

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COUNTY OF FRESNO,

Employer,

and

FRESNO COUNTY PUBLIC SAFETY
ASSOCIATION,

Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Exclusive Representative.

Case No. SA-DP-258-M

Administrative Appeal

PERB Order No. Ad-433-M

February 29, 2016

Appearances: Daniel C. Cederborg, County Counsel, and Catherine E. Basham, Chief Deputy County Counsel, for County of Fresno; Messing Adam & Jasmine, LLP, by Jason H. Jasmine, Attorney, for Fresno County Public Safety Association; Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union Local 521.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union Local 521 (SEIU) from an administrative determination (attached) by PERB's Office of the General Counsel (OGC) which set aside the results of a decertification election and ordered a re-run of that election after consideration of SEIU's objections to the conduct of the election.

We have reviewed the record in its entirety in light of the issues raised by SEIU's appeal and request for a stay of proceedings, including the response by the Fresno County Public Safety Association (Association) and the County of Fresno (County). We find the

administrative determination to be supported by the record, well-reasoned and in accordance with applicable law. We therefore adopt the administrative determination as the decision of the Board itself, as supplemented by the discussion below, and deny the appeal.

FACTUAL AND PROCEDURAL SUMMARY

On or about December 23, 2014, the Association filed a decertification petition pursuant to the County's local rules seeking to decertify SEIU as the exclusive representative for Bargaining Unit 2, described as consisting of employees of the sheriff's office and probation office.

On June 22, 2015, SEIU, the Association and the County entered into a consent election agreement (CEA) for a mailed ballot election to be conducted by an impartial election supervisor from the State Mediation and Conciliation Service (SMCS). The CEA provided that a voter's packet will be mailed to each eligible voter on July 20, 2015.¹ Ballots were to be returned to SMCS by August 7, and counted on August 12 in the presence of designated observers.

Due to an inadvertent mistake by the SMCS election supervisor assigned to conduct this election, the ballots were mailed on July 16, instead of July 20, 2015. Several bargaining unit members received their voter packets on July 18. According to a declaration from the regional director of SEIU's Fresno office, SEIU had planned a "get out the vote" campaign to begin around the agreed-upon July 20 mailing date. This campaign included assigning staff to be tasked with "get out the vote" activities. Because the ballots were mailed early SEIU was short staffed in the days immediately prior to July 20, according to the regional director.

On August 12, two SMCS staff members conducted the ballot count. The results were

¹ The term of a recently negotiated memorandum of understanding between SEIU and the County became effective on July 20, 2015.

228 votes for SEIU, 319 votes for the Association, and 24 for “no organization.” Thus, the Association won the election by a 91-vote margin.

SEIU’s Objections

SEIU’s objections were based on two grounds. First, it asserted that the early mailing of ballots was a serious irregularity in the conduct of the election that resulted in SEIU’s defeat. Second, it claimed that the County interfered with employees’ right to freely choose a representative. In support of this objection, SEIU alleged the following: (1) a County sheriff sergeant, Jeffrey Penry (Penry), encouraged bargaining unit members to decertify SEIU; (2) the County permitted Association leaders to roam freely around the County jail to solicit support for the decertification effort and to use County phones and intercoms for this purpose; and (3) the sheriff and two elected officials were members of a “closed” Facebook group which included approximately 73 unit members and was devoted to supporting the Association’s decertification efforts and criticizing SEIU, and Penry made numerous comments on the closed Facebook group page that were highly critical of SEIU and its leadership.

In its objections to the election, SEIU specifically requested:

We ask that PERB set aside the results of this tainted election and entirely dismiss the decertification petition. Alternately, we ask that PERB order a re-run election after an appropriate hiatus.

The Administrative Determination

The administrative determination sustained SEIU’s objection regarding the premature mailing of the voters packets, concluding that this was a serious irregularity in the conduct of the election. As a result, the OGC ordered the results of the election to be set aside and the election to be re-run. The parties were directed to make themselves available to SMCS in order to revise the CEA for a rerun election.

The administrative determination explicitly did not rule on SEIU's remaining objection regarding the County's alleged conduct in support of the Association's decertification efforts, noting that such a ruling was not necessary because the election results were set aside due to the premature mailing of voters' packets.

Appeal and Request for Stay

Despite the fact that the elections results adverse to SEIU were set aside, SEIU appealed the administrative determination, asserting that the OGC failed to resolve all the issues presented by SEIU's objections, namely, the objections related to the County's alleged interference with the employees' right to freely choose their representative. In its appeal, SEIU also repeats the remedy it requested in its objections—that the decertification petition be dismissed or, alternatively, that the election be re-run after “an appropriate hiatus.”

SEIU also requested a stay of activity pursuant to PERB Regulation 32370.² Specifically, SEIU seeks a stay until the OGC can conduct a further investigation or hold an evidentiary hearing to determine (1) if the decertification petition should be dismissed in its entirety; or (2) if the second election should be postponed until after an appropriate hiatus, i.e., after the “taint of the County's misconduct can dissipate.” (Request for Stay of Activity, p. 1.) SEIU asserts in its appeal that SMCS has initiated the process of re-running the election. According to SEIU, if an election were held now, the taint of the County's misconduct would not yet have dissipated and would continue to unduly influence how employees vote. SEIU

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32370 provides:

An appeal will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of any activity may file a request for a stay with the administrative appeal which shall include all pertinent facts and justification for the request. The Board may stay the matter, except as is otherwise provided in these regulations.

also argues that it would suffer hardship if it were required to submit to an election now because of the enormous amount of resources that SEIU must expend to defend against a decertification election.

The Association opposes the appeal and the request for stay, arguing that SEIU is merely attempting to delay the certification of the Association as the new exclusive employee representative. The Association argues that SEIU has failed to show that there was any actual interference by the County, or that even if there were any interference, it had a natural or probable effect on employee free choice under *Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M.

The Association also argues that a stay of the election would create an extreme hardship for the Association because it would be denied the right to represent employees who had voted overwhelmingly for its representation, and because the stay would create an extreme hardship on employees who are forced to pay either dues or fair share fees to SEIU in spite of already having voted to decertify SEIU. The Association argues that any further delay would be an abuse of discretion and a violation of the rights of the unit employees to exercise their right to a representative of their choice.

The County responded to the appeal by noting that it does not have an interest in the outcome of the decertification election, but denies any allegation of wrongdoing on the part of its management with regard to that election.

DISCUSSION

Because this election was conducted by SMCS pursuant to local rules, PERB Regulations at Article 1, Subchapter 9, beginning with Regulation 32999 et seq., apply. PERB Regulation 33009 (entitled "Objections") states, in relevant part:

(a) Within 10 days following the service of the tally of ballots, any party to the election may file with the Board, at the appropriate regional office, objections to the conduct of the election. . . .

[¶ . . . ¶]

(c) Objections shall be entertained by the Board only on the following grounds:

- (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.

[¶ . . . ¶]

(g) The Board shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d). The objecting party may appeal the dismissal to the Board itself in accordance with Chapter 1, Subchapter 4, Article 3 of these regulations.

(*Id.*; emphasis added.)

Unlike other regulations governing appeals to the Board itself, PERB Regulation 33009 is worded narrowly and specifically to permit appeals only by objecting parties whose objections have been actually dismissed. This regulation is not a general grant of appeal rights as is found, for example, in PERB Regulation 32300(a), pertaining to exceptions to proposed decisions after an administrative hearing (“A party may file with the Board itself . . . a statement of exceptions to a . . . proposed decision”); or in PERB Regulation 32360(a), governing appeals from administrative decisions other than election objections (“an appeal may be filed with the Board itself from any administrative decision”); or in PERB Regulation 32635, permitting appeals by a charging party of a dismissal of an unfair practice charge.³ The

³ PERB Regulation 32630 requires the refusal to issue a complaint if the Board agent reviewing the unfair practice charge concludes that the charge or evidence is insufficient to

narrow wording of PERB Regulation 33009 furthers the public policy favoring rapid and expedient resolution of representation matters, and for that reason we are compelled to construe and apply the regulation narrowly.

In this case, the OGC did not dismiss any objection. It sustained SEIU's objection concerning the early mailing of the ballots and granted its request that the election results be set aside and that a new election occur. In the words of the OGC, "Because the inadvertent early mailing of the voter's packets warrants setting aside the results of the election, it is not necessary for PERB to rule on SEIU's other election objections." (Admin. det., p. 20.) We agree with the OGC that it was not necessary to rule on SEIU's other objections, given the fact that it determined the election results should be set aside and a new election should be held. Because PERB Regulation 33009 permits appeals only of dismissals of objections, and because SEIU has obtained the relief that was available pursuant to PERB Regulation 33010, its request that the Board resolve its allegations of employer misconduct is not ripe.

We therefore dismiss SEIU's appeal and dismiss its objection based on the County's alleged misconduct without prejudice.⁴ Because these allegations were not dismissed by the

establish a prima facie case. This regulation also explicitly states, "The refusal shall constitute a dismissal of the charge." Similar language is not found in PERB Regulation 33009.

⁴ Because of the unusual procedural posture of this case, we exercise our general authority under Government Code section 3541.3, subdivision (n) to take any other action the Board deems necessary to discharge its powers and otherwise effectuate the purposes of the Act and dismiss the objection along with the appeal. Normally, we would not rule directly on an objection (as opposed to an appeal of a dismissal thereof), but instead remand the matter for the OGC to take action regarding the objection. However in this case, a remand would be superfluous because it would not result in any additional remedy beyond what the OGC already ordered and to which the objecting party is entitled under PERB regulations. Having determined that one of the grounds for SEIU's objection supported overturning the election and ordering a second election, the OGC did not need to investigate and determine the bona fides of the other ground asserted by SEIU as a basis for its objection to the election. There is no justification for any further delay in this case which a remand for action by the OGC on the second objection would entail.

OGC and PERB has not made any determination concerning them, they may therefore be reasserted as a basis for setting aside a second election. SEIU is free to raise these allegations of misconduct and any others, should they occur, if it does not prevail in the second election and believes the employer's alleged misconduct interfered with employee free choice.

We also deny SEIU's request that this matter be remanded to the OGC for a hearing on the allegations of employer misconduct. In the administrative determination, SEIU has already obtained the relief to which it is entitled under the regulations concerning election objections—the setting aside of the election results and the ordering of a new election. This result would not be altered by additional findings that the employer engaged in misconduct, and remanding in this circumstance would cause needless delay in the election process.

We also reject SEIU's request that the decertification petition be dismissed or that the re-run election be postponed. Through its adoption of Regulation 33010, PERB has circumscribed its authority in dealing with objections to elections. Objections will be considered only on the basis of allegations that conduct interfered with employees' right to freely choose a representative or because of a serious irregularity in the conduct of the election. The remedial powers that repose in the Board agent concerning objections are limited to dismissing the objections or setting aside the election. (PERB Regulation 33010.)⁵ Dismissal

⁵ PERB Regulation 33010 provides:

Concerning objections, a Board agent has the power to:

- (a) Direct any party to submit evidence through declarations or documents;
- (b) Order the inspection of documents by Board agents or the parties;
- (c) Direct any party to submit an offer of proof;
- (d) Obtain declarations from witnesses based on personal knowledge;

of the decertification petition is not among the remedial actions available to the Board agent when determining the disposition of objections. Neither is the Board agent empowered by this regulation to postpone a second election after an “appropriate hiatus.”⁶ Therefore, we reject SEIU’s request to dismiss the decertification petition or in the alternative to postpone the second election.⁷

In sum, the OGC properly determined that the decertification election results should be set aside because of a serious irregularity in the conduct of the election caused by the premature mailing of voters’ packets. If the OGC had considered the other grounds for SEIU’s objections and agreed that the County’s alleged conduct interfered with the employees’ free

(e) Conduct investigatory conferences with the parties to explore and resolve factual or legal issues;

(f) Dismiss any objections which, after investigation, do not warrant setting aside the election. Any such dismissal is appealable to the Board itself pursuant to Chapter 1, Subchapter 4, Article 3 of these regulations.

(g) Issue a written determination setting aside the election when, after investigation, it appears that such action is warranted, and that no material factual disputes exist. Such determination shall be in writing and served on the parties. Any such determination is appealable to the Board itself pursuant to Chapter 1, Subchapter 4, Article 3 of these regulations.

(h) Schedule a hearing when substantial and material factual disputes exist. Any hearing shall be limited to the issues set forth in the notice of hearing.

⁶ It is worth noting that SEIU failed to file an unfair practice charge accusing the County of interfering with employees’ rights to freely select their representative. Had it filed such a charge, SEIU could have requested that PERB adjudicate this claim prior to conducting a re-run election. PERB regulation 33002 permits the Board to stay an election upon issuance of a complaint alleging conduct that would prevent employees from exercising free choice. Having failed to file such a charge, SEIU may not obtain such relief, available only in conjunction with an unfair practice charge, through an appeal of a ruling by the OGC on objections to the election.

⁷ We note that the first election was held in July 2015. More than seven months has passed since then. SEIU has thus received a hiatus by virtue of our appeals process.

choice, it was empowered only to order the same remedy—setting aside the election results and ordering a second election. Nothing further can be accomplished by directing the OGC to consider the objections based on the County’s alleged wrongful acts, and we decline to do so.

We also deny SEIU’s request for a stay of further proceedings pending consideration of its appeal, as this decision resolves that appeal.

ORDER

Service Employees International Union Local 521’s appeal from the administrative determination in Case No. SA-DP-258-M is hereby dismissed. SEIU’s objection to the election based on the County’s conduct that allegedly interfered with the employees’ right to freely choose a representative is dismissed without prejudice. SMCS is directed to meet with the parties for the purpose of entering into a new consent election agreement for a new election consistent with the parties’ agreement. The parties are directed to participate in this process for entering into a new consent election agreement.

Members Huguenin and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



COUNTY OF FRESNO,

Employer,

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FRESNO COUNTY PUBLIC SAFETY
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SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Exclusive Representative.

REPRESENTATION
CASE NO. SA-DP-258-M

ADMINISTRATIVE
DETERMINATION
(October 19, 2015)

Appearances: Kerianne Steele, Attorney, Weinberg, Roger and Rosenfeld, for Service Employees International Union Local 521; Jason Jasmine, Attorney, Messing, Adam and Jasmine, for Fresno County Public Safety Association; Catherine Basham, County Counsel, for County of Fresno.

Before Laura Z. Davis, Senior Regional Attorney.

INTRODUCTION

The County of Fresno (County) is a public agency within the meaning of the Meyers-Milias-Brown Act (MMBA)¹ section 3501, subdivision (c). The County has adopted local rules for the administration of employer-employee relations (Local Rules) under MMBA section 3507. The Local Rules provide a procedure under which an employee organization may seek decertification of the exclusive representative. On approximately December 23, 2014, the Fresno County Public Safety Association (FCPSA) filed a decertification petition

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

pursuant to the County's Local Rules. The petition sought to decertify the Service Employees International Union Local 521 (SEIU) as the exclusive representative for Bargaining Unit 2.²

On June 22, 2015,³ SEIU, FCPSA and the County entered into a Consent Election Agreement (CEA) for a mail ballot election, to be conducted by an impartial Election Supervisor from the State Mediation and Conciliation Service (SMCS). Paragraph 6 of the CEA provides that "A voter's packet will be mailed to each eligible voter on July 20, 2015." Paragraph 6 further provides that ballots must be returned to SMCS by August 7, and that the ballots will be counted on August 12, in the presence of designated observers.

On August 12, two SMCS staff members conducted the ballot count. The results were 228 votes for SEIU, 319 votes for FCPSA, and 24 for no organization. Thus, FCPSA won the election by a 91-vote margin.

APPLICABLE REGULATIONS

PERB Regulations 32999 et seq.⁴ govern elections conducted by SMCS. These provisions apply when SMCS conducts representation proceedings pursuant to the local rules adopted by an MMBA employer. (PERB Reg. 32999, subd. (a).) Such elections may only be conducted pursuant to a CEA. The CEA will either identify the time, place and manner of an election or authorize the SMCS Election Supervisor to determine the time, place and manner of the election. (PERB Reg. 32999, subd. (b).) PERB Regulation 33009 provides for the filing of objections to such elections:

(a) Within 10 days following the service of the tally of ballots, any party to the election may file with the Board, at the

² The unit is described as consisting of employees of the Sheriff's office and Probation office.

³ All subsequent dates herein are to the 2015 calendar year unless otherwise stated.

⁴ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

appropriate regional office, objections to the conduct of the election.

...

(c) Objections shall be entertained by the Board only on the following grounds:

(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.

(d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

...

(f) At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a representation hearing pursuant to Section 32175. The declarations shall specify the details of each occurrence; identify the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state where and when the allegedly objectionable conduct occurred; and give a detailed description of the allegedly objectionable conduct. . . .

PERB Regulation 33010 authorizes the Board's agent to conduct an investigation and to make a determination to either dismiss the objections, or set aside the election. The Board agent's determination is appealable to the Board itself. (PERB Regulation 33009 (g).)

SEIU'S OBJECTIONS

On August 21, SEIU filed election objections with PERB pursuant to PERB Regulation 33009. SEIU also filed eight declarations in support of its objections.⁵

⁵ SEIU provided declarations from the following individuals: (1) Tom Abshare; (2) Mariann Coolidge; (3) Francis Coronado; (4) Teneya Harrison-Johnson; (5) Mohammad Iqbal; (6) Lenora Licon; (7) Ana Martinez; and (8) Jada Pinder.

SEIU essentially advances four grounds for its objections. First, SEIU alleges that there was a serious irregularity in the conduct of the election, because SMCS mailed the voter packets⁶ to employees on July 16, rather than on July 20. Second, SEIU alleges that Sergeant Jeffrey Penry (Sgt. Penry) encouraged bargaining unit members to get rid of SEIU. Third, SEIU alleges that the County permitted leaders of FCPSA to “roam freely around the County jail” to solicit support for the decertification effort, and to use County phones and intercoms for this purpose. Fourth, SEIU alleges that Sgt. Penry, along with two elected officials—Board of Supervisors Member Andres Borgeas (Member Borgeas) and County Assessor Recorder Paul Dictos (Assessor Dictos)—were members of a “closed” Facebook group devoted to supporting FCPSA’s decertification efforts, and critical of SEIU. Moreover, Sgt. Penry made numerous comments on the closed Facebook group page that were highly critical of SEIU and its leadership.⁷

FINDINGS OF FACT

By letter dated August 26, PERB offered FCPSA and the County an opportunity to respond to the election objections advanced by SEIU. In addition, PERB requested information from SMCS regarding the issue of the alleged early mailing of the voter packets. SMCS responded, providing the information on August 28. On September 3, the FCPSA provided a position statement, accompanied by the declarations of two individuals.⁸ On

⁶ The voter packets include a ballot, instructions and return envelope.

⁷ SEIU also provides facts concerning testimony of several witnesses at a hearing in *SEIU Local 521 v. County of Fresno*, PERB Case No. SA-CE-793-M. This charge was withdrawn, and the complaint dismissed, on July 20, 2015. The testimony discussed by SEIU concerns events in 2012. This information seems to have no relevance to the instant objections by SEIU concerning the election in 2015, therefore, this information is not included in the summary of facts.

⁸ FCPSA provided declarations of (1) Victor Prado (Prado) and (2) Eulalio Gomez (Gomez).

September 4, the County provided a position statement, accompanied by the declarations of 12 individuals.⁹ On September 15, SEIU provided a further position statement and a declaration.¹⁰ The summary of facts below includes all relevant facts provided by the three parties.

A. Background Information Regarding Decertification Petition

The FCPSA filed a decertification petition with the County on approximately December 23, 2014. SEIU objected to the petition and sought to create a separate unit comprised only of Correctional Officers (COs).¹¹ SEIU filed a “challenging petition” to the decertification petition, which the County denied. SEIU then filed a unit modification petition, which the County also denied, in part on the basis that the proof of support offered was too old to be counted. According to the Supplemental Declaration of Harrison-Johnson (the Regional Director of SEIU’s Fresno Office), SEIU believed that the County misapplied its local rules in denying these petitions, and planned to file an unfair practice charge with PERB. However, SEIU discussed the matter internally and determined that if an SMCS-run election could be set up under the terms that SEIU proposed, then SEIU would proceed with the decertification election instead of filing with PERB. There is no indication that this reasoning was communicated to anyone outside of SEIU.

⁹ The County provided declarations of the following individuals: (1) Member Borgeas; (2) Raymond Diaz; (3) Assessor Dictos; (4) Carrie Kurtural; (5) Carlos Meza (Meza); (6) Margaret Mims (Sheriff Mims); (7) John Navarette; (8) Sgt. Penry; (9) Joe Rodriguez (Rodriguez); (10) Nuttapol Sutakul (Sutakul); (11) Robert Thao (Thao); and (12) Ron Vega (Captain Vega).

¹⁰ SEIU provided a Supplemental Declaration of Teneya Harrison-Johnson (Harrison-Johnson).

¹¹ The record does not reflect the exact composition of this proposed bargaining unit.

On July 16, the County's Board of Supervisors approved the terms of a tentative agreement for a successor Memorandum of Understanding (MOU) to cover the bargaining unit at issue in the decertification.¹² The term of the MOU started July 20, 2015. SEIU's declarant Harrison-Johnson attests that the July 20 date was pivotal, as this is when members would start to see pay increases that SEIU had negotiated.

A meeting to discuss the CEA was scheduled for June 22. Using a form from a previous election, SEIU prepared a draft CEA, providing that a notice of election would be posted 14 days after the execution date of the agreement. Counting from the assumed execution date of June 22, (the date of the meeting) the notices would be posted on July 6. The voter packets would then be mailed out 14 days later, or on July 20. The SMCS Election Supervisor provided a revised version of the CEA. SEIU's attorney Kerianne Steele (Steele) then modified that document. The final CEA changed the notice posting date to July 8, but left intact the July 20 date for the mailing of the ballots.

B. Date of Mailing of Voter Packets

SMCS provides a declaration by its Chief, dated August 28, concerning the mailing of the voter packets. The Election Supervisor assigned by SMCS to conduct the election had a pre-scheduled leave of absence that started on July 13. However, he arranged to interrupt his leave, and worked on Thursday, July 16, to prepare the voter packets for the election. The Election Supervisor and three other SMCS staff members worked into the evening of July 16 to prepare the voter packets.¹³ At approximately 8:30 p.m., the Election Supervisor took the sealed voter packets to the post office, inadvertently forgetting that they were to be held for

¹² The tentative agreement was reached on June 10 and ratified by SEIU members in June.

¹³ According to the Tally of Ballots, there were 854 eligible voters, therefore 854 voter packets would have been prepared.

mailing until Monday, July 20. The Election Supervisor then resumed his leave of absence. By pre-arrangement, the ballot count on August 12 was conducted by two other SMCS Conciliators. The Election Supervisor did not realize that the ballots were mailed early until the day after the ballot count (August 13.) He notified the SMCS Chief of the error the next day (August 14). Thus, it is undisputed that the voter packets were, erroneously, mailed on July 16.

SEIU provides declarations¹⁴ attesting that several bargaining unit members reported receiving their voter packets before July 20, thus confirming that the voter packets were mailed earlier than the date specified in the CEA. At least two employees received their voter packets on July 18. One bargaining unit member, Ana Martinez, received the voter packet on July 18 and mailed her ballot the same day.

The Regional Director of SEIU's Fresno Office, Harrison-Johnson, provides a declaration and a supplemental declaration regarding the alleged impact of the early mailing on SEIU. She states that SEIU had planned its "get out the vote" organizing campaign around the mailing date of July 20, because SEIU views the first few days after mailing as critical decision-making days for voters. Because of the early mailing, SEIU representatives missed opportunities to talk to members about the election during the first few days of the voting period. SEIU had planned its "get out the vote" staffing around the date of July 20, and thus was short staffed in the days immediately prior. Upon learning of the early mailing, SEIU immediately dispatched its available organizers to go talk to voters. Harrison-Johnson states that she believes the early mailing of the ballots cost SEIU the election.

FCPSA provides the declaration of Victor Prado, who is the vice-president of FCPSA and a CO. Prado was present at the ballot count on August 12. Before the counting started,

¹⁴ See declarations of Coronado, Martinez, and Pinder.

the SMCS personnel conducting the ballot count asked if anyone had objections to the election process. No party objected. FCPSA alleges that the first time that SEIU took issue with the process was after the ballot count was completed. SEIU refused to sign the SMCS Certification of Conduct of Election form.

There are no facts to show whether anyone present at the ballot count informed the two SMCS conciliators conducting the count that the voter packets were mailed early. The Election Supervisor, who was not present at the count, did not realize the error until the next day, August 13.

C. Conduct of Sergeant Jeff Penry

SEIU provides a declaration of CO Mohammad Iqbal (Iqbal) concerning the pre-election conduct of Sgt. Penry. On the evening of July 28, at approximately 8:50 p.m., Iqbal states that he was on duty relieving another officer who was on break. He noticed that Sgt. Penry was talking to some other COs, including C. Meza, N. Sutakul, and R. Thao. Another CO, R. Necochea, was present, but was walking back and forth in the area. Iqbal overheard Sgt. Penry say words to the effect that "SEIU ... was not good for us." Iqbal also states that he heard Sgt. Penry say that SEIU refused to get peace officer status for the COs, and that SEIU was scared that the COs were going to leave the union and move to the FCPSA. Sgt. Penry then noticed that Iqbal was listening and left.

Iqbal further states, "while conducting his supervisory checks, Sgt. Penry used department time to spread rumors and pass his own personal opinions." Iqbal states that Sgt. Penry has been seen talking to COs, who were involved in the decertification, during the night shift in the jail and in the parking lot. On an unspecified date, Iqbal overheard Sgt. Penry saying he would help COs with the decertification process and that he supported the process. CO Raymond Diaz told Iqbal that he (Diaz) "just stands and listens to what [Sgt. Penry and the

other COs] say and does not provide his input.” On one occasion, Sgt. Penry said to Iqbal “SEIU is not good for law enforcement, they are only good for laborers, restaurant employees, secretaries, etc.” Iqbal also states that Sgt. Penry has harassed Iqbal, and Sgt. Penry got Iqbal in trouble when another officer started an argument with Iqbal about a union issue.

The County provides a declaration by Sgt. Penry. Sgt. Penry has been a Correctional Sergeant since 2007; prior to that he was a CO. He is the Vice President of the Correctional Sergeants Association, which is the certified representative of the County’s Bargaining Unit 37, comprised of Correctional Sergeants. When he was a CO, he was a member of Bargaining Unit 2, represented by SEIU. As a Sergeant, he is a first line supervisor of COs, but he is not a manager. Sgt. Penry states that he has never been directed by any management employee of the County to discuss SEIU or the FCPSA, nor has he been given permission to do so by management.

Sgt. Penry states that he has regular conversations with COs, some of whom are his friends as well as co-workers, concerning family and personal matters, and conversational topics such as sports and movies. He states that he has listened as some have expressed frustration with SEIU, however, he has never told anyone how they should vote. Sgt. Penry further states that he has not talked to CO Iqbal about SEIU, nor has he ever written him up or done anything to get him in trouble. Sgt. Penry also states that he was on annual leave (from July 31 through August 10) during part of the mail balloting period. Sgt. Penry states that the Correctional Sergeants Association is attempting to get peace officer status for its members, and that bargaining Unit 2 would have to agree with this in order for it to happen.

The County provides declarations from COs Diaz, Meza, Sutakul, and Thao. To the extent that they have had conversations with Sgt. Penry while on duty, they state that they have not discussed union issues, nor has Sgt. Penry tried to influence their vote. Meza states that on

one occasion a CO raised the topic of union representation, and Sgt. Penry stated he could not comment because it was not his place to do so. Diaz denies having the conversation with Iqbal about standing and listening to Sgt. Penry.

The FCPSA's Prado states in his declaration that he has been friends with Sgt. Penry for many years. Prado states that he and Sgt. Penry have conversations in the parking lot on occasion, but typically do not discuss work-related matters. In the past, Prado asked for Sgt. Penry's advice on forming an employee organization because Sgt. Penry had helped form the Correctional Sergeants Association. Prado further states that Sgt. Penry has not offered support or assistance to FCPSA, nor has the FCPSA sought Sgt. Penry's support or assistance.

D. Conduct of Other Bargaining Unit Members

Iqbal states that COs involved in the decertification effort "have been given freedom of going from one area of the jail to other [*sic*] persuading officers to join in their cause." In particular, COs Gomez, Holmes, Hanlin, Prado, and Rodriguez have done this on the day shift, which, he states, would be "easy to prove" by viewing security camera footage and interviewing those COs. Iqbal also states that COs have also used the intercom system "in the elevators following a systematic plan of telling officers how and whom to vote for in the elections." Iqbal does not provide any details concerning the alleged use of the intercom system. Iqbal states that on July 27, "Officer J. Rodriguez was also heard calling different floors and telling the officers to vote for the [FCPSA]." Iqbal also states that other COs are scared that they will be targeted.

The County states that Iqbal works the night shift (6 p.m. to 6 a.m.), so he would not have personal knowledge regarding events occurring during the day shift (6 a.m. to 6 p.m.). The County provides a declaration from Rodriguez, a CO who works the day shift. Rodriguez states that in the course of his duties Rodriguez will call other COs about inmate and

scheduling matters. Rodriguez further states that during the week of July 19, he sometimes ended these phone calls with a reminder to vote in the election but he did not tell anyone who to vote for, and he has never used the intercom system to speak about union issues or heard others doing so.

According to SEIU, Iqbal is assigned to the night shift, however, he frequently works overtime and therefore works day shifts from time to time. SEIU does not identify any specific dates that Iqbal worked overtime on the day shift during the pre-election period.

The FCPSA's leaders Gomez and Prado both state in their declarations that they have not been given any more latitude in campaigning at work sites and on work time than have representatives of SEIU.

E. The Closed Facebook Group

Employees supporting FCPSA formed a closed group, called Fresno County Employees United, on the social media site Facebook. (See SEIU's declarations of Harrison-Johnson and SEIU Fresno Office President Tom Abshare (Abshare).) According to SEIU, a "closed group" means that an individual with a Facebook account must affirmatively request to join the group or approve an invitation he/she has received to join the group. As of August 19, the closed group had approximately 561 members. SEIU calculated that 73 members of the closed group were employees and bargaining unit members who were eligible to vote in the decertification election. SEIU was able to access the closed group and obtain this information because a member of the closed group gave their log-in and password information to Abshare.

SEIU provides approximately 200 pages (some are duplicates) of screen shots of discussions and postings on the closed group page. Many of the discussions and postings are highly critical of SEIU. Sgt. Penry is apparently a member of the closed group, and the screen shots indicate that during the pre-election period, Sgt. Penry posted a number of comments that

were critical of SEIU, and supportive of FCPSA President Gomez and the decertification effort by FCPSA.

Member Borgeas and Assessor Dictos also appear to be members of the closed group. SEIU alleges that Program Technicians in the Assessor Recorder's Office were eligible voters in bargaining Unit 2.

SEIU provides a declaration by Mariann Coolidge who states that a flyer she posted on her Facebook page was reposted on the closed group page, without her consent, and that derogatory remarks were made about her on the closed group page.

SEIU also provides a declaration by Lenora Licon, who served as a negotiator for SEIU. SEIU asserts that FCPSA made a video recording of Licon when she was speaking at a public meeting of the County's Board of Supervisors, and put the recording on the closed group page. Licon does not have access to the closed group. Licon states that supporters of FCPSA also sent text messages to her accusing her of disseminating incorrect information.

The County asserts that a person can be added to a closed Facebook page by a member of that page, without the person having to take any affirmative action to join the group. (See Declaration of Carrie Kurtural, submitted by the County.) A person added to a group he/she does not wish to belong to can delete themselves from the group by clicking on "leave the group."

Sgt. Penry states that in January 2015 he received an invitation from Gomez to join the closed Facebook page. Sgt. Penry states that he has expressed his personal opinions regarding SEIU on this site while off duty and away from work. He further states that his opinions were his own and no one told him what he could or could not write.

The County provides a declaration by Member Borgeas. He states he was informed on August 11 that his name was on a membership page for the closed Facebook group. Prior to

this date, he was unaware that he was a member of this closed group and he did not take any steps to become linked with this closed group. Member Borgeas has a public Facebook page with over 2,500 friends, and members of his staff administer the page. The County also provides a declaration by Assessor Dictos, who likewise states that on August 10 he was informed that he was a member of the closed Facebook group, but he does not recall taking any steps to join the group or being notified that the group existed.

The FCPSA's President Gomez states in his declaration that he is the administrator of the closed Facebook group. He added Member Borgeas to the closed group. He never spoke to Member Borgeas about the decertification effort.

F. Other Relevant Facts

On August 3, SEIU attorney Steele sent a letter, by e-mail message, to County Counsel Catherine Basham (Basham) stating that FCPSA representatives were soliciting employees in work areas, on work time; that Sgt. Penry was questioning and influencing bargaining unit members, and that there was a closed Facebook group that was being supported by Member Borgeas and Sgt. Penry. Basham was out of the office and the County asserts that Basham did not receive the letter until August 9. According to documents provided by the County, Basham sent a reply e-mail message to Steele on August 9, stating that she had been out of the office, that she expected Steele would have received an automatic out-of-office message, and that she did not know if Steele had contacted anyone else with this information in Basham's absence.

The County provides a declaration from Captain Vega of the County Sheriff's Office. Captain Vega states that no one from SEIU contacted him during the pre-election period with any concerns related to the decertification election. County Sheriff Mims states in her declaration that on August 10, she received a copy of Steele's letter to Basham dated August 3. Sheriff Mims states that prior to receipt of this letter she was not aware of the closed Facebook

group, nor did she have any information that any manager in the Sheriff's Office had taken or expressed any opinion regarding the decertification election.

DISCUSSION AND CONCLUSIONS

As noted above, PERB Regulation 33009 allows for election objections under only two grounds: (1) the conduct complained of interfered with the employees' right to freely choose a representative, or (2) there was serious irregularity in the conduct of the election. The party raising objections to an election must make a prima facie showing of conduct establishing the grounds for the objections. (*Poway Unified School District* (2000) PERB Order No. Ad-306 (*Poway*)). This includes a factual showing that: (1) employee choice was affected or (2) the conduct complained of had the natural and probable effect of impacting employee choice. (*Ibid.*, citing *Pasadena Unified School District* (1985) PERB Decision No. 530, *Jefferson Elementary School District* (1981) PERB Decision No. 164, *San Ramon Valley Unified School District* (1979) PERB Decision No. 111, and *Santa Monica Unified School District and Santa Monica Community College District* (1978) PERB Decision No. 52.)¹⁵

After this threshold showing is met, PERB then must decide whether to set aside the election result depending "upon the totality of the circumstances raised in each case and, where appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (*Ibid.*, citing *Clovis Unified School District* (1984) PERB Decision No. 389 and *State of California (Departments of Personnel Administration, Developmental Services, and*

¹⁵ No administrative determination or Board decision has yet addressed election objections regarding SMCS under PERB Regulation 33009. However, the language of PERB Regulation 33009 is identical to that of PERB Regulation 32738, concerning objections to elections conducted by PERB. The cases cited herein were decided under PERB Regulation 32738 and are therefore applicable in analyzing identical language in PERB Regulation 33009.

Mental Health) (1986) PERB Decision No. 601-S.) Even where some impact upon voters can be inferred, the election result will not necessarily be set aside. (*Ibid.*)¹⁶

PERB must ensure that elections are conducted without undue interference from parties, but must also ensure that employees' votes are not unnecessarily set aside. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S.) Election objection cases involve a balancing of competing interests, and therefore PERB must weigh whether alleged misconduct was sufficient to affect the outcome. (*Ibid.*)

It is against these standards that SEIU's objections must be considered.

A. Early Mailing of Voter's Packets

PERB's consistent policy and practice has been to conduct election proceedings with the highest degree of detail and care. (*Poway, supra*, PERB Order No. Ad-306.) This is to ensure that all parties have full confidence in the election process, and are assured of a fair and neutral result. However, an election does not need to be perfect in order to be valid. The question is whether any mistakes are sufficient to affect the outcome of the election. (*State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.)

Historically, PERB has not hesitated to question the conduct of its own Board agents when conducting an election. In *Poway, supra*, PERB Order No. Ad-306, the Board affirmed the Regional Director's decision to void the results of a decertification election where three separate ballot counts—the second and third counts conducted after additional ballots were discovered—yielded three different results. The Board concluded that the Board agent

¹⁶ PERB has rejected the rigid application of the NLRB's "laboratory conditions" test. (*Poway, supra*, PERB Order No. Ad-306, citing *Sierra Sands Unified School District* (1993) PERB Decision No. 977.) However PERB may, and does, look for guidance to NLRB decisions in election objections cases. (*Gilroy, supra*, PERB Order No. Ad-226, citing *State of California* (1982) PERB Decision No. 198.)

conducting the election had committed “critical errors,” in failing to count ballots that had been received, thus constituting a serious irregularity and raising doubts as to the fundamental integrity of the election. Clearly, the failure to count votes properly cast disenfranchises voters and creates an inaccurate result.

In *Jefferson Elementary School District* (1981) PERB Decision No. 164, the Board authorized the subpoenaing and cross-examination of two Board agents, one accused of disseminating inaccurate information during an election period, and the other accused of failing to halt alleged electioneering at the polling location. While ultimately exonerated of any wrongdoing in that case, both Board agents were subjected to intense scrutiny and to an objective examination of whether their conduct had affected the results of the election.

In both *Poway* and *Jefferson Elementary School District*, the Board made clear that the election process must be transparent, free from error, and capable of withstanding close inquiry in the event of an objection. PERB holds itself and its agents to the highest standards because of the public trust that has been placed upon PERB to conduct fair and neutral elections. (See, e.g., *Poway, supra*, PERB Order No. Ad-306.) SMCS personnel are held to the same high standards, by virtue of the critically important work they perform as neutrals.¹⁷

Here, the CEA expressly provided that voter packets would be mailed on July 20. There is no dispute that the Election Supervisor erroneously mailed the voter packets on the evening of Thursday, July 16. Several members of the bargaining unit received their voter packets as early as July 18. It also appears that the Election Supervisor’s error in mailing the

¹⁷ SMCS has provided the State with qualified professional mediators and neutrals since 1947 – nearly 30 years longer than PERB. In July 2012, SMCS was administratively transferred from the Department of Industrial Relations to become a division of PERB. The regulations specifically authorizing SMCS to conduct consent elections for MMBA jurisdictions took effect in October 2013. However, SMCS has been conducting elections in the public sector for much of its history. (See Fecher, CPER Pocket Guide to Public Sector Mediation in California (2012).)

voter's packets early was completely inadvertent. There is nothing to suggest that the early mailing was deliberate or designed to favor a party, or done by pre-arrangement with a party. It further appears that no party brought the early mailing of the voter's packets to the attention of SMCS prior to the ballot count.¹⁸ While it is clear that a mistake was made, it must also be established that this mistake had the natural and probable effect of impacting employee choice.

In *Gilroy Unified School District* (1991) PERB Order No. Ad-226, PERB considered NLRB authority, noting that, "in assuring the integrity of the election process the [NLRB] goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity." (Citing *Brink's Armored Car, Inc.* (1986) 278 NLRB No. 16.)

In *Gilroy*, PERB conducted an on-site election, that also allowed for specified voters to vote by mail (certain employees on leaves of absence or who would be out of town). PERB conducted the election pursuant to a Directed Election Order (DEO), however the parties agreed on many of the key terms, including the definition of which employees would be allowed mail ballots. The employer, a school district, provided PERB with a list of names of employees who were to receive mail ballots. However, the employer also provided PERB with a supplemental list of "absentee voters" that had been provided by California Teachers Association (CTA), a party to the election. PERB allowed employees on both lists to vote by mail. PERB's use of the supplemental list was not contemplated by the DEO, and this allowed a much larger number of individuals to vote by mail than had been agreed to and specified in the DEO. Because the mail ballots were a different color than the on-site ballots, PERB was able to discern a significant difference in the results, such that it became evident that

¹⁸ SEIU did not tell the County either; the letter by Steele to Basham dated August 3, raising concerns about pre-election conduct, does not mention the early mailing of the ballots.

individuals who had mailed ballots overwhelmingly favored CTA—the party that had provided the improper supplemental list.

In *Gilroy*, PERB concluded that objections regarding various minor delays in service and the mailing of the lists were de minimus and insufficient to set aside the election. However, PERB did find that the use of the supplemental list and the mailing of ballots to a number of individuals not entitled to mail ballots under the DEO constituted sufficient grounds for setting aside the election. PERB considered the DEO's provision defining the group of employees entitled to receive mail ballots and found that it had not been complied with:

...it is undisputed that all parties agreed to this provision of the [DEO]. The board has held that the provisions of a consent election agreement control the terms and conditions of an election, including voter eligibility. [Citations omitted.] The same rule must be held to apply to the provisions of a directed election order, especially where the relevant provisions are in fact the result of the parties' agreement.

The NLRB similarly has set aside election results on the basis that there was some error in the mechanics of the election, or a failure to comply with the election agreement. For example, in *Athbro Precision Engineering Corp.* (1967) 166 NLRB No. 116, the NLRB set aside an election where a ballot box had been left open and unattended for a few minutes, even though there was no claim that the ballots had actually been tampered with. The NLRB will also set aside an election where a material term of an election agreement has been breached, stating that the parties to an election are entitled to have the provisions of their agreement diligently upheld. (*T & L Leasing* (1995) 318 NLRB No. 28.) Posting Notices of Election seven or eight hours later than scheduled is also grounds to set aside an election. (*Sara Lee Bakery Group* (2004) 342 NLRB No. 12.) Under these authorities, the inadvertent early mailing of voter's packets by SMCS was a deviation from a material term of the parties' CEA.

The early mailing also had the practical effect of enlarging the voting period beyond the period contemplated by the parties' CEA. The NLRB has established a bright-line rule strictly enforcing polling times and prohibiting voters from voting in an on-site election if they are not present during the time the polls are open. (*Monte Vista Disposal Co.* (1992) 307 NLRB No. 93.) Voters who arrive late, after the polls close, are not permitted to vote. (*Ibid.*) The NLRB has applied this rule equally to voters who arrive early, before the polls open. (*Rosewood Care Center* (1994) 315 NLRB 746, *enf.* (8th Cir. 1996) 83 F. 3d 1028.) By analogy, here the employees were improperly permitted to "arrive early" and cast their ballots several days prior to the start of the voting period as set forth in the CEA.

The unanticipated expansion of the voting period created an unknown impact upon the results of the election. Verifying the actual impact upon voters would, under these particular circumstances, be impossible. SMCS does not keep track of which voters returned ballots on what day, nor does it track whether voters on different days did or would have voted for one union in favor of the other. The process of secret balloting means that the ballots, their choices, and their date of return, are anonymous in every respect. It would work a prejudicial unfairness for PERB to require a party—SEIU in this case—to empirically prove that the longer voting period actually impacted results. It is enough to show that the early mailing was a material deviation from the terms of the CEA and had a probable effect upon the outcome. SMCS made an inadvertent and honest error, but the parties should not have to bear the consequences of that error.

PERB decides whether to set aside the election result depending upon the totality of the circumstances and, where appropriate, the cumulative effect of the conduct alleged. (*Poway, supra*, PERB Order No. Ad-306.) In an abundance of caution, and in light of the specific circumstances set forth herein, the election results must be set aside and the election re-run.

B. Other Objections

Because the inadvertent early mailing of the voter's packets warrants setting aside the results of the election, it is not necessary for PERB to rule on SEIU's other election objections.

PROPOSED ORDER

Based on the entire record in this matter and applicable law, the objection to the election based on the early mailing of the voter packets, is hereby SUSTAINED. The parties are directed to make themselves available to SMCS in order to revise the consent election agreement for a rerun election. SMCS will work with the parties to establish a new voting period and mail ballot election consistent with the parties' agreement.

RIGHT OF APPEAL

An appeal of this decision to the Board itself may be made within ten calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, §§ 33010; 32360.) To be timely filed, the original and five copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the

U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal. (Cal. Code Regs., tit. 8, § 32360, subd. (c).) An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request. (Cal. Code Regs., tit. 8, § 32370.)

If a timely appeal is filed, any other party may file with the Board an original and five copies of a response to the appeal within ten calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be “served” upon all parties to the proceeding and on the regional office. A “proof of service” must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly “served” when personally delivered, or when deposited in the mail or with a delivery service properly addressed, or when sent by facsimile transmission in accordance with the requirements of California Code of Regulations, title 8, sections 32090 and 32135, subdivision (d).

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be

accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8,
§ 32132.)

Laura Z. Davis
Senior Regional Attorney