STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA VIRTUAL ACADEMIES, Employer, and CALIFORNIA TEACHERS ASSOCIATION, Petitioner.	Case No. LA-RR-1227-E Request for Judicial Review PERB Decision No. 2484 PERB Order No. JR-27 September 30, 2016

Appearances: Jackson Lewis by David S. Allen and Michael A. Wertheim, Attorneys, and Gibson, Dunn & Crutcher by Eugene Scalia, Greta B. Williams and Megan Cooney, Attorneys, for California Virtual Academies; Laurie M. Burgess, Staff Attorney, for California Teachers Association.

Before Winslow, Banks and Gregersen, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request filed pursuant to PERB Regulation 32500[1] that the Board join California Virtual Academies (CAVA) in seeking judicial review of the Board's decision in *California Virtual Academies* (2016) PERB Decision No. 2484. In that case, an administrative law judge (ALJ) considered a petition for exclusive recognition by California Teachers Association (CTA) of a single bargaining unit of approximately 700 certificated teachers employed by 11 charter schools. The ALJ concluded that a statewide bargaining unit consisting of all CAVA teachers was appropriate and that CAVA Schools and each of the 11

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32500 provides in pertinent part: "(a) Any party to a decision in a representation case by the Board itself . . . may file a request to seek judicial review within 20 days following the date of service of the decision. . . . (c) The Board may join in a request for judicial review or may decline to join, at its discretion."

individual schools were joint employers of the nearly 700 teachers. Both CAVA and CTA excepted to the proposed decision.

The threshold issue presented on appeal was whether the self-described network of 11 "virtual" charter schools that comprise CAVA was a single or joint employer for representation purposes under the Educational Employment Relations Act (EERA).[2]

The Board affirmed the ALJ's ultimate conclusion that a single, statewide unit is appropriate and affirmed the ALJ's order certifying CTA as the exclusive representative of the employees in the petitioned-for unit. However, it reached this conclusion on the grounds that the single employer doctrine applies for representation purposes under EERA. CAVA asserts that the Board's determination that CAVA constitutes a single employer is a question of special importance warranting the Board to join CAVA in seeking judicial review.

The Board has reviewed the entire record in light of CAVA's request for judicial review (Request), CTA's response, and the relevant law. Based on this review, the Board declines to join CAVA's request for judicial review for reasons explained below.

CAVA'S REQUEST

CAVA asserts in its Request that the Board's decision in *California Virtual Academies, supra*, PERB Decision No. 2484 is a departure from nearly 40 years of Board precedent; that the Board's determination that 11 separately-incorporated schools across the State are a single employer will have significant ramifications for the growing number of charter schools in the State, as well as for other public employers that, like CAVA schools, outsource administrative functions and use some of the same personnel to reduce costs to taxpayers and consumers. CAVA further asserts that judicial review is appropriate to: (1) determine whether the single

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

employer doctrine may be used to "override an individual charter school's declaration under section 47611.5(b) of the Education Code that it is the 'exclusive' public school employer for representation purposes under the EERA, and (2) determine how the 'single employer' doctrine should be applied where there are multiple, geographically dispersed 'public entities involved.'" (Request, p. 6.)

DISCUSSION

Under EERA section 3542, subdivision (a):

> (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

(Emphasis added.)

Under PERB Regulation 32500, the Board has the sole discretion to determine whether a case is "one of special importance." The regulation states, in pertinent part:

> (c) The Board may join in a request for judicial review or may decline to join, at its discretion.

(PERB Regulation, § 32500, subd. (c).)

As the Board noted in *San Diego Community College District* (2002) PERB Order No. JR-20 (*San Diego CCD*):

> The Board's considerable discretion in the determination of appropriate units is demonstrated by the very limited circumstances under which judicial review of its unit decisions may be obtained. (*San Diego Unified School District* (1981) PERB Order No. JR-10.) The reason for PERB's strict standard is to ensure that the fundamental rights of employees to form, join and participate in the activities of employee organizations is not abridged. Further, the standard is also employed to prevent employee organizations' rights from being inhibited because if

> unit determinations by PERB are subject to numerous legal challenges, delays of implementation of the Board's decisions could occur. (*San Francisco Community College District* (1995) PERB Order No. JR-16-E (*San Francisco*); *State of California (Department of Personnel Administration)* (1993) PERB Order No. JR-15[-S].)

(*San Diego CCD, supra*, PERB Order No. JR-20 at pp. 2-3.)

The Board applies a strict standard when reviewing requests for judicial review, and will join in a request only in cases of special importance. (*San Diego, supra*, PERB Order No. JR-20 at p. 2.) The Board has held that:

> A case has "special importance" if the Board determines that (1) there is a novel issue presented; (2) the issue primarily involves construction of a statutory provision unique to EERA; and (3) the issue is likely to arise frequently.

(*Burlingame Elementary School District* (2007) PERB Order No. JR-24 (*Burlingame*).)

PERB joins in requests for judicial review only in the narrowest of circumstances. The three-part test for determining "special importance" articulated in *Burlingame, supra*, PERB Order No. JR-24 is phrased in the conjunctive, and therefore all three parts must be satisfied before PERB will join in the request for judicial review. (*The Regents of the University of California* (1999) PERB Order No. JR-19-H, p. 4.)

In the instant case, CAVA has not met any of the three indicia of "special importance," as explained below.

a. Novel Issue Presented

CAVA argues that the case involves the Board's first-ever determination that separate entities are a "single employer" under EERA. CAVA also argues that the circumstances of this case are unprecedented, in that they (1) present the issue of whether the "single employer" doctrine analysis may be used to override an individual charter school's declaration under

section 47611.5 subdivision (b) of the Education Code that it is the "exclusive" public school employer for representation purposes under the EERA, and (2) involve the finding that 11 different charter schools in locations across the State constitute a single employer, while single employer findings ordinarily involve just two entities.

While PERB has not previously concluded that multiple public agencies have comprised a single employer, it is not the case that PERB has never considered and analyzed the single employer doctrine before. The Board has considered the "single employer" doctrine under EERA on prior occasions and determined under the facts of those cases that the "single employer" theory did not apply. Our analysis of the doctrine clearly indicates that the "single employer" concept is not novel to the Board. (See, e.g., *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332 at p. 2, fn. 2: "[W]e hold that EERA section 3540.1(k) does not preclude the possibility of two entities acting as a single or a joint employer within the meaning of the EERA. [Citation omitted.] In this case, however, the hearing officer properly found that the District and the County Superintendent were separate employers." (*Turlock School Districts* (1977) EERB Order No. Ad-18.) There is nothing "unprecedented" about our finding that the 11 CAVA schools constitute a single employer. Under CAVA's argument, any factual distinction between the *California Virtual Academies* decision and prior decisions would make it "unprecedented," despite our consistent application of the well-established "single employer" doctrine.[3]

[3] CAVA points to a comment in *California Virtual Academies*, *supra*, PERB Decision No. 2484 that "we are in uncharted waters" (*id*. at p. 86) implying the Board itself has already determined its decision that the case presents a novel issue for purposes of justifying PERB's joining in a request for judicial review. We disagree. The fact that this case was the first time the Board applied the single employer doctrine to the facts presented and concluded the doctrine applied "only in the most unique of circumstances," prompted the "uncharted waters"

CAVA asserts that the Board's conclusion that Education Code section 47611.5, subdivision (b) did not preclude a finding that a charter school with multiple sites was a single employer presents a novel issue warranting judicial review.[4] This was an argument CAVA made in the proceedings below. The fact that CAVA disagrees with the Board's legal and factual conclusions does not make for a "novel" issue. If such disagreements did determine a "novel issue," every case involving conflicting statutory interpretations, no matter their merit, would satisfy this element, rendering meaningless the policy considerations discussed in *San Diego CCD*, *supra*, PERB Order No. JR-20 that counsel for a very strict standard in joining in requests for judicial review. (See, also, *Regents of the University of California* (1998) PERB Order No. JR-18-H at p. 8: "[M]ere disagreement with the Board's exercise of its fundamental responsibility to approve appropriate units does not demonstrate that a case is of special importance.")

b. Issues Primarily Involve Statutory Construction Unique to EERA

In support of the second *Burlingame* element, CAVA reasserts its argument that the

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comment. However, as the remainder of that sentence reads: "we are not without the analytical tools necessary to arrive at the appropriate result."

[4] On this point the Board reasoned that in a unit determination, the first issue is whether CAVA met the statutory definition of an employer under EERA, which includes in its definition of "public school employer" a "charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code." (EERA, § 3540.1, subd. (k).) Education Code section 47611.5, subdivision (b) provides in part: "A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. . . ." Even though each of the CAVA charter schools is the "exclusive public school employer" (as opposed to the authorizing public school district), the Board noted that there is no indication that by requiring a charter petition to designate whether the charter school or the school district would be the employer, the Legislature intended to impede PERB in its determination of matters uniquely within its own expertise, such as application of the single employer doctrine in the appropriate factual circumstance. (*California Virtual Academies*, *supra*, PERB Decision No. 2484, p. 53.)

Board's decision in *California Virtual Academies*, *supra*, PERB Decision No. 2484 primarily turned on the meaning of the phrase "exclusive public school employer" contained in Education Code section 47611.5, subdivision (b). (*Burlingame*, *supra*, PERB Order No. JR-24.)

We disagree. This case did not turn primarily on statutory construction. Rather, it was decided after the Board's painstaking analysis of the facts and an application of those facts to the law. (See *Palomar Community College District* (1992) PERB Order No. JR-14, p. 4.) The decision's discussion of "exclusive public employer" in addressing CAVA's argument does not turn this fact-intensive case into one of statutory construction.

By contrast, the decision in *Castaic Union School District* (2010), PERB Order No. JR-25 (*Castaic*), did turn on statutory construction (statutory definition of classified employee),[5] as did the Board's decision in *Fairfield-Suisun Unified School District et al.* (1980) PERB Order No. JR-8 (meaning of "same employee organization"). As explained in *California Virtual Academies*, *supra*, PERB Decision No. 2484, in employing the single employer doctrine to CAVA's network of schools, PERB was not identifying a "legally distinct entity" from those enumerated in EERA section 3540.1, subdivision (k). It was instead invoking an "analytical construct that is imposed under judicially developed doctrines [based] on legally distinct but nominally separate and functionally integrated entities *solely* for the purpose of representation and collective bargaining." (*California Virtual Academies*, *supra*, PERB Decision No. 2484, p. 67.) This conclusion was based primarily on a factual analysis, not on a statutory interpretation.

[5] The underlying decision on the merits in *Castaic* (*Castaic Union School District* (2010) PERB Order No. Ad-384) was overturned by *Center Unified School District* (2014) PERB Decision No. 2379, p. 5, which held that noon duty aides were "public school employees" entitled to collective bargaining rights under EERA.

c. The Issue is Likely to Arise Frequently

In support of the third *Burlingame* element, CAVA argues that the growth in California of charter schools generally and "on-line" schools particularly, make the issues presented in this case likely to arise with increasing frequency in the coming years. (*Burlingame*, *supra*, PERB Order No. JR-24.)

We are not persuaded. Simply because CAVA asserts that charter schools are likely to proliferate does not demonstrate that the particular issues in *this* case are likely to arise frequently, especially given the fact-intensive nature of the decision. (*Options for Youth-Victor Valley, Inc.* (2004) PERB Order No. JR-22.)

In contrast, the decision in *Castaic*, *supra*, PERB Order No. JR-25 was likely to arise frequently for the reasons stated therein. The issue in that case was whether individuals in part-time playground positions who hold no other classified position within the same school district, and who were thus excluded from the classified service by Education Code section 45103, subdivision (b)(4), have representational rights under EERA. According to the Board, the issue was likely to arise frequently because a significant number of existing classified bargaining units contain part-time playground positions, as well as other positions excluded from the classified service by Education Code section 45103, subdivision (b).

Furthermore, as the Board noted in *San Diego CCD*, *supra*, PERB Order No. JR-20, "[a]s the first two prongs of the Board's three part test for seeking judicial review are not met, it is not relevant whether the issues presented in this case are likely to arise frequently." (*Id.* at p. 4)

CAVA's additional arguments are mostly attempts to parse the language in the decision to support its position, or to point out the differences between the Board's decision and the

`ALJ's proposed decision. Much of the request is essentially a request for reconsideration in disguise. CAVA "merely seeks to relitigate the issues [presented] in another forum and is nothing more than a disagreement with the Board's exercise of the discretion vested in the Board by the Legislature." (*San Diego CCD, supra*, PERB Order No. JR-20 at p. 4.) As we have noted, when the requestor's arguments address "issues of fact and factual interpretation" upon which the underlying PERB decision is based, "[t]hey do not meet the standard necessary to justify approval of the request for judicial review." (*Palomar Community College District, supra*, PERB Order No. JR-14 at p. 5.)

Accordingly, we conclude that the Request fails to satisfy any of the three parts of the *Burlingame* test for determining that a case is one of "special importance" warranting the Board to join in a request for judicial review.

Request for Stay

CAVA requests that the Board stay its June 28, 2016 bargaining order pending judicial review. However, "[a]s the Board declines to seek judicial review, it is not necessary to rule on the [employer's] request for a stay." (*San Diego CCD, supra*, PERB Order No. JR-20 at p. 4.) Moreover, EERA section 3542, subdivision (a) states in part: "A board order directing an election shall not be stayed pending judicial review." While this case does not involve an election, we believe that this sentence reflects legislative and public policy that representation matters generally should not be subject to unwarranted delay through pursuit of judicial review. If an election is not to be stayed pending judicial review, a fortiori, a unit determination and certification of exclusive representative is not to be stayed pending a party's pursuit of judicial review.

Finally, we reject CAVA's claim that it will suffer irreparable harm if it is forced to

bargain collectively with approximately 700 teachers. First, it will not be bargaining with 700 employees. It will be bargaining with their representative, CTA, collectively. Second, CAVA seeks review only of PERB's application of the single employer doctrine. Had the proposed decision stood, CAVA would still be "forced to bargain" as a joint employer.

ORDER

The request filed by California Virtual Academies that the Public Employment Relations Board join in a request for judicial review of the Board's decision in *California Virtual Academies* (2016) PERB Decision No. 2484 is hereby DENIED.

Members Banks and Gregersen joined in this Decision.