

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



MORGAN HILL UNIFIED SCHOOL DISTRICT,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Exclusive Representative.

Case No. SF-UM-768-E

Administrative Appeal

PERB Order No. Ad-443

December 13, 2016

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 521; Liebert Cassidy Whitmore by Laura Schulkind and Kristin Lindgren, Attorneys, for Morgan Hill Unified School District.

Before Winslow, Banks, and Gregersen, 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 Abeyance Letter (Abeyance Letter) issued by the PERB Office of the General Counsel (OGC). The Abeyance Letter placed into abeyance a unit modification petition filed by SEIU on or about July 1, 2016 under the Educational Employment Relations Act (EERA)¹ to modify its classified employee bargaining unit with Morgan Hill Unified School District (District), pending the outcome of a decertification petition also filed on or about July 1. In addition to appealing the Abeyance Letter under PERB Regulation 32360 subdivision (a), SEIU requested

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

a stay of activity on the decertification petition under PERB Regulation 32370.²

For the reasons explained below, we deny SEIU's appeal and request for stay.

PROCEDURAL HISTORY

On or about July 1, 2016, a group of bargaining unit employees seeking to decertify SEIU as the exclusive representative of the District's classified employee bargaining unit filed a decertification petition. This petition is being processed as PERB Case No. SF-DP-322-E.

On the same day, SEIU filed a unit modification petition to delete the Human Resources Specialist classification from the classified employee bargaining unit, on the grounds that it is a confidential employee position under EERA sections 3540.1, subdivision (c) and 3543.4. On or about July 25, 2016, the District filed a response opposing SEIU's unit modification petition on the merits.

On August 8, 2016, the OGC determined that the decertification petition was timely and was accompanied by a sufficient proof of support. On the same day, the OGC notified the parties that SEIU's unit modification petition would be placed in abeyance until the decertification petition could be processed. The Abeyance Letter noted that the Board has held that "a decertification petition which is properly filed in an established unit and contains the requisite proof of support should be given priority over a unit modification petition, so long as no formal determination on the merits of the unit modification petition has been made at the time the decertification petition is filed." (*Peralta Community College District* (1987) PERB Order No. Ad-164 at p. 8 (*Peralta*); underline in original.) No determination was made on the merits of the unit modification petition.

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

Concluding that *Peralta, supra*, PERB Decision No. Ad-164 applied to this case, the OGC placed the unit modification petition in abeyance pending resolution of the decertification petition.

SEIU'S APPEAL

SEIU appealed the Abeyance Letter, asserting that it satisfied the definition of an administrative decision under PERB Regulation 32350,³ even though it was not titled “administrative determination.” On the merits, SEIU urges that the rule articulated in *Peralta, supra*, PERB Decision No. Ad-164 should not apply in this case because an alleged confidential employee “acted in her capacity as a confidential employee and as an agent of management to further the decertification effort.” (Administrative Appeal, p. 1.) Thus, according to SEIU, the confidential employee’s participation in the decertification effort has tainted it and the decertification petition therefore should be dismissed.

SEIU requests that the Board direct the OGC to remove the unit modification petition from abeyance and set the matter for informal conference or formal hearing and stay the

³ PERB Regulation 32350, “Definition of Administrative Decision,” states:

- (a) An administrative decision is any determination made by a Board agent other than:
 - (1) a refusal to issue a complaint in an unfair practice case pursuant to Section 32630,
 - (2) a dismissal of an unfair practice charge, or
 - (3) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to Section 32215.
- (b) An administrative decision shall contain a statement of the issues, fact, law and rationale used in reaching the determination.

decertification election until the unit modification petition can be adjudicated. We deny this request for reasons explained below.

SEIU also requested official notice of its unfair practice charge filed on August 19, 2016, which did not yet have a case number, and SEIU's request to block the decertification election in Case No. SF-DP-322-E. We grant that request.⁴

DISCUSSION

Although the broad definition of "administrative decision" contained in PERB Regulation 32350 could theoretically include an abeyance letter, such a conclusion ignores PERB Regulation 32380, which states that interlocutory orders are not appealable unless certain conditions are met.

Our regulations do not define "interlocutory order." However, we may look to other authority for guidance. The OGC's placement of SEIU's unit modification petition in abeyance pending resolution of the decertification petition constitutes an interlocutory order if the Abeyance Letter does not "constitute[e] a final resolution of the whole controversy."⁵

⁴ PERB may take official notice of matters within its own filed and records (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C. p. 16.) We note that in Case No SF-DP-322-E, the OGC considered SEIU's request to block the decertification election on the basis of Unfair Practice Case No. SF-CE-3194-E, among other charges. In that unfair practice charge, SEIU alleged that the Human Resource Specialist classification is "confidential," that an incumbent employee in that classification was active in the decertification effort, and that the District improperly provided that employee with a list of employees in the unit. On September 23, 2016, the OGC determined that these allegations provided no basis for staying the election. SEIU did not appeal that administrative determination.

⁵ INTERLOCUTORY, Black's Law Dictionary (10th ed. 2014). See also 7 Witkin, *Cal. Procedure*, (5th ed. 2008) Judgment, § 12; *Sawyer v. Orange Motors* (N.Y. App. Div. 2005) 24 A.D.3d 1117, 1117: ("[T]he Board's decision—which essentially held claimant's reduced earnings benefits in abeyance pending consideration of a more developed record—was interlocutory in nature and neither disposed of all substantive issues nor reached a threshold legal issue which might be conclusive of the claim . . .").

Placement of the unit modification petition in abeyance was not a final determination on the merits, because the OGC's ruling did not decide the merits of that petition, i.e., whether the classification in question or the four employees in that classification were "confidential."

Moreover, the abeyance does not prejudice SEIU's legal position with respect to the decertification petition. SEIU may challenge the ballots cast by the employees it contends are improperly in the bargaining unit. It may also file objections to the election if it loses the election, and it may pursue the unfair practice charges it has filed. In short, SEIU has several avenues to litigate the question of whether participation by the four allegedly confidential employees so tainted the decertification process that adverse election results should be overturned.

For these reasons, the Abeyance Letter is properly characterized as an interlocutory order. Under PERB Regulation 32380 subdivision (b), interlocutory orders are not appealable unless the board agent joins in the request and certifies the matter to the Board itself. (PERB Regulation 32200.) Under PERB Regulation 32200, "[t]he Board itself will not accept the request unless the Board agent joins in the request." SEIU did not seek the board agent's joinder in SEIU's appeal. The appeal is therefore procedurally deficient, and we reject it on that ground.

We also reject SEIU's request that the decertification petition be dismissed prior to the election. The only grounds on which decertification petitions may be dismissed prior to an election are those enumerated in PERB Regulations 32770 and 32776.⁶ (See, e.g., *State of*

⁶ PERB Regulation 32770 requires a proof of support of at least 30 percent of unit members. Failing to meet that level of support justifies dismissal of the decertification petition. PERB Regulation 32776 incorporates the doctrines of contract bar and representation bar.

California (Department of Personnel Administration) (1985) PERB Decision No. 532-S; Capistrano Unified School District (1994) PERB Order No. Ad-261; Taft Union High School District (1978) PERB Order No. Ad-50.) Since the decertification petition was accompanied by more than 30 percent support and there was no bar to an election, the OGC could not dismiss the decertification petition prior to the election, even if the classification at issue in the unit modification petition was confidential.

Since we deny SEIU's appeal, we also hereby deny SEIU's request for a stay of activity on the decertification petition under PERB Regulation 32370.

ORDER

Service Employees International Union Local 521's appeal of the Office of the General Counsel's abeyance letter in Case No. SF-UM-768-E is hereby DISMISSED.

Members Banks and Gregersen joined in this Decision.