



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

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Employer,

and

SAN DIEGO HOUSE STAFF ASSOCIATION,

Exclusive Representative.

Case No. SF-UM-788-H

PERB Order No. Ad-459-H

January 19, 2018

Appearance: Paul J. Mirowski, Attorney, for San Diego House Staff Association.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on the San Diego House Staff Association's (Association) appeal of an administrative determination (attached) by PERB's Office of the General Counsel. The Association filed a unit modification petition requiring proof of majority support among the employees to be added to the unit. (PERB Reg. 32781, subd. (e)(1).)¹ To meet this requirement, the Association provided printouts of employees' electronic signatures in favor of representation by the Association. The Office of the General Counsel dismissed the petition on the grounds that the Association did not provide the employees' original signatures.

In its appeal, the Association argues that the Board is required either to accept electronic signatures on proof of employee support, or to conduct an election to determine

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 30001 et seq.

whether the Association enjoys majority support among the employees proposed to be added to the unit.

The Board has reviewed the entire case file and fully considered the issues raised by the Association's appeal. Based on this review, the Board concludes that the administrative determination was in accordance with PERB Regulations and Board precedent, and we adopt it as the decision of the Board itself, subject to the following discussion of issues raised by the Association's appeal.

BACKGROUND

The Association is the exclusive representative of a bargaining unit of 568 resident physicians at University of California's San Diego campus (UCSD). Its unit modification petition, filed on May 17, 2017, seeks to add approximately 220 medical fellows to the unit.

The petition included a description of a survey conducted by the Association, in which the Association contacted by e-mail 426 individuals it believed were current medical fellows, and asked them to complete an online form stating whether or not they desired to be represented by the Association. The petition also included a spreadsheet identifying the individuals who had completed the form, the date and time they submitted their responses, whether they were currently employed as a medical fellow or would be employed in that capacity during the 2017-2018 academic year, and whether they had indicated a desire to be represented by the Association.

On May 18, 2017, the Office of the General Counsel sent a letter notifying the Association that the information submitted with the petition did not constitute valid proof of support as defined by PERB Regulation 32700. In response, the Association provided copies the employees' responses to the survey. Each response is in the form of an e-mail message

from JotForm, the service used to conduct the survey. The messages include the information that was input by the employees, including their signature.

On June 21, 2017, the Office of the General Counsel sent a letter informing the Association that its proof of support still did not meet the requirements of PERB Regulation 32700. The Association was given 10 additional days to cure the deficiency.

On July 20, 2017, having received no additional proof of support, the Office of the General Counsel dismissed the petition.

DISCUSSION

Because the Association's petition sought to increase the size of its bargaining unit by more than 10 percent, proof of majority support among the employees to be added was required by PERB Regulation 32781, subdivision (e)(1).

Proof of support is defined in PERB Regulation 32700. Subdivision (b) of this regulation requires the proof of support to "indicate each employee's printed name, signature, job title or classification and the date on which each individual's signature was obtained."

Subdivision (e) provides in part:

proof of support may consist of any one of the following original documents or a combination thereof:

- (1) Current dues deduction authorization forms;
- (2) Membership applications;
- (3) Authorization cards or petitions signed by employees. The purpose of the petition shall be clearly stated on each page thereof;
- (4) A notarized membership list, provided it is accompanied by the date of each member's signature on an enrollment form, membership application, or designation card or cards, supported by a declaration under penalty of perjury that the employee organization has on file the aforementioned documents which

indicate the employee's desire to be represented by the employee organization. A sample of such signed forms shall accompany the list.

(5) Other evidence as determined by the Board.

The Association argues that this regulation does not preclude submission of digital or electronic signatures. We disagree. The regulation requires that proof of support consist of "original documents." PERB Regulations specifically distinguish between "original" documents and documents submitted by facsimile transmission or electronic mail (PERB Reg. 32135, subd. (c)), as well as between "original" documents and "copies" (see, e.g., PERB Reg. 32135, subd. (a)). In this context, "original" means "that from which a copy, reproduction, or translation is made." (Merriam-Webster Online Dictionary <<https://www.merriam-webster.com/dictionary/original>> [as of September 29, 2017].) It is also noteworthy that subdivision (b) of PERB Regulation 32135 specifically excepts proof of support as described in Regulation section 32700 from "all documents" that may be filed by facsimile or electronic mail. For these reasons, we conclude that a paper document showing a digital or electronic signature is not an original document.

Our reading of PERB Regulation 32700 to permit only original signatures as proof of support by dues deduction authorization forms, membership applications, or authorization cards is further supported by the regulation's history. The Board inserted the phrase "original documents" in PERB Regulation 32700, subdivision (e), in 1988.² In its Final Statement of Reasons for this amendment, the Board explained:

The language in 32700(e) should be amended to clarify that PERB will only accept original signatures (as opposed to copies of such signatures). Requiring original signatures eliminates any

² The previous version of Regulation 32700 subdivision (e) made no reference to original documents, but in every other respect was identical to the current version.

possibility that sophisticated copying techniques could be utilized to create cards of [*sic*] petitions which are then filed with PERB in support of a recognition, election or unit modification petition.

Because subdivision (e) of 32700 requires “original documents,” and in light of the above-quoted explanation for that requirement, we do not believe we can interpret the regulation as authorizing the Board to accept electronic signatures without changing it through a regular rule-making process. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, pp. 8-9.)

The Association next argues that various statutes require the Board to accept digital or electronic signatures, including Government Code section 16.5, Civil Code section 1633.7, and the federal Electronic Signatures in Global and National Commerce Act (ESIGN Act), 15 U.S.C. § 7001 et seq. We find none of these statutes to be on point. Government Code section 16.5, subdivision (b) specifically provides that “[n]othing in this section shall require a public entity to use or permit the use of a digital signature.” Civil Code section 1633.7 is part of the Uniform Electronic Transactions Act (UETA) (Civ. Code, § 1633.1 et seq.), which applies “only to a transaction between parties each of which has agreed to conduct the transaction by electronic means.” (*Id.*, § 1633.5, subd. (b).) The UETA defines “transaction” broadly as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” (*Id.*, § 1633.2, subd. (o).) Thus, the UETA, like Government Code section 16.5, requires that PERB consent to accept electronic signatures.³ Finally, the ESIGN Act does not “limit[] or supersede[] any

³ At least one appellate court has questioned whether the UETA requires a government agency to accept electronic signatures. (See *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1648, fn. 6 [“Given the important role of elections officials in the [process of verifying signatures for initiative petitions], they arguably should be considered parties to the signature collection process”].)

requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.” (15 U.S.C. § 7004(a).)⁴ Therefore, none of these statutes require PERB to accept electronic signatures.

The Association also argues that we should apply the NLRB’s standards for accepting proof of support with electronic signatures. In 2014, the NLRB considered whether to adopt regulations allowing it to accept such proof of support for representation petitions filed under the National Labor Relations Act. (Representation–Case Procedures, *supra*, 79 Fed.Reg. 74308, 74329-74331.) It ultimately concluded that it could accept proof of support in this format without changing its existing regulations, but it directed its general counsel to study the issue further and promulgate guidelines for accepting electronic signatures. (*Id.* at p. 74331.) The following year, the NLRB’s general counsel issued extensive guidance on the subject. (*Guidance Memorandum on Electronic Signatures to Support a Showing of Interest* (Oct. 26, 2015) 2015 WL 6523463 (N.L.R.B.G.C.).)

The Association correctly notes that the Board often looks to NLRB practices and precedents for guidance when interpreting the statutes within its jurisdiction. (See, e.g., *City of Sacramento* (2013) PERB Decision No. 2351-M.) But we have also noted that this guidance may have limited value, particularly in the context of representation matters. This is because “we cannot ignore the plain command of the statutes we are entrusted to enforce, nor can we make changes to our regulations through decision-making rather than rulemaking.” (*Regents*

⁴ Notably, National Labor Relations Board (NLRB) considered whether the E-SIGN Act requires it to accept proof of support with electronic signatures, and determined only that it “embod[ies] a strong policy preference . . . for the use and acceptance of electronic signatures, when practicable. . . .” (Representation–Case Procedures, 79 Fed.Reg. 74308, 74330 (Dec. 15, 2014).)

of the University of California (2016) PERB Order No. Ad-435-H, p. 9.) “PERB has generally construed its regulations governing representation matters narrowly and declined to look to private-sector authority for guidance when PERB’s regulations expressly address the policy concerns underlying the practice and procedure of private-sector labor boards such as the NLRB or Agricultural Labor Relations Board.” (*Regents of the University of California* (2016) PERB Order No. Ad-434-H, pp. 8-9.)

This is an instance where PERB’s regulations diverge from the NLRB’s. Although our regulations require that proof of support consist of “original documents” (and therefore original signatures), the NLRB’s do not.⁵ As a result, we cannot simply adopt through case law the NLRB’s approach to electronic proof of support. (See *Regents of the University of California, supra*, PERB Order No. Ad-435-H, p. 9.)⁶

We are not unsympathetic to the Association’s policy arguments in favor of accepting proof of support with electronic signatures. It may well be that our regulations’ narrowly-defined “original” signature requirement is in need of an update to better correspond to the

⁵ For instance, a petition for certification filed with the NLRB must include “[a] statement that a substantial number of employees in the described unit wish to be represented by the petitioner,” and “[e]vidence supporting the statement. . . .” (29 C.F.R. § 102.61(a)(7) (2017).) A petition for decertification requires “[a] statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative,” and “[e]vidence supporting the statement. . . .” (*Id.*, subd. (c)(8).) The NLRB allows evidence consisting of “original signatures” to be filed separately from electronically filed petitions (*id.*, subd. (f)), but it does not require original signatures. (See Representation–Case Procedures, *supra*, 79 Fed.Reg. 74308, 74329, fn. 94 [“While the Board’s practice has been to accept only handwritten signatures, it may, consistent with its current Rules and Regulations . . . , accept electronic signatures”].)

⁶ *City of Sacramento, supra*, PERB Decision No. 2351-M, on which the Association relies, is not to the contrary. In that case, PERB followed the NLRB in supplementing its traditional notice posting remedy in unfair practice cases, by requiring transmission of the notice by means of e-mail, intranet, websites, or other electronic means the employer regularly uses to communicate with its employees. (*Id.* at pp. 44-45.) This did not require a regulatory change because PERB’s regulations are silent on the notice posting remedy.

realities of the 21st Century. (See *City of Sacramento, supra*, PERB Decision No. 2351-M, p. 45.) Accordingly, the Board will direct the Office of the General Counsel to review and make recommendations to us on whether regulatory amendments are appropriate to accommodate the creation, storage and use of electronic data as proof of support in representation matters and, if so, what safeguards are necessary to protect employee choice and legitimate privacy concerns. (See, e.g., PERB Reg. 32700, subd. (g).) However, in this case, we affirm the Office of the General Counsel's determination that the Association's proof of support did not comply with PERB Regulations for reasons explained above.

In light of this conclusion, we reject the Association's argument that if the Office of the General Counsel deemed the digital signatures "questionable," it should have conducted an election among the employees to be added to the unit. PERB Regulation 32786, subdivision (a) requires the Board to conduct a representation election in a unit modification petition "where appropriate." The appropriate action when a unit modification petition lacks sufficient proof of support is not an election, but dismissal of the petition. (PERB Reg. 32786, subd. (b)(2).)

ORDER

The San Diego House Staff Association's appeal from the administrative determination in Case No. SF-UM-788-H is hereby DENIED.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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July 20, 2017

Paul J. Mirowski, Managing Attorney
8030 La Mesa Boulevard, Suite 501
La Mesa, CA 91942

Re: Case No. SF-UM-788-H
University of California
San Diego House Staff Bargaining Unit – M6
Dismissal of Petition

Dear Mr. Mirowski:

The above-referenced petition for unit modification pursuant to PERB Regulation 32781(a)(1)¹ was filed with the Public Employment Relations Board (PERB or Board) on May 15, 2017, by the San Diego House Staff Association (Association) regarding employees of the University of California, San Diego (UCSD). The Petition seeks to add to the unit Medical Fellows in title codes 2726 and 2732.

Due to the number of employees proposed to be added to the unit, the petition requires proof of majority support of persons employed in the classifications or positions to be added pursuant to PERB Regulation 32781(e)(1).

On June 21, 2017, petitioner was notified of PERB's initial determination that the proof of support submitted in the above-referenced case was insufficient, and the petitioner was granted an additional time period in which to perfect its proof of support. No additional proof of support has been received.

Final review of all proof of support submitted in this case has resulted in the administrative determination that it does not meet the requirements of PERB Regulation 32781(e)(1) and is therefore insufficient to support the unit modification petition. For this reason, the petition is hereby dismissed. (PERB Regulation 32786(b).) A response pursuant to PERB Regulation 32783 is not necessary from the employer or any interested party.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (PERB Regulation 32360.) To be timely filed,

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 Eighteenth 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. (PERB Regulations 32135(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. (PERB Regulation 32136(b), (c) and (d); see also Regulations 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. (PERB Regulation 32360(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 justification for the request. (PERB Regulation 32370.)

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal. (PERB Regulation 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 PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

cc: Allison Woodall, Deputy General Counsel