

Every Vote Counts Really

Tim Yeung, PERB Blog, April 6, 2016 at 9:23 pm

Regents of the University of California (2016) PERB Decision No. A434-H (Issued on 02/29/16)

You've heard it before: "Every Vote Counts!" But do you believe it? You will after reading about this case.

The Teamsters were trying to organize the "skilled crafts unit" at the University of California at Davis. PERB mailed ballots to the 314 eligible members of the proposed bargaining unit. Each mailing from PERB included a blue, postage-paid return envelope with the voter's name and address, and blank lines for the voter to print and sign his or her name; an official ballot; a one-page voter instruction sheet; and a white secret ballot envelope. Voters were instructed to mark their ballot, seal it inside the secret ballot envelope, and seal the secret ballot envelope in the blue return envelope.

On October 20, 2015, PERB counted the ballots. The result: 129 votes for Teamsters; 129 votes for "no representation." A tie. However, along with these ballots PERB received an envelope containing a "homemade" ballot from a voter. The voter claimed to have requested a duplicate ballot; and having not received one, decided to send in a homemade ballot.

The union initially objected to the homemade ballot; but when the result was a tie, the union changed its mind and asked PERB to count the ballot. The union also approached the voter and obtained a declaration from the voter stating that he intended to vote in favor of the Teamsters. The voter also declared that he requested a duplicate ballot but never received one. In rejecting the initial challenge, the Board agent noted that PERB had no record of the voter requesting a duplicate ballot for this particular election. However, the union appealed the Board agent's decision to the full Board. The union argued that since voter intent was clear, the disputed ballot should be counted.

In its decision, the Board held that it was bound by its own regulations which require that "[a]ll elections shall be conducted by secret ballot under the supervision of the Board," and that ballots also "shall be prepared under the supervision of the Board." (PERB Reg. 32722, subds. (a), (b).) Here, it was undisputed that the ballot at issue was not prepared by PERB. The Teamsters argued that the Board should follow NLRB precedent which allows for the consideration of non-standard ballots in certain situations. However, the Board held that it was not at liberty to follow NLRB precedent (without agreeing or disagreeing that NLRB precedent would have allowed consideration of the ballot here) because it was bound by its own regulations. To the extent it wants to depart from its regulations, the Board held that it "may do so only through its rulemaking process at a public meeting with notice and opportunity afforded to the public to present its views, and not through the Board's decisional law."

NOTE: PERB Board decided the ballot should not be counted.

Comments:

1. Full Disclosure: My firm and I represented the University in this matter. So I obviously agree with the outcome of the Board's decision in this case. However, I wanted to comment on an important public policy issue raised by this case.
2. Here is the issue: I don't think it's appropriate to ask someone how he or she voted in a secret ballot election. The idea of the secret ballot is an important one in our democracy. Had the Board ruled in favor of the union, it would encourage the parties in a close election to start contacting voters, particularly if there are disputed ballots. Here, the voter just happened to be in favor of the union. But query, would it have been proper for the University to approach the voter and ask how he voted? What if the voter said he was in favor of the Teamsters, would it have been appropriate for the University to keep silent? What if the voter told the Teamsters he was in favor of no representation, would it have been appropriate for the Teamsters to keep silent? And if the choice on a homemade ballot wasn't entirely clear would we call the voter in to testify about what he or she intended? In my humble opinion, public policy favors keeping secret ballots secret. So I'm glad this decision at least furthers that policy.