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# ***Los Angeles Unified School District v. Public Employment Relations Board: The Potential Dominion Test***

The California Educational Employment Relations Act (EERA)<sup>1</sup> governs collective bargaining between California public school employers and employees.<sup>2</sup> The EERA recognizes the right of both supervisory<sup>3</sup> and rank and file<sup>4</sup> employees to bargain with the public school employer<sup>5</sup> over matters including wages,<sup>6</sup> hours,<sup>7</sup> working

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1. CAL. GOV'T CODE §§ 3540-3549.3 (West 1980 & Supp. 1988) (the California Educational Employment Act, hereinafter the EERA). The EERA was introduced as Senate Bill 166 in 1975 by Senator Albert G. Rodda. The EERA establishes a system of collective bargaining for employees of public school districts serving students in grades K-14. 1975 Cal. Stat. ch. 961, at 2247. The EERA is also known as the Rodda Act. *See, e.g.,* Brittain, *At the Table: The Implementation of Collective Negotiations Under the Rodda Act*, 33 CAL. PUB. EMP. REL. 9 (1977); Herman, *Scope of Representation Under the Rodda Act: Negotiable and Non-Negotiable Issues*, 32 CAL. PUB. EMP. REL. 14 (1977).

2. CAL. GOV'T CODE § 3540.1(j) (West 1980 & Supp. 1988) (defining public school employee as any person employed by any public school employer, except persons elected by popular vote, persons appointed by the Governor of California, management employees, and confidential employees). *See id.* §§ 3540.1(g) (defining management employee to mean an employee responsible for formulating district policies or administering district programs); 3540.1(c) (defining confidential employee to mean an employee who has access to information relating to the employer-employee relations of the employer during the regular course of employment).

3. *Id.* § 3540.1(m) (defining supervisory employee as an employee having the authority to hire, transfer, suspend, promote, discipline, assign work to, or adjust grievances of employees, provided such authority requires the use of independent judgment).

4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1881 (1976) (defining rank and file as ordinary members, as distinguished from leaders of an organization). An employee of a school district who is not a supervisor will be designated for purposes of this note to include a rank and file or non-supervisory employee.

5. CAL. GOV'T CODE § 3540.1(k) (West 1980 & Supp. 1988) (defining public school employer as the governing board of a school district, a school district, a county board of education, or a county superintendent of schools).

6. *Id.* § 3543.2.

7. *Id.*

conditions,<sup>8</sup> and employee representation by an employee organization.<sup>9</sup> The EERA limits the right of employee representation, however, by prohibiting the same employee organization from representing both the rank and file and the supervisory employees of a particular school district.<sup>10</sup> Separation of representation is required to insure the loyalty of a supervisory employee to his employer and to guard against potential conflicts of interest between supervisory employees and the rank and file employees they supervise.<sup>11</sup>

The California courts and the State of California Public Employment Relations Board (PERB)<sup>12</sup> have disagreed over an appropriate test for determining when two unions affiliated with the same international or statewide employee organization are sufficiently related to be considered the same employee organization within the meaning of the EERA.<sup>13</sup> Specifically, the state appellate courts and PERB are in conflict over the issue of when, if at all, two affiliated unions may represent the supervisory and the rank and file employees of the same district in labor negotiations with district employers. A decision by either a state appellate court or by PERB that the union affiliates representing the supervisory and rank and file employees, respectively,

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8. *Id.*

9. *Id.* §§ 3540 (stating the goals of the EERA to include improving personnel management and employer-employee relations within the public school systems of the State of California); 3543, 3543.3 (providing for representation of public school employees in labor negotiations with employers). An employee organization is defined as any organization that includes employees of a public school employer and that has as a primary purpose representing those employees in employer-employee relations. *Id.* § 3540.1(d). Employee organization also includes any person the organization authorizes to act on behalf of the organization. *Id.*

10. *Id.* §§ 3540.1, 3541.

11. Sacramento City Unified School Dist., PERB Dec. No. 122, 12-13 (1980).

12. See *infra* note 42 and accompanying text (delineating the scope of authority of PERB).

13. See, e.g., Los Angeles Community College Dist., PERB Dec. No. 123 (1980) (applying an actual dominion test to determine whether two affiliates of the same international union are the same employee organization within the meaning of the EERA); Los Angeles Community College Dist. v. Public Employment Relations Bd., No. 2 Civ. 59951 (Cal. 2d Dist. Ct. App. June 16, 1981) (a California court of appeal applied a potential dominion test to overturn the PERB decision in Los Angeles Community College District); Los Angeles Unified School Dist. v. Public Employment Relations Bd., 191 Cal. App. 3d 551, 237 Cal. Rptr. 278 (1986) (again applying a potential dominion test to overturn PERB decision in *Los Angeles Unified School Dist.*). See also *infra* notes 55-144 and accompanying text (detailing the holdings of the PERB and appellate court decisions). Generally, labor unions are organized on a national, international or statewide basis. The national, international or statewide union then charter local unions on a regional basis. *Harrison v. Brotherhood of Ry. & S.S. Clerks*, 271 S.W.2d 852 (Ky. 1954). While a local union is generally subject to requirements of affiliation set forth in the constitution or by-laws of a national, international, or statewide union, the local can exist without a relationship to a national organization. *United Elect., Radio & Mach. Workers v. United Electrical, Radio & Mach. Workers*, 232 Minn. 217, 45 N.W.2d 408, 414 (1950), *Bakery & Confect. Workers Int'l Union v. American Bakery & Confect. Workers Int'l Union*, 405 S.W.2d 917, 919 (1966).

are sufficiently related to be considered the same employee organization disqualifies one affiliate from further representation.<sup>14</sup>

In three simultaneous decisions, PERB held that two affiliates of the same international union are the same employee organization within the meaning of the EERA if either affiliate actually influences the course of action of the other, or if the international union actually controls the conduct of both affiliates.<sup>15</sup> The actual control test established by PERB was later challenged by the Los Angeles Unified School District.<sup>16</sup>

In *Los Angeles Unified School District v. Public Employment Relations Board*,<sup>17</sup> the court of appeal rejected the actual control test established by PERB.<sup>18</sup> The court held that two local unions affiliated with the same international union are the same employee organization for purposes of the EERA if either affiliate actually or potentially exercises substantial control over the other or if the international union actually or potentially exercises such control over both affiliates.<sup>19</sup>

Part I of this note will examine the legal background of the California Appellate Court decision in *Los Angeles Unified School District v. Public Employment Relations Board*.<sup>20</sup> Part II will set forth the facts of the case and review the opinion of the court.<sup>21</sup> Finally, part III will explore potential legal ramifications of the Los Angeles Unified School District decision.<sup>22</sup>

## I. LEGAL BACKGROUND

### A. California Statutory Enactments

The National Labor Relations Act (NLRA) governs private sector labor relations.<sup>23</sup> Public employees, however, are explicitly excluded

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14. See *supra* notes 10-11 and accompanying text (discussing the separation of representation clause of the EERA).

15. Fairfield-Suisun Unified School Dist., PERB Dec. No. 121 (1980); Sacramento City Unified School Dist., PERB Dec. No. 122 (1980); Los Angeles Community College Dist., PERB Dec. No. 123 (1980). See *infra* notes 53-105 and accompanying text (detailing the holdings of PERB cases interpreting "the same employee organization").

16. *Los Angeles Unified School Dist. v. Public Employment Relations Bd.*, 191 Cal. App. 3d 551, 237 Cal. Rptr. 278 (1986).

17. *Id.*

18. *Id.*

19. *Id.* at 557.

20. See *infra* notes 23-105 and accompanying text.

21. See *infra* notes 108-146 and accompanying text.

22. See *infra* notes 145-162 and accompanying text.

23. 29 U.S.C.S. §§ 151-170 (Law. Co-op. 1975 and Supp. 1988). Technically, the National

from the coverage of the NLRA.<sup>24</sup> Consequently, public employees must rely on common law or state statutes for bargaining rights similar to those granted private employees under the NLRA.<sup>25</sup>

### 1. *The George Brown Act*

California first enacted legislation extending bargaining rights to public employees in 1961.<sup>26</sup> The George Brown Act permitted state public employees to join employee representative organizations.<sup>27</sup> Under the George Brown Act, all state public employers were required to confer with employee representatives upon their request to consider proposals regarding employment conditions and employer-employee relations.<sup>28</sup> The George Brown Act did not, however, give any public employees, specifically public school employees, the right to bargain collectively.<sup>29</sup> Furthermore, the Act did not include enforcement provisions.<sup>30</sup>

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Labor Relations Act of 1935 (NLRA) as amended by the Labor Management Relations Act of 1947 (also known as the Taft-Hartly Act) is subchapter II of the Labor Management Relations Act of 1947. *Id.* § 167 (subchapter II may be cited as the National Labor Relations Act). *See id.* §§ 151-158, 159-168. The NLRA is a regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. *See Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). The goals of the NLRA include protecting interstate and foreign commerce by affording employees the rights of freedom of association, self-organization, and selection of representatives of choice to negotiate terms and conditions of employment with employers. 29 U.S.C.S. § 151 (Law Co-op. 1975 & Supp. 1988) (stating the findings and policies of the United States Congress).

24. 29 U.S.C.S. § 152(2) (Law Co-op. 1975 & Supp. 1988).

25. *See* Comment, *The Right to Strike and the Rodda Act: A Shift in Bargaining Power*, 10 PAC. L.J. 971, 972 (1979) (discussing the development of public labor law in California).

26. 1961 Cal. Stat. ch. 1964, sec. 1, at 4141-43, *amended by* 1968 Cal. Stat. ch. 1390, secs. 1-12.5, at 2725-29 (codified at CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1988)) (entitled the Meyers-Milias-Brown Act).

27. 1961 Cal. Stat. ch. 1964, sec. 1, at 4141 (stating the purpose and intent of the George Brown Act and defining employee organization for purposes of the Act).

28. *Id.* at 4141-42. Public employers were required to consider proposals by the employee organizations fully as the employer deemed reasonable. *Id.* The 1968 amendment substituted "consider fully" for "consider fully as it deemed reasonable." 1968 Cal. Stat. ch. 1390, sec. 6, at 2727.

29. 1961 Cal. Stat. ch. 1964, sec. 1, at 4143.

30. *Id.* While the legislature authorized "a public agency" to adopt reasonable rules and regulations for the administration of employer-employee relations, the George Brown Act did not specifically create that particular agency. *Id.* at 4142. Public agency was defined as the State of California, a governmental subdivision, a district, a public or quasi-public corporation, a public agency or service corporation, a town, city, county, city and county, and municipal corporation. *Id.* at 4141.

## 2. *The Winton Act*

California enacted the Winton Act<sup>31</sup> in 1965 to specifically govern labor relations within the California public school system.<sup>32</sup> The Winton Act conferred upon public school employees<sup>33</sup> the right to representation by an employee organization<sup>34</sup> in labor negotiations with public school employers.<sup>35</sup> Further, the act afforded employee organizations the privilege of representing district employees.<sup>36</sup> The act also continued the duty of the public school employer to meet and confer with district employee representatives.<sup>37</sup> The statute did not, however, provide for a mechanism through which the bargaining rights of public school employees could be enforced.<sup>38</sup> Despite the right to representation by an employee organization and the right to bargain collectively with public school employees extended to all school employees by the Winton Act, public school employees and employee organizations demanded the California legislature create representation rights for school teachers separate from the rights of public school administrators.<sup>39</sup> Public school employees and employee

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31. 1965 Cal. Stat. ch. 2041, secs. 1-2, at 4660-63 (The Winton Act).

32. *Id.* at 4660-61 (stating the purpose of the Winton Act).

33. *Id.* at 4661 (defining public school employee as any person employed by a public school employer except persons elected by popular vote or appointed by the governor).

34. *Id.* (defining employee organization as any organization that includes employees of a public school employer and has as a primary purpose representing such employees in relations with a public school employer).

35. *Id.* A public school employer is a school district, county board of education, county superintendent of schools, or a personnel commission of a school district. *Id.* The scope of representation included all matters relating to employment conditions and employer-employee relations including wages and hours. *Id.*

36. *Id.* The Winton Act did not, however, grant employee organizations the right to exclusively represent school district employees. *Id.* Thus, employee organizations were under no duty to represent school district employees declining to become members of the organization in labor negotiations with public school employees. *Id.*

37. *Id.* at 4661-63.

38. *Id.* Without a statutory enforcement mechanism, public school employees relied on the courts to determine their rights under the Winton Act. Rodda, *Collective Bargaining in the California Schools*, 18 SANTA CLARA L. REV. 845, 849 (1978). The courts responded with varying constructions of the Winton Act. *Id.*

39. Bowen & Aussieker, *Teacher Negotiations in a Changing Environment*, 11 CAL. PUB. EMP. REL. 2 (1971). During the seven years following the enactment of the Winton Act, the environment of negotiations within the public school system changed from a community of interest among the public school employer and the school employee to that of disparate interests. *Id.* at 11-13. Between 1965 and 1970, California school systems experienced an increase in the number of non-teachers employed per school staff, a decrease in the amount of public financial support of public education, and a depressed teacher labor market. *Id.*

organizations supported the establishment of a state agency to administer and uniformly interpret provisions of a collective bargaining act.<sup>40</sup>

### 3. *California Educational Employment Relations Act*

In response to the employee movement seeking repeal of the Winton Act, California enacted the Educational Employment Relations Act (EERA).<sup>41</sup> The legislature also established PERB to administer the EERA on a statewide basis.<sup>42</sup> The EERA provides for a uniform and systematic method of recognizing the bargaining rights of public school employees.<sup>43</sup> Bargaining rights include negotiating with a public school employer over wages and working conditions, and selecting an exclusive employee representative.<sup>44</sup> Once recognized

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These events resulted in growing concern by the public school employees over deteriorating salaries and lack of job security. *Id.* On the other hand, the interests of school employers generally aligned with the interests of the school board. *Id.* See also Rodda, *supra* note 38, at 847-49 (discussing the enactment of the California Educational Employment Act).

40. Rodda, *supra* note 38, at 849.

41. CAL. GOV'T CODE §§ 3540-3549.3 (West 1980 & Supp. 1988) (The EERA). See Rodda, *supra* note 38, at 849 (discussing reasons supporting the proposal for the California Educational Act). The professed purpose of the EERA is to improve labor relations between management and employees within the public school systems of California. CAL. GOV'T CODE § 3540 (West 1980 & Supp. 1988).

42. CAL. GOV'T CODE §§ 3540.1, 3541 (West 1980 & Supp. 1988). PERB is empowered to certify or decertify an exclusive representative recognized by a school district, to conduct representational elections, to assist negotiating parties in reaching collective agreements, and to resolve unfair labor practice disputes. *Id.* §§ 3541.3(c), (j), (k), 3548. PERB, originally titled the Educational Employment Relations Board (EERB), received its current title in 1977. 1977 Cal. Stat. ch. 1159, sec. 4, at 3571 (operative July 1, 1978).

43. See *infra* notes 44-50 and accompanying text (describing the methods by which public school employees may select an employee representative and public school employers may recognize such representatives in labor negotiations). See also *supra* note 42 and accompanying text (describing the authority of PERB to enforce the right of the public school employees to representation and to resolve disputes concerning such representation). The EERA attempts to achieve uniformity by providing for one agency to administer and interpret the provisions of the EERA. *Banning Teacher's Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804 n.5, 750 P.2d 313, 315 n.5, 244 Cal. Rptr. 671, 673 n.5 (1988). "PERB is . . . 'presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'" *Id.* at 804. 750 P.2d at 315, 244 Cal. Rptr. 673 (*quoting* *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 478 (1950)). The interpretation of PERB generally will be followed unless clearly erroneous. *Id.*

44. CAL. GOV'T CODE § 3543 (West 1980 & Supp. 1988). Exclusive representation is a term of art whereby all employees in a bargaining unit are represented by only one organization at the bargaining table. *Id.* §§ 3540.1(e), 3543, 3543.3. Compare *id.* at §§ 3543, 3543.1 (providing for exclusive representation under the California Educational Employment Relations Act) with 1965 Cal. Stat. ch. 2041, secs. 1-2, at 4661-63 (providing no exclusive representation under the George Brown Act). See also CAL. GOV'T CODE § 3545 (West 1980 & Supp. 1988) (establishing a standard for determining appropriateness of bargaining units).

by the public school employer as the exclusive representative of a bargaining unit,<sup>45</sup> the employee organization acquires the right and the obligation to represent all unit members.<sup>46</sup>

Under the EERA, a public school employer may recognize an employee organization as the exclusive representative of a bargaining unit only after the organization proves that a majority of employees sponsor representation by the organization.<sup>47</sup> The employer may then voluntarily grant the organization exclusive representative status or delay such recognition until an election is conducted to determine the majority selection.<sup>48</sup> The EERA limits the scope of representation of an exclusive representative, however, by providing for a separation of representation.<sup>49</sup> The EERA prohibits the same employee organization from being the exclusive representative of both rank and file employees and supervisory employees to whom the rank and file employees must report.<sup>50</sup> The separation of representation requirement is intended to prevent any conflicts of interest that might arise in the course of unilateral representation of both employees and their supervisors.<sup>51</sup> Significantly, the EERA fails to define the term “same

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45. A bargaining unit is defined as a particular group of employees with a similar community of interest appropriate for bargaining. BLACK'S LAW DICTIONARY 712 (5th ed. 1979). An exclusive employee representative may be any employee organization with the primary goal of representing employees in bargaining relations with employers. CAL. GOV'T CODE § 3540.1(d). Employee organization includes any person such an organization authorizes to act on behalf of the organization. *Id.* at 3401.1(e).

46. CAL. GOV'T CODE §§ 3543.1(a), 3544.9 (West 1980 & Supp. 1988). The statutory obligation of the exclusive representative to represent all unit members requires the employee organization to negotiate with public school employers on behalf of those employees who are members of the organization and those who decline membership. The exclusive representative has the right to enter into a written agreement with the public employer on behalf of all members of the bargaining unit. *Id.* § 3540.1(h). The agreement must be within the scope of the employee representation. *Id.* See *id.* § 3543.2. The scope of employee representation includes wages, hours, terms and conditions of employment. *Id.*

47. *Id.* § 3544. Appropriate proof of majority support includes current dues deduction authorization, notarized membership lists, membership card, or petitions designating the organization as the exclusive representative of the employees. *Id.*

48. *Id.* §§ 3544.1 (detailing the voluntary recognition procedure), 3544.7 (detailing the representative election procedure). The public employer need not voluntarily grant recognition if: (1) Another employee organization files a challenge to the appropriateness of the unit or submits a competing claim of representation; (2) a written agreement effectively negotiated by the employer and another employee organization covers the unit; or (3) the employer already has recognized another organization as the exclusive representative of employees in the unit. *Id.* §§ 3544.1(b)-(d). See also G. MATHIASON, W. TERHEYDEN, L. SCHAPIRO, THE PUBLIC SCHOOL EMPLOYER AND COLLECTIVE BARGAINING: A GUIDE TO THE CALIFORNIA EDUCATIONAL EMPLOYMENT ACT 12-36 (1977) (hereinafter MATHIASON) (outlining procedures of voluntary recognition and recognition by certified election results).

49. CAL. GOV'T CODE §§ 3540.1, 3541 (West 1980 & Supp. 1988).

50. *Id.*

51. Sacramento City Unified School Dist. v. California School Employees Ass'n, PERB



employee organization." The EERA does not state whether two employee organizations affiliated with the same international union are the same employee organization.<sup>52</sup>

*B. Interpretation of the Term "Same Employee Organization" by PERB*

*1. Fairfield-Suisun Unified School District*

The first opportunity of PERB to determine when employee organizations are considered the same under the EERA was provided by the representatives of two chapters affiliated with the California State Educators Association (CSEA).<sup>53</sup> The Fairfield-Suisun Unified School District (the District) voluntarily recognized CSEA local chapter 302<sup>54</sup> as the exclusive bargaining representative of the district-classified rank and file employees.<sup>55</sup> Subsequently, local CSEA chapter 1048<sup>56</sup> filed a request with PERB for recognition as the exclusive representative of all classified supervisory employees in the District.<sup>57</sup> The District denied the request.<sup>58</sup> The District claimed that CSEA

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Dec. No. 122, at 12-13 (1980). "The legislature was determined not to avoid the tension between the interests of management and its supervisory employees, but to minimize this tension . . . . Thus, the legislature struck a balance between the supervisory employees' interest in negotiating collectively and the employers interest in preventing its supervisors from sharing the specific organizational aims of their subordinates." *Id.* at 12-13.

52. See CAL. GOV'T CODE § 3542 (West 1980 & Supp. 1988). Thus, for example, where one affiliated employee organization seeks to represent the rank and file employees of a school district and the other associated employee organization has been recognized by the school district as the exclusive representative of the district supervisors, PERB is left to determine whether one or both affiliates are precluded from representing district employees. Under the EERA, the determination of PERB may be challenged by a school district, employee representative, or competing employee organization by petitioning the appropriate court of appeal for review. *Id.*

53. CAL. SCHOOL EMPLOYEES ASS'N CONST., art. I, § 2 (1987) (delineating objectives of CSEA). The CSEA represents employees of schools, colleges, universities, cities, counties, local government districts, and private employers contracted to perform services for such entities within California. *Id.* art. II, § 1(a). See *id.* art. III, § 1-4 (providing for the affiliation of local chapters and setting forth requirements governing affiliates).

54. Fairfield-Suisun Unified School Dist., PERB Dec. No. 121, at 2 (1980). PERB adopted the proposed decision of the hearing officer. See Fairfield-Suisun Unified School Dist., proposed decision (PERB July 7, 1978) [hereinafter proposed decision]. *Id.* See generally CAL. PUB. EMPL. REL. 40 (June, 1980) (summarizing the facts and holding of *Fairfield-Suisun Unified School District*).

55. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 2.

56. See *supra* note 53.

57. Fairfield-Suisun Unified School Dist., PERB Dec. No. 122, at 2 (1980). The request was filed by CSEA pursuant to California Civil Code section 3544. *Id.*

58. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 2.

chapter 302 and 1048 were not separate employee organizations, but merely subdivisions of a single employee organization, CSEA.<sup>59</sup> Thus, the District concluded that recognition of the CSEA as the exclusive employee representative of both supervisory and rank and file employees would violate the separation of representation requirement of the EERA.<sup>60</sup>

The CSEA and local chapter 1048 filed a petition, requesting that PERB determine whether CSEA locals 302 and 1048 were the same employee organization within the meaning of the EERA.<sup>61</sup> Upon review, PERB found that the two local chapters of the CSEA were the same employee organization.<sup>62</sup> PERB reasoned that locals 302 and 1048 functioned as the same organization based on the election and voting procedures of CSEA and affiliated chapters,<sup>63</sup> the finance allocation structure of CSEA,<sup>64</sup> and the assistance provided by CSEA to the local affiliates in labor negotiations between the District and each affiliated chapter.<sup>65</sup> Thus, CSEA and local 1048 were precluded from representing the supervisors employed by the District.<sup>66</sup>

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59. *Id.* at 3.

60. *Id.*

61. *Id.* at 4. The petition was filed by CSEA pursuant to California Government Code section 3544.5. *Id.* at 2. This section states a petition may be filed with PERB requesting PERB to investigate and decide whether employees have selected or wish to select an exclusive representative. *Id.* See also CAL. GOV'T CODE § 3541.3 (West 1980 & Supp. 1988) (empowering PERB to decide contested matters of recognition of an employee organization).

62. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 14.

63. *Id.* at 2-3 (detailing the election of officers of CSEA). Specifically, the CSEA officers were elected from all members of both the non-supervisory unit and the proposed supervisory unit. *Id.* at 6. See CAL. SCHOOL EMPLOYEES ASS'N, art. IV, §§ 1-3 (outlining election procedures). Thus, recognition of local 1048 as the representative of supervisory employees would result in both supervisory and non-supervisory employees voting on issues that affect their competing interests. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 8-9. For example, the board of the CSEA, members of which include supervisory employees, vote upon the funding of any grievance procedure initiated by one of the affiliated locals. *Id.* Should local 302 bring an action against the supervisors of members, those supervisory employees sitting on the board of directors would be voting on the allocation of funds to pursue grievances against themselves. *Id.* at 9-10. Such an outcome violates the separation of representation provision of the EERA. *Id.*

64. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 11-13 (detailing the financial structure of the CSEA). Under the CSEA constitution, dues paid by locals are given directly to CSEA, who then re-allocates the money to the local chapters. *Id.* at 11. See CAL. SCHOOL EMPLOYEES ASS'N CONST. art. VII, § 1-16 (describing CSEA financial structure). Hence, when local 302 submits dues to CSEA, who in turn reallocates to 1048, the employee organization representing the rank and file employees provides monetary assistance to the efforts of the organization representing the supervisors of such employees. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 11.

65. Fairfield-Suisun Unified School District, proposed decision, *supra* note 54, at 11. PERB observed that the CSEA field representative who assisted the non-supervisory employees of 302 in negotiations with their employers was under the direct supervision of the field representative assigned to 1048. *Id.* Moreover, on one occasion, the field representative for

The decision of PERB was based on the actual relationship between CSEA and the two local chapters.<sup>67</sup> In dictum, PERB suggested that actual, not potential, dominion and control by an international or state-wide organization over affiliated chapters is determinative of whether the two affiliates are the same employee organization within the meaning of the EERA.<sup>68</sup> Further, the decision indicated that the mere affiliation of two local chapters with the same international union would not render the affiliates the same employee organization for purposes of the EERA.<sup>69</sup> This dictum was incorporated into the holding later adopted by PERB in Sacramento City Unified School District.<sup>70</sup>

## 2. Sacramento City Unified School District

PERB addressed the issue of what organizations are considered the same employee organization under the EERA in a decision rendered the same day as Fairfield-Suisun Unified School District.<sup>71</sup> In *Sacramento Unified School District*, however, PERB did not merely suggest by way of dicta the circumstances under which two locals of the same international union would be deemed the same

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1048 substituted for the field representative of 302 during contract negotiations with the district. *Id.*

66. *Id.* at 14. The CSEA and local 1048 then filed with PERB an exception to the proposed decision. *Id.* at 2. PERB adopted the proposed decision and dismissed the petition. Fairfield-Suisun School Dist., PERB Dec. No. 121, at 2-3 (1980).

67. Fairfield-Suisun Unified School Dist. PERB Dec. No. 121, at 8-14 (1980). Despite the separate offices, telephone numbers, officers, membership meetings, and financial records of the local chapters, PERB listed significant links between locals 302 and 1048. For example, members of both locals are eligible for special services provided by CSEA, each chapter is required to adopt a constitution and by-laws conforming to and approved by CSEA, all members of the locals become members of the CSEA, all concerted activities by locals must be approved by the CSEA Board of Directors, and members of all locals contribute to a fund for the maintenance of the CSEA headquarters complex. *Id.* at 6-7.

68. *Id.* at 12. In response to the argument of CSEA that the EERA did not intend to prohibit the affiliation of one organization that represents district supervisors with the organization that represents district non-supervisors, PERB noted that that were locals 302 and 1048 "merely affiliated with the state CSEA this argument might prevail." *Id.*

69. *Id.*

70. See *infra* notes 73-92 and accompanying text (examining the holding in *Sacramento City Unified School District*).

71. Sacramento City Unified School Dist., PERB Dec. No. 122 (1980). See *infra* notes 55-72 and accompanying text (analyzing the decision of PERB in *Fairfield-Suisun Unified School Dist.*). See generally CAL. PUB. EMPL. REL., 41-42 (June, 1980) (summarizing and comparing the decision in *Sacramento City Unified School Dist.* to *Fairfield-Suisun Unified School Dist.*).

employee organization.<sup>72</sup> Instead, PERB articulated a standard for reviewing the issue of what constitutes the same employee organization under the EERA. PERB held that one local affiliate must actually dictate the course of action of another local affiliate before the two locals are the same employee organization for purposes of the EERA.<sup>73</sup> Moreover, if an international organization in fact controls both local affiliates representing the supervisory and rank and file employees of the same district in a manner that renders the affiliates conduits for the international organization, then the international is the true representative of both supervisory and rank and file employees in violation of the EERA.<sup>74</sup>

In *Sacramento City*, local 535,<sup>75</sup> an affiliate of the Service Employees International Union (SEIU), petitioned the Sacramento City Unified School District (the District) for recognition as the exclusive representative of the supervisory employees of the District.<sup>76</sup> Previously, the District recognized another SEIU affiliate, local 22, as the exclusive representative of rank and file school district employees.<sup>77</sup> The California School Employees Association (CSEA),<sup>78</sup> a union competing with local 535 for recognition as exclusive representative by the district supervisory employees, filed with PERB an exception to the request for recognition submitted by SEIU local 535.<sup>79</sup> CSEA alleged that both SEIU local affiliates were the same employee organization.<sup>80</sup> Specifically, CSEA objected to particular provisions of the SEIU international constitution authorizing international control over both locals by SEIU.<sup>81</sup> PERB addressed three of the

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72. See *Sacramento City Unified School District*, PERB Dec. No. 122. See also *Fairfield-Suisun Unified School District*, proposed decision, *supra* note 54 (suggesting that mere affiliation with the same international does not render two locals the same employee organization within the meaning of the EERA).

73. *Sacramento City Unified School Dist.*, PERB Dec. No. 122, at 14-15.

74. *Id.*

75. According to PERB, the stated jurisdiction of local 535 is all social service workers and related chain of employees employed within California. *Sacramento City Unified School Dist.*, proposed decision, (PERB Oct. 26, 1978) [hereinafter proposed decision].

76. *Sacramento City Unified School Dist.*, PERB Dec. No. 122, at 2. The petition was filed pursuant to California Government Code section 3544. *Id.*

77. *Id.* at 4 (adopting facts of *Sacramento City Unified School District*, proposed decision, *supra* note 75, at 3).

78. See *supra* note 53 (describing the jurisdiction of the CSEA).

79. *Sacramento City Unified School Dist.*, PERB Dec. No. 122, at 2-3. The petition was filed pursuant to California Government Code section 3544.1(b), that allows an employee organization to file a challenge with the public school employer to the appropriateness of the unit or a competing claim of representation. *Id.*

80. *Id.*, at 2-3.

81. *Id.* at 15-16.

provisions of the SEIU international constitution enumerating the powers of the international president and the international board.<sup>82</sup> PERB recognized that each provision of the SEIU constitution creates the potential for control by SEIU over the local affiliates that could result in a conflict of interest in representation.<sup>83</sup> PERB held, however, that the mere potential for the international to act in a manner inconsistent with the separation of representation clause of the EERA is insufficient to disqualify affiliates of the same international union from representing rank and file and supervisory employees from the same district in separate bargaining units.<sup>84</sup> Thus, PERB concluded that locals 535 and 22 were not the same employee organization under the EERA.<sup>85</sup>

PERB relied on the legislative intent in the separation of representation requirement of the EERA to support the holding.<sup>86</sup> PERB noted that the provisions of the EERA are patterned after language in the NLRA.<sup>87</sup> When drafting the EERA, however, the California legislature declined to adopt the per se affiliation test embodied in the NLRA.<sup>88</sup> Thus, PERB reasoned that the legislature did not intend

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82. *Id.* at 16-17. The first provision of the SEIU constitution interpreted by PERB empowers the international president to negotiate and enter into national, regional, or area-wide collective bargaining agreements. *Id.* at 16. The second provision authorizes the international executive board to merge local affiliates. The third provision allows an international president to impose a trusteeship on a local under certain circumstances. *Id.*

83. *Id.*, at 16.

84. *Id.* at 17. *See also id.* at 19 (Gluck, Chairperson, concurring). "Something more than mere common affiliation or connection with another organization must be shown in order to deny representational status to a union of supervisory employees. That something more is the opportunity for domination and control by a group with disparate interests and the likelihood that internal dissension would inevitably lead to a breakdown of the negotiation process designed to promote stability and harmony in employer-employee relations." *Id.* at 22-23.

85. *Id.* at 17. PERB reasoned the SEIU could exercise constitutional powers consistent with the EERA, but cautioned that the exercise of such powers is subject to review by PERB. *Id.* If, for example, the international prescribed the negotiating aims and strategies of the local affiliates, or insisted that the international appoint the negotiating team of the local, PERB could then re-evaluate the relationship between the organizations representing the supervisors and their subordinates, and take whatever steps necessary to serve the purposes of the Act. *Id.*

86. *Id.* at 14.

87. *Id.* Compare 29 U.S.C.S. § 159(b)(3) (Law. Co-op. 1975 & Supp. 1988) (providing that "[n]o labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, . . . employees other than guards" under the NLRA) with CAL. GOV'T CODE § 3545(b)(2) (West 1980 & Supp. 1988) (providing that "a negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise" under the EERA).

88. Sacramento City Unified School Dist., PERB Dec. No. 122, at 14.

that mere affiliation of two local employee organizations with the same international union would render the two locals the same employee organization within the meaning of the EERA.<sup>89</sup>

### 3. Los Angeles Community College District

PERB continued to utilize the actual domination standard set forth in *Sacramento City* to determine whether two affiliates of the same international were the same employee organization in *Los Angeles Community College District*.<sup>90</sup> In *Los Angeles Community College District*, local 699,<sup>91</sup> a classified union of supervisory employees affiliated with Service Employees International Union (SEIU), requested recognition from the Los Angeles Community College District (the District) as the exclusive representative of the classified supervisory employees of the District.<sup>92</sup> The District previously recognized SEIU, local 99 as the exclusive representative of non-supervisory employees.<sup>93</sup> The District therefore denied the request of local 699,

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89. *Id.* In a strong dissent, Member Gonzales argued that the term "same employee organization" should be interpreted to preclude supervisory employees from representation by a local organization that is part of the same statewide or national employee organization as the local representative of rank and file employees. *Id.* at 24. Gonzales reasoned that despite the absence of actual control by an international organization over local affiliates, the loyalty the district supervisors owe to fellow members of SEIU is likely to conflict with the loyalty the district supervisors owe to district employees. *Id.* Specifically, new members of SEIU are required to make a pledge in which they promise to attempt to prevent other SEIU members from being wronged and from injuring the interests of another member. *Id.* at 30. Such divided loyalty, noted Gonzales, is exactly what the EERA was designed to prevent. *Id.* at 29-30 (interpreting SEIU Constitution, art. XV, § 1 which delineates the pledge requirement of SEIU members). Gonzales noted the conflicts the legislature sought to prevent in enacting California Government Code section 3545(b)(2) are inherent rather than merely potential in the relationship between SEIU and local affiliates. *Id.* Another reason advanced by the dissent for adopting a potential conflict of interest standard is that PERB is unlikely to learn of an actual conflict unless reported by the district or a rival organization. *Id.* at 28-29. Further, the authority of the international over the local affiliates may not be exercised until a crisis situation, such as a strike, arises. *Id.* By then, the public school employer would have already felt the consequences of the divided loyalties of the supervisory representatives. *Id.* Any subsequent action by PERB to remedy the situation would be inadequate. *Id.*

90. Los Angeles Community College Dist., PERB Dec. No. 123 (1980). See generally *Recent Decisions*, 50 CAL. PUB. EMPL. REL. 45, 45-46 (1981); 71 CAL. PUB. EMPL. REL. 60, 60-61 (discussing the holding of PERB in *Los Angeles Community College Dist.* and the immediate reaction from international and local unions representing California school employees).

91. Los Angeles Community College Dist., proposed decision, at 2 (PERB June 6, 1978) [hereinafter proposed decision]. Local 699 was chartered by SEIU and has jurisdiction to include members who are classified supervisory employees of public school employers in Los Angeles County. *Id.*

92. *Id.* at 1.

93. *Id.*

as recognition of local 699 would violate the separation of representation provision of the EERA.<sup>94</sup>

Both locals 699 and 99 were subject to constitutional and organizational control by SEIU international in a similar manner as presented by the facts of *Sacramento Unified School District*.<sup>95</sup> Thus, PERB concluded that SEIU locals 699 and 99 were not the same employee organization within the meaning of the EERA.<sup>96</sup> Further, PERB held that despite organizational assistance provided to local 699 by SEIU international, local 699 was not barred from representing district supervisory employees because no evidence was introduced suggesting that local 99 is similarly controlled by the international.<sup>97</sup>

The District subsequently petitioned the California Court of Appeal to vacate the PERB decision.<sup>98</sup> The District claimed that the decision did not comply with the EERA.<sup>99</sup> The court reversed the decision of PERB and held that local 699 was precluded from representing supervisory employees by the EERA because locals 699 and 99 were the same employee organization.<sup>100</sup>

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94. *Id.* at 1-2.

95. See *supra* notes 82-86 and accompanying text (examining the control exercised by SEIU over local affiliates). The district objected to the provisions of the constitution of local 699 that required every member of the local to follow the international constitution and not interfere with the rights of fellow members. Los Angeles Community College Dist., proposed decision, *supra* note 91 at 8. Objectionable portions of the international constitution provide: (1) the president of the SEIU can veto a strike vote of a local affiliate; (2) the SEIU must approve all local constitutions; (3) where a conflict arises between the constitution of the international and the local, the constitution of the international controls; (4) no international member shall injure the interest of another member; and (5) all locals are subject to suspension or revocation of their charter by the international. *Id.* at 8-9. Further, PERB recognized that local 699 was assisted in formation and organization by the international and received office space, equipment, clerical help, and supplies from another subsidiary of SEIU. Los Angeles Community College Dist., PERB Dec. No. 123, at 4-7 (1978).

96. Los Angeles Community College Dist., PERB Dec. 123, at 9 (1978).

97. *Id.* at 8. The locals elected separate officers, maintained jurisdiction over separate employee classifications, kept a separate dues structure and treasury, and conducted separate elections. Los Angeles Community College Dist., proposed decision, *supra* note 91, at 2-10. The district argued that cases interpreting section 9(b)(3) of the NLRA should control. *Id.* at 5. See 29 U.S.C.S. § 159(b)(3) (Law. Co-op. 1975 & Supp. 1987). In the private sector, the NLRB has held that temporary assistance by a non-guard union while guards organize is not "affiliation." Federal Services, Inc., 115 N.L.R.B. 1729, 1731 (1956). Further, organizing advice is acceptable. See, e.g., Consolidated Copper Co., 142 N.L.R.B. 53, 54 (1963); The Midvale Co., 114 N.L.R.B. 372, 374 (1955). Substantial financial aid from a non-guard union or the overlapping of officers, however, constitutes impermissible affiliation. Willcox Construction Co. Inc., 87 N.L.R.B. 371, 373-74 (1949).

98. Los Angeles Community College District v. Public Employment Relations Bd., No. 2 Civ. 59951 (Cal. 2d Dist. Ct. App. June 16, 1981). The EERA affords an employer or employee organization the right to petition the district court of appeal for judicial review of a PERB decision where PERB joins in the request for review or when the issue is raised as a defense to an unfair practice complaint. CAL. GOV'T CODE § 3542 (West 1980 & Supp. 1988).

99. Los Angeles Community College Dist., No. 2 Civ. 59951, at 1.

100. The appellate court decision was ordered depublished by the California Supreme

The precedential value of the appellate court decision, according to PERB, is limited to the facts of the case.<sup>101</sup> Thus, when later faced with the same issue in *Los Angeles Unified School District*, PERB disregarded the ruling of the court of appeals in *Los Angeles Community College District*.<sup>102</sup> PERB again applied the actual domination standard to determine whether two local affiliates are the same employee organization under the EERA.<sup>103</sup>

## II. THE DECISION

In *Los Angeles Unified School District v. Public Employment Relations Board*,<sup>104</sup> a California Court of Appeal rejected the actual domination test established by PERB to determine whether two affiliates of the same international union are the same employee organization within the meaning of the EERA. The California appellate court held in favor of a new test.<sup>105</sup> The new test states that two affiliates of the same international union are the same employee organization under the EERA if an international actually *or potentially* exercises substantial control over the actions of two affiliates, each of which is recognized as the exclusive representative of supervisory and rank and file employees, respectively.<sup>106</sup> Further, the court held that the two affiliates are the same employee organization if either affiliate actually *or potentially* exercises substantial control over the course of action of the other.<sup>107</sup> The California Supreme Court express approval of the new test espoused by the court of appeal and ordered the appellate court opinion published.<sup>108</sup>

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Court. *Los Angeles Unified School Dist. v. Service Employee Int'l Union Local 347*, PERB Dec. No. 424, at 3 (1984). Thereafter, pursuant to an order of a California court of appeal, PERB issued decision number 123a, holding that local 699 and 99 were the same employee organization. *Id.* See also 50 CAL. PUBL. EMP. REL. 45, 45 (discussing the appellate court decision).

101. *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 25-26 (1984).

102. See *infra* note 100 and accompanying text (analyzing the decision of the California Court of Appeal in *Los Angeles Community College Dist.*).

103. *Id.*

104. *Los Angeles Unified School Dist. v. Public Employment Relations Bd.*, 191 Cal. App. 3d 551, 237 Cal. Rptr. 278 (1986). See generally 71 CAL. PUBL. EMP. REL. 60, 60-61 (1986) (discussing the appellate court holding).

105. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 551, 237 Cal. Rptr. at 278. PERB established the standard of review in *Sacramento City Unified School Dist.*, PERB Dec. No. 122 (1980).

106. *Los Angeles Unified School District*, 191 Cal. App. 3d at 557, 237 Cal. Rptr. at 281.

107. *Id.*

108. See *supra* note 82 (detailing affiliation of local unions with SEIU).



### A. The Facts

The Classified Union of Supervisory Employees, SEIU, Local 347,<sup>109</sup> sought exclusive representation of a unit of classified supervisors employed by the Los Angeles Unified School District (the District).<sup>110</sup> The District had previously recognized SEIU, local 99, as the exclusive representative of the classified rank and file district employees.<sup>111</sup> Consequently, the District denied voluntary recognition of local 347.<sup>112</sup> The District claimed that locals 347 and 99 were the same employee organization under the EERA based upon evidence of potential domination by SEIU over the two local affiliates.<sup>113</sup> The District concluded that recognition of local 347 would violate the separation of representation proscription of the EERA.<sup>114</sup>

In response to the denial of recognition by the District, local 347 requested PERB to conduct a representation hearing.<sup>115</sup> After conducting the hearing, PERB applied the actual domination test to the facts of the case.<sup>116</sup> PERB determined that locals 99 and 347 were not the same employee organization within the meaning of the EERA because neither local actually controlled the other, and because the

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109. *Los Angeles Unified School Dist. v. Public Employment Relations Bd.*, No. L.A. 32262 (Cal. May, 1987) (order directing publication).

110. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 553-54, 237 Cal. Rptr. at 279. Initially, supervisory employees of the district, some of whom were members of local 99, began organizing a union to represent district supervisors. *Id.* The union was named local 699 and filed a petition with PERB to conduct an election to determine whether 699 would be the exclusive representative of the district supervisory personnel under the California Government Code Section 3544.7. *Id.* Local 699 later merged with SEIU local 347 to become Supervisory Employees Union local 347. *Id.* See also *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 6-7 (1984) (detailing the merging of SEIU locals 347 and 699). Local 347 throughout this note refers to the union consisting of both 699 and 347. Significantly, local 699 was the same SEIU local affiliate seeking exclusive representation of the supervisory employees of the Los Angeles Community College District. *Los Angeles Community College Dist.*, PERB Dec. No. 123 (1980). See *supra* notes 79-81 and accompanying text (examining the *Los Angeles Community College Dist.* decisions of PERB and the California Court of Appeal).

111. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 553, 237 Cal. Rptr. at 279. See *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 3 (1984) (setting forth the procedural background of *Los Angeles Unified School Dist.*).

112. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 553, 237 Cal. Rptr. at 279.

113. *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 3 (1984). See *supra* notes 79-81 and accompanying text (analyzing the relationship between SEIU and locals 347 and 99).

114. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 553, 237 Cal. Rptr. at 279. See also *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 3 (1984) (examining the contentions of the school district).

115. *Los Angeles Unified School Dist.*, PERB Dec. No. 424, at 3 (1984).

116. *Id.* at 24-26.

international did not actually control both locals.<sup>117</sup> Therefore, local 347 could properly represent the supervisory employees of the District.<sup>118</sup> The District subsequently petitioned the First District Court of Appeal for judicial review of the PERB decision.<sup>119</sup>

### B. The Opinion

The principle issue presented to the California Court of appeal involved determining the intent of the California legislature in enacting the separation of representation provision of the EERA.<sup>120</sup> Both the District and PERB agreed that the legislature, by prohibiting the same employee organization from representing both the supervisory and rank and file employees of a district, intended to prevent the division of supervisor loyalty between management and rank and file employees.<sup>121</sup> The District, however, argued that the legislative intent was best served by applying a potential dominion test to determine whether two affiliates of the same international union are

117. *Id.*

118. *Id.* PERB rejected the arguments of the District. First, the District argued, PERB erroneously relied on Sacramento City Unified School Dist., PERB Dec. No. 122 (1980), as the leading case interpreting subsection 3545 of the EERA and that Fairfield-Suisun Unified School Dist., PERB Dec. No. 121 (1980), provides the applicable analysis. *Id.* at 14. PERB distinguished *Los Angeles County Unified School Dist.* from *Fairfield-Suisun Unified School Dist.* based upon the relationship between CSEA and CSEA local affiliates evidencing the impermissible exercise of control over CSEA local affiliates by CSEA. *Id.* at 19. Next, the District argued that the determination of whether two locals affiliated with the same international were the same employee organization must necessarily be based upon potential control of an international over local affiliates as such an issue is resolved before the certification of any exclusive representative. *Id.* at 20. PERB rejected the argument as ignoring the fact that the relationship between locals 347 and 99 and SEIU international existed prior to certification in any particular district. *Id.* at 22. Further, relying on *Sacramento City Unified School Dist.*, PERB noted that, if at a date later than certification, the international attempted to exercise authority in a manner inconsistent with EERA, the PERB reserved the right to reevaluate the relationship. *Id.* at 21. PERB also rejected the contention that the legislature, in enacting the separation of representation clause of the EERA, intended to preclude any two local unions affiliated with the same international from representing supervisory and rank and file employees of a single district, respectively. *Id.* at 22. PERB reasoned that because the legislature declined to adopt a per se affiliation test in line with the NLRA, mere affiliation with the same international was insufficient to render two locals the same employee organization. *Id.* at 16. Finally, the District argued that both the court of appeal decision and the opinion of PERB remanded by the court of appeal are determinative of the case at bar because the same locals, 99 and 347 (formerly 699) were therein adjudged to be the same employee organization. *Id.* at 24-25. Because the decision was unpublished, however, PERB held the decision may not be relied upon as res judicata or collateral estoppel under Rule 977 of the California Rules of Court. *Id.* at 25.

119. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 553, 237 Cal. Rptr. at 279.

120. *Id.* at 555, 237 Cal. Rptr. at 280.

121. *Id.* at 556, 237 Cal. Rptr. at 281.

the same employee organization.<sup>122</sup> PERB contended that the actual dominion test set forth in *Sacramento City Unified School District* was the more appropriate standard of review.<sup>123</sup>

The court of appeal rejected the actual dominion approach established by PERB in favor of a potential dominion standard for three reasons. First, the potential domination test recognizes that even where no actual control is exercised by the international over the local affiliate, the local may nevertheless conduct activities in accordance with the wishes of the international based upon the potential consequences of failing to do so.<sup>124</sup> In contrast, the actual dominion test only considers the relationship between the affiliate and the international existing at the time a court decides the same employee organization issue.<sup>125</sup>

Second, the application of a potential dominion standard allows the court to determine the appropriateness of an exclusive representative based upon the actual relationship between an international and affiliates.<sup>126</sup> More importantly, the potential dominion test requires the court to consider the relationship between an international and affiliates as contemplated by the constitutions and bylaws of both the locals and the international.<sup>127</sup> In contrast, an actual dominion standard permits analysis only of the day to day conduct of the international and the affiliates.<sup>128</sup>

Finally, the court observed that the issue of whether a local affiliate is the appropriate exclusive representative of a group of district employees is resolved prior to the existence of an actual relationship between the affiliate and an international union or another affiliate.<sup>129</sup> Thus, whether the possibility of subsequent conflicts of interest exist between an affiliate seeking representation of supervisory employees and an affiliate certified as the exclusive representative of rank and file employees must necessarily be based upon a potential local-international relationship.<sup>130</sup>

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122. *Id.*

123. *Id.* at 556-57, 237 Cal. Rptr. at 281.

124. *Id.* See *infra* notes 134-38 (the court concludes that constitutional provisions provide for potential control by an international union over local affiliates).

125. *Los Angeles Unified School District*, 191 Cal. App. 3d at 556-57, 237 Cal. Rptr. at 281.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* PERB previously refuted the assumption made by the court that little or no

Applying the potential dominion test to the facts of *Los Angeles Unified School District*, the court examined the actual relationship between SEIU international and local 347, the established past practice of the international, and the constitutions and by-laws of both international and local unions.<sup>131</sup> Specifically, the court noted that employees of SEIU provided financial and organizational assistance to both locals 99 and 347.<sup>132</sup> Additionally, the court observed that past practices of SEIU included the payment of dues by affiliates to the international, strike support among local affiliates, and mediation of local disputes by the international.<sup>133</sup> Finally, the court found that the SEIU international constitution provided for potential control over the two local affiliates by SEIU through provisions governing discipline of SEIU members,<sup>134</sup> approval of constitutions of local affiliates,<sup>135</sup> strike decisions,<sup>136</sup> and placement by the international of a local affiliate in trusteeship.<sup>137</sup>

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relationship between an international union and an affiliate exists prior to the certification or recognition of the affiliate as the exclusive representative of district employees. *Los Angeles Unified School District*, PERB Dec. No. 424, at 22 (1984). Specifically, PERB recognizes that a relationship between the international and the affiliate may be established prior to certification or recognition. *Id.* PERB contends that an actual relationship provides a more realistic basis for determining the same employee organization issue. *Id.*

131. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 556-57, 237 Cal. Rptr. at 281 (citing *NLRB v. North Shore University Hosp.*, 724 F.2d 269 (2d Cir. 1983)). In *North Shore University*, the court considered evidence of both the governing structure and actual practice of an organization seeking certification as a bargaining representative. *NLRB v. Northshore University*, 724 F.2d 269, 273 (2d Cir. 1983).

132. *Los Angeles Unified School District*, 191 Cal. App. 3d at 553-54, 237 Cal. Rptr. at 279-80. For example, SEIU employed two organizers to assist local 347 in the request for recognition as the exclusive representative of the district supervisory employees. *Id.* During the period of employment, one organizer "worked with" local 99. *Id.* at 553-55, 37 Cal. Rptr. at 279. Further, local 347 hired a temporary secretary-treasurer who was paid for six months by the international. And, despite receiving income from dues payments, local 347 continued to receive financial subsidies from SEIU and the assistance of five field organizers. *Id.*

133. *Id.* A member of each local affiliate serves on the international board and both locals pay per capita dues to the international, a portion of which is set aside for locals engaged in authorized strikes. Further, SEIU once informally mediated a dispute between locals 99 and 347 concerning supervisory employees who remained members of local 99 following the organization of local 347. *Id.*

134. *Id.* at 555, 237 Cal. Rptr. at 278. The SEIU constitution also provides that any member of SEIU violating the oath of office, working as a strike breaker, violating the SEIU wage or work standards, or injuring the interests of another member may be disciplined by imposition of fines, suspension, or expulsion. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The SEIU constitution requires that all members of SEIU local affiliates be members of the SEIU international and act subject to the discipline of SEIU. Additionally, the constitution of a local affiliate must be approved by the international, whose constitution will govern in the case of conflict. Moreover, the international must first approve of the decision of a local to cancel membership meetings or to hold fund raisers. The court also

Under the potential dominion approach, the appellate court determined that SEIU international exercised an impermissible degree of control over locals 347 and 99.<sup>138</sup> Thus, the court concluded that locals 347 and 99 were the same employee organization within the meaning of the EERA.<sup>139</sup> In addition, the court concluded that local 347 was not an appropriate representative of the supervisory employees of the District.<sup>140</sup>

### III. LEGAL RAMIFICATIONS

The decision of the appellate court in *Los Angeles Unified School District v. Public Employment Relations Board*<sup>141</sup> to adopt a potential dominion test for determining whether two affiliates of the same international union are the same employee organization under the EERA raises several issues. The resolution of these issues will affect the bargaining duty of public school employers and the bargaining rights of public school employees.<sup>142</sup>

#### A. *The Duty of the School District Employer to Negotiate*

One unresolved issue following *Los Angeles Unified School District* is whether a district employer will violate a statutory duty to bargain in good faith by relying upon the potential dominion test.<sup>143</sup> To illustrate, some district employers relied upon the actual dominion test previously established by PERB in recognizing exclusive employee representatives. As a result, the rank and file employees and the supervisory employees within a number of school districts are cur-

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recognized as significant the constitutional power of the international to place a local affiliate in trusteeship. The constitution empowered SEIU to appoint a trustee to conduct the affairs of an affiliate subject to the supervision of SEIU. Finally, the SEIU may merge existing local unions and decide jurisdictional questions among the locals. *Id.*

138. *Los Angeles Unified School Dist.*, 191 Cal. App. 3d at 557-8, 237 Cal. Rptr. at 282.

139. *Id.*

140. *Id.* at 557-58, 237 Cal. Rptr. at 282.

141. 151 Cal. App. 3d 551, 237 Cal. Rptr. 278 (1986).

142. See *infra* notes 151-153 and accompanying text (analyzing the impact of *Los Angeles Unified School Dist.* on public school employers and employees).

143. Personal interview with Martha Geiger, In House Counsel for PERB, (December 7, 1987) (notes on file at the *Pacific Law Journal*) [hereinafter Interview with Geiger]. The legislature, in enacting the EERA, imposed a bilateral duty to bargain upon both public school employers and exclusive representatives of public school employees. CAL. GOV'T CODE §§ 3543.5(c) and 3543.6(c) (West 1980 & Supp. 1988). A breach of this duty may constitute an unfair practice and result in disciplinary action by PERB. *Id.*

rently exclusively represented by the same employee organization as now defined by the California Supreme Court.<sup>144</sup> Consequently, the district employer who determines that one or both units of employees are improperly represented must decide whether to refuse to bargain with the exclusive representative of the supervisory employees, with the exclusive representative of the rank and file employees, or with both representatives. Further, the employer may choose to negotiate with both representatives despite knowing or having reason to know of improper representation. Such conduct may constitute a breach of the employer's duty to bargain under the EERA.

The EERA requires the public school employers and exclusive representatives of district employees to negotiate with one another in good faith.<sup>145</sup> PERB utilizes both a totality of the circumstances test and a per se test to determine whether an employer has exercised good faith in negotiating with an exclusive representative.<sup>146</sup> The totality of the circumstances test examines the entire course of negotiations between an employer and an exclusive representative to establish the requisite subjective intent of the employer to reach an agreement.<sup>147</sup> The per se test renders unlawful certain acts that

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144. PERB Survey, *Units in Place* (August 31, 1987) (on file at *Pacific Law Journal*).

145. CAL. GOV'T CODE §§ 3543 (stating that public school employees may not meet and negotiate with public school employers where an exclusive representative is recognized under California Government Code section 3544.1 or certified under section 3544.7); 3543.5(c) (unlawful for public school employer to refuse or fail to meet and negotiate in good faith with an exclusive representative); 3543.6(c) (unlawful for employee organization to refuse or fail to negotiate in good faith with a public school employer on behalf of any of the employees of which it is the exclusive representative); 3543.7 (duty to meet and negotiate in good faith requires parties to begin negotiating prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date). See also *id.* § 35401(h) (defining meeting and negotiating). Before a duty to negotiate arises, a request by the exclusive representative of an employer to bargain must first be made. *Id.* at § 3543.3. See generally MATHIASON, *supra* note 49, at 211.

146. Pajaro Valley Educ. Ass'n v. Pajaro Valley Unified School Dist., PERB Dec. No. 51, at 4-7 (1978). See Stockton Teachers Ass'n., PERB Dec. No. 143, at 21 (1980) (applying both standards). See *infra* notes 147-54 and accompanying text (defining the scope of the per se and good faith tests).

147. Pajaro Valley Educ. Ass'n, PERB Dec. No. 143 at 5 (1978). PERB suggests that good faith negotiating requires the parties to negotiate with open minds, on an appropriate number of occasions, with a view of trying to reach an agreement on matters within the scope of employment. *Id.* See generally MATHIASON, *supra* note 49, at 212 (discussing the standard of PERB for determining whether a violation of the duty to bargain has occurred). The presence or absence of such an intent will be decided by PERB upon a charge of bad faith bargaining against the public school employer or by the courts upon an appeal of a PERB decision based upon the negotiations of a particular case. CAL. GOV'T CODE §§ 3543.5(c) and 3543.6(c) (West 1980 & Supp. 1988). See also *id.* §§ 3541.3(i) (empowering PERB to investigate unfair practices and take appropriate action), 3541.5 (detailing procedures for filing unfair practice claim), 3542 (setting forth the procedure for requesting judicial review of PERB decision). Evidence of bad faith bargaining includes cancelling negotiating meetings, engaging

potentially frustrate negotiations and undermine the good faith conduct of the exclusive representative without determining bad faith by the school district employer.<sup>148</sup>

Whether the conduct of a public school employer will violate the duty to bargain requires the application of the good faith and *per se* tests. Under the good faith test, an employer who negotiates with both exclusive employee representatives, despite knowing or having reason to know of improper representation, will likely violate the duty to negotiate. Nevertheless, a school employer who relies on *Los Angeles Unified School District* to determine whether an exclusive representative of district employees has been properly certified or recognized may have a defense to a bad faith violation. PERB recognizes that where an employer entertains a reasonable, good faith doubt of the majority status of a representative, the employer is under no obligation to negotiate with the representative.<sup>149</sup> Arguably, this defense can, by analogy, be extended to a reasonable and good faith doubt of the employer as to the validity of the certification or recognition of an exclusive representative. Thus, where an employer doubts the validity of a union's exclusive representative status in reliance on *Los Angeles Unified School District*, PERB is likely to rule that the refusal to bargain is made in good faith. Ironically, such a ruling would undermine the express purpose of the EERA to promote the improvement of employer-employee relations by encouraging negotiation.<sup>150</sup> Allowing an employer to refuse to bargain in reliance on *Los Angeles Unified School District* would directly inhibit negotiations by creating an artificial excuse for the employer to terminate negotiations.<sup>151</sup>

Where a school employer does not negotiate with the exclusive representatives of district employees, but instead refuses to bargain

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in evasive tactics or delay, conditioning bargaining concerning non-economic matters, failing to furnish information required for bargaining, attempting to undermine the exclusive representative by dealing directly with employees, and reneging on tentative agreements. *Stockton Teachers Ass'n v. Stockton Unified School Dist.*, PERB Dec. No. 143, at 33-34 (1980); *Fremont Unified School Dist. v. Fremont Unified Dist. Teacher's Ass'n*, PERB Dec. No. 143, at 15 (1980), *reversed*, PERB Dec. No. 143a.

148. *Pajaro Valley Educ. Ass'n*, PERB Dec. No. 51, at 5 (1978). Such conduct includes an outright refusal to bargain concerning matters within the scope of representation. *Id.* at 5-7.

149. *California School Employees Ass'n, Pittsburg Chapter*, PERB Dec. No. 318, at 24 (1983).

150. CAL. GOV'T CODE § 3540 (West 1980 & Supp. 1988) (stating the purpose and intent of the EERA).

151. Interview with Martha Geiger, *supra* note 143.

with either representative, the employer will probably violate the duty to bargain under the per se test. Although the employer claims reliance on *Los Angeles Unified School District*, PERB will not consider such a claim, because the per se test recognizes a refusal to bargain as unlawful despite the subjective good faith intent of the employer.

*B. The Right of the School District Employee to Representation by a Chosen Representative*

After the decision in *Los Angeles Unified School District v. Public Employment Relations Board*, school district rank and file employees must, through voluntary recognition or election, select an exclusive representative who is not affiliated with the same international union as the exclusive representative of the district supervisory employees.<sup>152</sup> Further, supervisory employees must adhere to the same limitation regarding employee organizations affiliated with the same international as the exclusive representative of the district rank and file employees.<sup>153</sup> The decision of the court in *Los Angeles Unified School District* therefore limits the statutory bargaining right of district employees to select a representative of their own choosing.<sup>154</sup> Such a limitation may, in turn, undermine the purpose of the EERA to encourage employment relationships among public school employers and employees by recognizing the right of public school employees to be represented in negotiations with public school employers by representatives of choice.<sup>155</sup>

CONCLUSION

In *Los Angeles Unified School District*, the California Court of Appeal interpreted the separation of representation clause of the EERA. This clause prohibits the same employee organization from representing both the supervisory employees of a school district and the rank and file employees whom they supervise. The court held that whether two local affiliates of the same international union are

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152. *Los Angeles Unified School Dist. v. Public Employment Relations Bd.*, 151 Cal. App. 3d 551, 556-57, 237 Cal. Rptr. 279, 281 (1986).

153. *Id.*

154. Interview with Martha Geiger, *supra* note 143.

155. CAL. GOV'T CODE § 3540 (West 1980 & Supp. 1988).



the same employee organization is dependent upon the potential for dominion and control by the international over the local affiliates or by the locals over one another. The court, however, has left unresolved how the holding of *Los Angeles Unified School District* will impact the daily interactions of public school employers and employees. In particular, the court leaves unanswered whether the decision will affect the statutory duty of the public school employer to bargain with the exclusive representative of school employees. Moreover, the decision raises concerns that the holding of the court infringes upon the statutory bargaining right of school district employees to representation in labor negotiations with employers by representatives of choice.

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