support is defined by PERB Regulation 32700.

PERB Regulation 32700's provisions specify that the proof of support must demonstrate that the employee desires to be represented by the employee organization and what information must be provided as to each employee signing the proof of support. There is no language in these proof of support regulations or any PERB rules governing severance petitions which provides that this demonstration of an employee's desire to be represented may be controverted by a showing that the employee has subsequently withdrawn his or her support.

Because no PERB regulations exist authorizing the use of signature revocations, we find that the Board agent improperly accepted SEIU 1000's authorization revocation cards to determine if Unit 22 had proof of majority support.

In this opinion, we do not address whether the Legislature has empowered PERB to enact such rules governing severance petitions.[12] That issue is not before PERB in this case.

3. Do the NLRB cases cited by SEIU 1000 provide guidelines supporting its position that revocation cards should be accepted to offset signatures on a Dills Act severance petition?

In support of its position that the revocation cards at issue herein are acceptable, SEIU 1000 argues the NLRB conclusions in Struther-Dunn and Blue Grass should be followed. SEIU 1000 contends that the NLRB found in both cases that statements signed by

[1212]PERB regulations are enacted pursuant to and in conformity with authority granted by the Legislature through the statutes creating PERB's jurisdiction. (Santa Clarita Community College District (College of the Canyons) (2003) PERB Decision No. 1506.)

an individual indicating a desire to revoke a prior signature supporting a union should be counted. Having reviewed both cases, we find that they provide no guidelines applicable to this case.

The issue of whether union authorization cards had been validly revoked arose in Struther-Dunn in the context of the appropriateness of a determination to issue a bargaining order in the absence of a certified election under NLRB v. Gissel Packing Co., Inc. (1969) 395 U.S. 575 (71 LRRM 2481) which required a showing that the union at one point had a card majority.

During the authorization card collection process in Struther-Dunn, the union president had specified to the five employees collecting the cards that anyone who signed a card remained free to change his mind and withdraw it. After signed authorization cards representing a majority for the union were submitted to NLRB, a statement was filed revoking the signatures on 16 of the authorization cards thereby negating this majority. The NLRB took the position that the withdrawal statement was ineffective because it was not communicated to the union thus the required majority for a bargaining order did not exist.

The NLRB's rejection of the withdrawal statement was reversed by the reviewing court in Struther-Dunn on the basis that the NLRB had incorrectly reasoned that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition. Pertinent herein is the fact that Struther-Dunn was not a case in which the right to revoke a union authorization card was disputed or where an interpretation of federal statutes or rules was required to determine if such a right existed.

Blue Grass is inapposite for the same reasons. In Blue Grass, the NLRB found that it did not need to pass on the ALJ's determination of the validity of individual authorization

cards (which included whether they had been revoked) because the union's majority status ceased to be an issue given the unfair labor practices did not warrant a bargaining order. There was no review of federal labor law to determine if a right to revoke existed in federal statutes or regulations.

It is well settled that although not bound, PERB will take cognizance of NLRB decisions where appropriate as an aid in interpreting identical or analogous provisions of the statutes. (Carlsbad Unified School District (1979) PERB Decision No. 89; County of Imperial (2007) PERB Decision No. 19l6-M.) Additionally, NLRB's experience with doctrines developed in a series of cases rather than codified in a federal statute or regulation can be considered where such doctrines are used as a prototype or model for California labor enactments. (State of California (1983) PERB Decision No. 348-S.)

SEIU 1000's reliance on the above NLRB cases is misplaced. The cases are inapposite factually. Legally, there is no basis to take cognizance of these cases given there are no parallel state and federal laws regarding the revocation of authorization signatures being interpreted. Similarly, these cases involve no case doctrine validating signature revocations which has been used as a prototype for PERB regulations.

CONCLUSION

Based on the record before us, we hold that the Board agent erred as a matter of law when he determined that PERB's approval of revocation cards in Antelope Valley applied to the revocation cards submitted by SEIU 1000 thereby authorizing them to be used to offset signatures on Unit 22's Dills Act severance petition. We further find that no procedures have

been enacted under the Dills Act which provide employees with a right to revoke their signatures on a severance petition, thus there was no legal basis to accept SEIU 1000's revocation cards.

ORDER

The Board agent's finding of insufficient proof of support for Unit 22's severance petition is VACATED. This case is REMANDED to the General Counsel's Office for a determination of the sufficiency of Information Technology Bargaining Unit 22's proof of support for its severance petition without the use of Service Employees International Union Local 1000's revocation cards to offset signatures on said severance petition.

Chair Neuwald and Member McKeag joined in this Decision.