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Honorable Eric Banks
Honorable Erich Shiners
Honorable Arthur A. Krantz
Honorable Lou Paulson
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

Via Electronic and First Class Mail

Re: Proposed Regulatory Packages

Dear Honorable Board Members:

I am writing to provide comments on the various proposed regulatory packages being considered by the Public Employment Relations Board (PERB). Overall, I believe these proposed regulations are well-written and will provide helpful guidance on important issues. There are only two proposed regulations to which I have strong objections. First, I believe the proposed regulation allowing PERB to draw an adverse inference from the failure to comply with a subpoena inappropriately relieves PERB of its obligation to seek enforcement of subpoenas in the superior court. Second, I believe the proposed regulation allowing for proof of support to be established using electronic signatures lacks the security protocols necessary to ensure the integrity of electronic signatures. Other than these two issues, there are a few others that I believe can be drafted to provide even more clarity. I provide my specific comments below and I hope you find them helpful.

Comments on Proposed Exceptions Regulations

§ 32300. Exceptions to Board Agent Decision

The proposed revision of PERB Regulation 32300 provides that, "(e) Absent good cause, the Board itself will not consider … (2) arguments raised in the statement of exceptions that do not ***impact*** the outcome of a case." (Emphasis added). I write to comment that the term "impact" is vague and appears to be a lower bar than that set forth in current Board precedent and therefore may cause confusion among stakeholders.

Last year, in *Oak Valley Hospital District* (2018) PERB Dec. No. 2583-M, the Board affirmed the general rule that it will not consider initial exceptions filed by the prevailing party "unless the Board's ruling on the exceptions would ***change*** the outcome of the ALJ decision."

(*Oak Valley Hospital District* (2018) PERB Dec. No. 2583-M, at p. 5 (*citing* to *Fremont Unified School District* (2003) PERB Dec. No. 1528) (Emphasis added).) The rationale for this policy is that "[t]he Board should not be forced to expend its limited resources correcting harmless errors in the record." (*Ibid*.) Further, such a rule prevents a prevailing party from unilaterally transforming a proposed decision into a precedential one by filing initial exceptions over a harmless error.

By utilizing the term "impact" instead of "change," the Board appears to be lowering the bar for the types of situations where it will consider exceptions by a prevailing party. For example, even correcting a "harmless" error arguably has an "impact" on a decision. Accordingly, by utilizing the term "impact" the Board appears to be opening the door to allowing a prevailing party to transform a proposed decision into a precedential one by filing exceptions over issues that merely have an "impact" on a decision but will not change it. I respectfully submit that such an outcome is contrary to public policy.

Accordingly, consistent with Board precedent the Board should consider using the term "change" instead of "impact." In the alternative, the Board could moot this entire issue by revising PERB Regulation 32320 to allow itself the ability to designate only certain Board decisions as precedential. This latter option would be my preferred one.

Comments on Proposed Recusal Regulations

§ 32155. Recusal

PERB Regulation 32115, subdivision (e), currently provides that when a Board member recuses herself or himself *sua sponte*, the Board member's declaration declaring the disqualification "shall be made part of the official record of the Board." This requirement is missing in the proposed revision of PERB Regulation 32155. While the lack of this requirement, by itself, is not particularly significant it does raise an important question regarding notice to the affected parties.

As written, there appears to be no requirement by the Board to notify the affected parties of the *sua sponte* recusal of a Board member. Indeed, under current Board practice the parties are generally unaware of the Board members assigned to the panel considering a case until a Board decision is issued. This lack of notice poses two potential problems under the revised regulation. First, if the parties are unaware of the Board members assigned to a case until a decision is issued, a motion for recusal could be made after a party has reviewed the Board's decision. This is problematic because if recusal is warranted, the Board's limited resources may have been wasted in preparing the initial decision. Second, the lack of notice may actually encourage parties to file motions for recusal when such a motion may be unnecessary. For example, if a

party knows that a Board member has a disqualifying relationship with the opposing party, the party may feel obligated to file a motion for recusal at the outset of any Board proceedings in order to ensure that the Board member is not empaneled to the case. However, such a motion may be completely unnecessary if the Board member has already recognized the disqualifying relationship and recused herself or himself *sua sponte*. But without notice, the affected parties would not be aware of the Board member's recusal.

Accordingly, I would suggest that the revised regulation include a provision requiring notice to the affected parties if a Board member recuses herself or himself *sua sponte*. This requirement would also have the benefit of eliminating disputes over when a party becomes aware of the Board members assigned to any particular case.

Although it is unnecessary to include this level of detail in the regulations, I note that the ideal time to inform the parties of such a recusal would be in the letter notifying the parties that a case is complete and has been placed on the Board's docket. Ideally, that notice would specify the Board members assigned to the panel considering the case or at least set forth any recusals by any Board members.

Comments on Proposed Regulations on
Subpoenas, Motions and Authority of Board Agents

General Comments

Notably, the proposed regulations do not address one of the most common areas of dispute regarding subpoenas: how much notice must be provided. In my experience, it is not at all uncommon to receive subpoenas only days before a hearing. Obviously, such short notice makes it very difficult to comply and almost always necessitates a motion to revoke.

I would propose that PERB expressly adopt the generally applicable minimum standards of at least ten (10) days' notice for a testimonial subpoena and twenty (20) days' notice for a records subpoena.[1] However, even with these time-lines witnesses may not be available and there may be insufficient time to gather necessary documents. Experienced PERB advocates generally serve subpoenas at least 30 to 90 days before the hearing. Thus, PERB may want to consider even longer time-lines to avoid disputes over witness availability and disputes over burdens of production.

[1] *See, e.g.*, Code of Civ. Proc., §1987, sub. (c). Obviously, there could be situations where these notice requirements are insufficient to allow time for compliance and situations where less notice may be appropriate.

32150(e)(1). Subpoenas.

The proposed PERB Regulation 32150, subdivision (e)(1), provides that a motion to extend the production date may be filed at least five (5) working days before the scheduled requested production date. First, the use of "working" days in this section, when all other references are to calendar days, is an unnecessary trap for practitioners. I would request that the Board change this and all other requirements to calendar days.

More important, the requirement of five days—whether working or calendar—assumes that a records subpoena has been served at least five days before the production date. But that is not a certainty given the lack of a specific timeline for service of a records subpoena. The simplest way to solve this issue is to specify that a records subpoena must be served with at least twenty (20) days' notice.

32150(h). Subpoenas.

The proposed PERB Regulation 32150, subdivision (h), provides that as an alternative to seeking enforcement of a subpoena, the Board may draw adverse inferences from a responding party's failure to comply with a valid subpoena. I have strong objections to this new provision and believe that it exceeds PERB's authority.

It is well-established that PERB, as an administrative agency, does has not have the authority to enforce subpoenas directly or to hold individuals in contempt to failure to comply with a subpoena. (*See Community Learning Center Schools, Inc*. (2017) PERB Dec. No. Ad-448.) Instead, PERB must bring an action in superior court to enforce compliance with a subpoena (*See* Gov. Code, §3541.3, subd. (j); PERB Regulation 32150, subd. (f).) By allowing an adverse inference to be drawn from the failure to comply with a subpoena, PERB is essentially relieving itself of its obligation to seek enforcement in superior court. Moreover, as the below example illustrates, such a practice is highly prejudicial to a responding party with good faith objections to a subpoena.

For example, assume a typical case where a union issues a subpoena to an employer for records. Let's assume the employer timely raises good faith objections to the scope of the subpoena in a motion to revoke but that the Administrative Law Judge denies the motion. Let's further assume that the employer maintains its objections and believes that a superior court would deny enforcement of the subpoena. Under current law, the union would have to request that the Office of the General Counsel seek to enforce the subpoena in superior court. At that time, the employer could raise its objections and obtain a court decision on the validity of the subpoena.

Under the proposed regulation, instead of requesting enforcement the union could simply request that the Board draw an adverse inference from the employer's continued good faith refusal to comply with the subpoena. This places the employer in an untenable situation: 1)

maintain its good faith objections in the hope of obtaining judicial review and risk an adverse inference; or 2) comply with the subpoena even though there has been no judicial review.

In civil litigation, an employer faced with this dilemma could proactively seek a protective order in lieu of the other party seeking a motion to compel. However, there is no authority under the statutes administered by PERB for a party, on its own, to seek a protective order in superior court. Given the lack of clear statutory authority for a party to seek a protective order, the proposed regulation essentially excuses PERB from seeking enforcement in superior court and effectively denies a responding party judicial review. Accordingly, I strongly object to this proposed regulation.

In the alternative to the proposed regulation, I would not object to an adverse inference after a final court order compelling compliance has been issued by a court and the responding party continues to refuse to comply.

Comments on Proposed E-File Regulations

32700. Proof of Support.

The proposed revision of PERB Regulation 32700 provides that:

> (e) Subject to subsections (a), (b), (c) and (d) of this section, proof of support may consist of any one of the following original documents or a combination thereof:
> …
>
> (5) A notarized list of employees who are not exclusively represented by an employee organization and who have electronically signed authorization cards indicating the employees' desire to be represented by an employee organization, provided that the list is accompanied by the date of each employee's electronic signature, a printout of a sample of the electronically signed forms, and a sworn declaration demonstrating that the employee organization has obtained ***electronic signatures using generally accepted security protocols or their equivalent.*** (Emphasis added)

This proposed revision is presumably in response to the Board's decision in *Regents of the University of California* (2018) PERB Order Ad-459-H where the Board held that electronic signatures cannot be submitted as proof of support, absent a change in the regulations.

While I do not object to the concept of electronic signatures as proof of support, I strongly object to the proposed regulation as being inadequate to ensure the integrity of any electronic signatures. Specifically, the reference to "generally accepted security protocols or their equivalent" is far too vague and ambiguous. PERB must instead either provide additional guidance as to what constitutes an acceptable security protocol for electronic signatures or provide a direct reference to such requirements.

For example, the California Secretary of State (SOS) has promulgated regulations on "digital signatures." (2 Cal. Code of Regs., §22000 et. seq.) The SOS regulations expressly require that an acceptable technology for digital signatures must meet the following requirements of Government Code section 16.5:

1. It is unique to the person using it;
2. It is capable of verification;
3. It is under the sole control of the person using it;
4. It is linked to data in such a manner that if the data are changed, the digital signature is invalidated;
5. It conforms to Title 2, Division 7, Chapter 10 of the California Code of Regulations.

The SOS regulations further provide that technologies such as Public Key Cryptography and Signature Dynamics are acceptable technologies for use by public entities in California for accepting digital signatures. (2 Cal. Code of Regs., §22003, subd. (a), (b).) The regulations describe these technologies in detail and set forth specific requirements for new technologies to be accepted. Finally, the SOS regulations require that:

1. Prior to accepting a digital signature, public entities shall ensure that the level of security used to identify the signer of a document is sufficient for the transaction being conducted.
2. Prior to accepting a digital signature, public entities shall ensure that the level of security used to transmit the signature is sufficient for the transaction being conducted.
3. If a certificate is a required component of a digital signature transaction, public entities shall ensure that the certificate format used by the signer is sufficient for the security and interoperability needs of the public entity. (2 Cal. Code of Regs., §22005.)

None of these requirements or specifications are set forth in PERB's proposed regulation. While PERB may intend to rely upon the SOS regulations, nothing in the proposed regulations require such reliance. Indeed, the proposed regulations are so devoid of any security protocols that any Board ruling relying on electronic signatures will almost certainly be subject to

extensive litigation. Accordingly, I strongly urge the Board to provide specific guidance as to the security protocols required for accepting electronic signatures.

Comments on Proposed SMCS Regulations

32998. Reimbursement for Services

I have no objection to the increased reimbursement rate for Facilitation or the reimbursement rates for elections. However, it does seem cumbersome to set forth these rates in regulation since any change requires going through the regulatory process. Instead, I wonder whether these reimbursement rates could be set annually by the Board at a noticed meeting and then simply published on the PERB website.

In conclusion, I am generally in support of the proposed regulatory packages. As for the two issues to which I have voiced strong objection, I hope that the Board will take my comments into consideration and modify them accordingly. However, I do want to express my appreciation to the Board and the staff at PERB for the time and effort put into developing these proposed regulatory packages.

Sincerely,

Timothy G. Yeung