STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119, Petitioner.	)	**Case No.: SF-UM-779-H** **PERB Order No. Ad-453-H**

EMPLOYER REGENTS OF THE UNIVERSITY OF CALIFORNIA'S REQUEST FOR JUDICIAL REVIEW

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I. INTRODUCTION

For over forty years, and through eight Presidential administrations, the National Labor Relations Board ("NLRB") has protected employee freedom of choice by requiring an election when a new group of employees is added (or "accreted") to an existing bargaining unit, in all but the narrowest of circumstances. The NLRB is especially vigilant on this issue as it recognizes that the misuse of accretion poses a significant threat to employee freedom of choice. In this case, the Public Employment Relations Board ("PERB" or "Board") similarly recognized that, "…employee choice is a bedrock principle of HEERA [Citations omitted]." (*Regents of the University of California v. University Professional and Technical Employees, CWA Local 9119* (2017) ("*Regents*") PERB Order No. Ad-453-H, p. 9.) Yet, instead of following well-settled NLRB and federal court precedent, the Board held that accretions of less than 10% of an existing bargaining unit *never* require proof of majority support.

The University submits that this novel interpretation of HEERA, which is contrary to all other precedent in this area, warrants judicial review because of its special importance. Having the Board join in this request will provide judicial review of this decision in the most expeditious manner, which is of benefit to all the parties in this case. Accordingly, even though the Board disagrees with the University's position in this matter, the University nevertheless respectfully requests that the Board join in this request for judicial review.

II. REQUEST FOR JUDICIAL REVIEW

Pursuant to Government Code section 3564 and PERB Regulation 32500, the Regents of the University of California ("University") hereby respectfully requests that the Board join in a request for judicial review of the Board's decision in *Regents*. This request

is based on this Request for Judicial Review, the Board's decision in *Regents*, and the documents and pleadings contained in the underlying case file.

III. LEGAL ARGUMENT

A. Standard for Judicial Review

Under the Higher Education Employer-Employee Relations Act ("HEERA") judicial review of a unit determination decision is permitted only when: 1) the Board agrees that the case is one of special importance and joins in a request for judicial review; or (2) when the issue is raised as a defense to an unfair practice complaint. (Gov. Code, § 3564, subd. (a).) PERB regulations do not define what constitutes a case of "special importance" but rather leave this issue to the Board's discretion. (PERB Reg. 32500.)

In recent years, the Board has developed a three-part test for considering requests for judicial review. (*Burlingame Elementary School District* (2007) PERB Order No. JR-24 ("*Burlingame*"); *California Virtual Academies* (2016) PERB Order No. JR-27.) Under the *Burlingame* standard, 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*, p. p. 4.)

The Board's application of these standards has admittedly been stringent. Indeed, of the almost thirty decisions issued by PERB, the University believes that only three have ever been granted, two of which involved the same issue.[1] (*Fairfield-Suisun Unified*

[1] In addition, the Educational Employment Relations Board granted judicial review in *Grossmont Union High School* (1977) EERB Order No. JR-2. In that case, the Board determined that the employee organization was no longer an exclusive representative and therefore could not "draw" an unfair practice charge. Accordingly, the Board recognized that if it did not join in a request for judicial review, no judicial review would be possible.

School District et. al. (1980) PERB Order No. JR-8 (judicial review granted on "same employee organization" issue); *Los Angeles Unified School District* (1985) PERB Order No. JR-13 (judicial review granted on "same employee organization" issue); *Castaic Union School District* (2010) PERB Order No. JR-25 (whether part-time playground employees have representational rights under EERA).) Thus, the Board has recognized that judicial review is appropriate in only the narrowest of circumstances. (*California Virtual Academies* (2016) PERB Order No. JR-27.) However, even applying these stringent standards, the issues in this case meet all three parts of the *Burlingame* test.

B. This Case Presents a Novel Issue

This case raises several novel issues. First, there is the question of whether under PERB Regulation 32781, PERB has the discretion to require proof of majority support in accretions of less than 10% of an existing bargaining unit. Interestingly, in the underlying decision the Board noted that since HEERA does not mandate an election when an established bargaining unit is modified, it is firmly within the Board's discretion to define when an election is appropriate. (*Regents*, p. 10.) The Board then goes on to assert that the Board *abdicated* its discretion through the promulgation of PERB Regulation 32781. (*Ibid*.)

As argued in the University's appeal, the Board's position that it lacks discretion to require proof of majority support in accretions of less than 10% of a bargaining unit directly contradicts established NLRB and federal court precedent. For over forty years, and through eight Presidential administrations, the NLRB has protected employee freedom of choice by requiring an election when a new group of employees is added (or "accreted") to an existing bargaining unit, in all but the narrowest of circumstances. (*See Laconia Shoe* (1974) 215 NLRB 573.) The NLRB is especially vigilant on this issue as it recognizes that

the misuse of accretion poses a significant threat to employee freedom of choice. (*See, e.g., Intl. Assn. of Machinists & Aerospace Workers, AFL-CIO, Dist. Lodge No. 190, Local Lodge No. 1414 v. NLRB* (9th Cir. 1985) 759 F.2d 1477, 1480 [noting that employee freedom of choice "must be paramount" and "the accretion doctrine should be applied restrictively as it offends this basic employee right"].) In this case, the Board rejected this NLRB and federal court precedent on the ground that the statutory language of HEERA is different. As argued in the University's appeal, the language of HEERA does not support such a conclusion. However, even though the Board disagrees with the University's position, the Board must admit that this is a novel issue worthy of judicial review.

The Board may respond by pointing out that this issue was previously addressed in *Regents of the University of California* (2010) PERB Decision No. 2107-H. While true, that decision did not result in any judicial review; specifically, that decision and this issue have never been addressed by a published court decision. (*See Castaic Union School District* (2010) PERB Order No. JR-25 (finding that the novel issue prong was met since the issue had not been addressed by any court); *cf. California Virtual Academies* (2016) PERB Order No. JR-27 (finding the that the novel issue prong was not met where PERB had addressed issue under the other acts).) In past cases, the Board has deemed issues to be "novel" where there has not been a published court decision even where the issue itself has been litigated. (*Los Angeles Unified School District* (1985) PERB Order No. JR-13 (prior case was depublished which justified judicial review on same issue).)

Second, there is the question of whether an employee organization can evade the proof of majority support requirement in PERB Regulation 32781 by strategically filing a series of unit modification petitions that each seek to accrete a group of employees that

constitutes less than 10% of the bargaining unit when those petitions collectively seek to accrete a group of employees that far exceeds that 10% threshold. This issue has never been addressed by either PERB or the courts.

Third, there is the issue of whether, in determining whether the 10% threshold has been met, PERB may forego counting employees who are performing the exact same functions as the employees in the job classifications identified in the unit modification petition simply because they work at locations that have not yet implemented the new job classifications. This issue has also never been directly addressed by either PERB or the courts.[2]

C. This Case Primarily Involves Interpretation of the Statutory Mandates of HEERA

This case also involves interpretation of the statutory mandates of HEERA. Specifically, this case calls into question whether the Board's interpretation of PERB Regulation 32781 complies with the statutory mandate of HEERA to protect employee freedom of choice. However, while the statutory provisions of HEERA are certainly implicated in this case, it is undisputed that several of the novel issues presented more directly involve PERB Regulation 32781. This necessarily raises the question of whether the term "statutory mandate" includes a regulation. As argued below, it must.

The California courts generally recognize two types of regulations: quasi-legislative and interpretive. (*See Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 798-799.) A quasi-legislative regulation is one adopted by an agency to which the

[2] This case also raises issues that may not necessarily be "novel," such as the Board's application of the community of interest standards to the Systems Administrators in this case. Even if not novel, the University intends, and specifically reserves the right, to raise all issues in the appeal before the Board in its request for judicial review even if the Board only joins in a few issues.

Legislature has delegated the power to "make law." Such regulations therefore have the force of statutes. (*Ibid*.) Thus, to the extent PERB Regulation 32781 is a quasi-legislative regulation, it has the force of statute and, therefore, questions related to interpreting that regulation must necessarily meet the requirement for a "statutory" interpretation issue.

The second type of regulation is an interpretive regulation which involves an agency's interpretation of a statute. (*Ibid*.) Here, the Board has stated that PERB Regulation 32781 carries out the mandate set forth in HEERA. Thus, any dispute over the Board's interpretation of PERB Regulation 32781 must necessarily involve statutory interpretation. Further, it would make no sense to allow judicial review of a decision interpreting a statute, but not allow judicial review of a decision interpreting a regulation that interprets the same statute. Such a distinction would be a distinction without a difference.

The University does acknowledge that there is one decision in which the Board held that an interpretation of a regulation does not constitute an interpretation of a statute for purposes of meeting the judicial review test. (*State of California (Department of Personnel Administration*) (1993) PERB Order No. JR-15 ("*DPA*").) In *DPA*, the issue involved a PERB Regulation concerning nondisclosure of home addresses to parties to a representation election. (*Ibid*.) In denying judicial review, the Board noted that the regulation in question was expressly authorized by the Legislature in the Public Records Act. (*Id*. at fn 5.) Indeed, the regulation mirrored Government Code section 6254.3. (*Ibid*.) The present case is distinguishable. There is no statutory provision mandating a 10%

threshold before requiring proof of majority support. Accordingly, this case presents much more of a statutory interpretation issue than the one in *DPA*.[3]

D. The Issue in this Case Is Likely to Arise Frequently

Finally, the issues in this case are likely to arise frequently. First, as noted above, the contours of PERB Regulation 32781 was discussed in a previous case involving the University. (*Regents of the University of California* (2010) PERB Decision No. 2107-H.) The fact that this issue has arisen again supports a finding that this part of the test is met. Further, as evidenced by the facts presented in this case the University is still in the process of completing its Career Tracks review. Thus, there is a strong possibility that UPTE, or some other employee organization, will seek to accrete additional employees as they are placed into more specific classifications. Accordingly, the issues in this case are likely to arise frequently.

E. The Need to Obtain Court Review Expeditiously Also Favors Granting Judicial Review

In its decisions on judicial review, the Board has repeatedly emphasized that such review is rarely granted. (*California Virtual Academies* (2016) PERB Order No. JR-27.) This is to "ensure that the fundamental rights of employees to form, join and participate in the activities of employee organizations is not abridged." (*Ibid*.) However, the University respectfully submits that the Board's desire to avoid numerous legal challenges to its decision must be balanced and considered against all the factors in any given case.

For example, absent the Board joining in a request for judicial review, a party's only ability to obtain judicial review of a representational decision is as a defense to an

[3] To the extent *DPA* holds that any dispute over an interpretation of a regulation is not entitled to judicial review, the University urges the Board to overrule *DPA* based on the discussion above.

unfair practice charge. (Gov. Code, § 3564, subd. (a).) This procedure is known in labor law as a "technical refusal to bargain." (*See Redondo Beach City School District* (1980) PERB Decision No. 140; *El Monte Union High School District* (1982) PERB Decision No. 220, fn. 5; *Dixie Elementary School District* (1981) PERB Decision No. 298.) A "technical refusal to bargain" occurs when an employer refuses to meet and confer with a newly-certified union because it disputes the appropriateness of the unit composition. (*Jefferson School District* (1980) PERB Order No. Ad-82.) To effectuate a technical refusal to bargain requires the parties to go through the entire unfair practice charge process, which can take months, and possibly years.

Over the years, various Board members have recognized that forcing a party to go through a technical refusal to bargain may prolong a representational dispute, which directly conflicts with the Board's goal of trying to expedite such decisions. For example, *Regents of the University of California* (1998) PERB Order No. JR-18, Member Johnson dissented from the majority's denial of judicial review. Member Johnson argued that the Board should exercise its discretion and grant judicial review "as a means of expediting final resolution of this very important case." Similarly, in *California State University Police* (1984) PERB Decision No. 351a-H, Member Tovar dissented from the majority's denial of judicial review. Member Tovar disagreed with the majority's view that judicial review was not appropriate because the employer could ultimately obtain judicial review by making a technical refusal to bargain. Member Tovar stated that, "I don't think the Board should encourage any of the parties to refuse to negotiate in good faith as a means of challenging the Board's decision."

Here, the University is not suggesting that the Board should grant judicial review solely to avoid the delays of a technical refusal to bargain. Instead, the University is urging the Board not to apply the *Burlingame* factors in such a fashion that it effectively strips the Board of its discretion as provided by Government Code section 3564 and PERB Regulation 32500. In this case, the *Burlingame* factors, when considered in totality with all the other considerations, strongly warrants a grant of judicial review.

IV. CONCLUSION

This case presents several novel issues that involve the interpretation of HEERA and are likely to arise frequently in the future. Accordingly, the University submits that this case meets all the factors necessarily to establish a case of "special importance" for judicial review. However, even if the Board is not persuaded that every factor in PERB's test for special importance is met, the Board should nevertheless exercise its inherent discretion in this case to grant judicial review given the importance of the issues. Accordingly, the University respectfully requests that the Board grant this request for judicial review of its decision in *Regents of the University of California v. University Professional and Technical Employees, CWA Local 9119* (2017).

Dated: October 19, 2017

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By: _____
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REGENTS OF THE UNIVERSITY
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CERTIFICATE OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On October 19, 2017, I served the following documents(s) by the method indicated below:

EMPLOYER REGENTS OF THE UNIVERSITY OF CALIFORNIA'S REQUEST FOR JUDICIAL REVIEW

☒ **United States Mail**. I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ **Electronic Mail.** Based on an agreement of the parties to accept service by e-mail, copies of the above document(s) in PDF format were transmitted to the e-mail address(es) of the parties listed below on 10/19/2017. No delivery errors were reported.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 19, 2017, at San Francisco, California.

Rochelle Redmayne