

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT,
Employer

and

CHILDREN'S CENTER EMPLOYEES
UNION, LOCAL 2,
Employee Organization

and

OAKLAND EDUCATION ASSOCIATION, CTA/NEA,
Employee Organization

and

UNITED TEACHERS OF OAKLAND,
AFT LOCAL 771, AFL-CIO
Employee Organization

and

OAKLAND PERSONNEL AND GUIDANCE
ASSOCIATION

Employee Organization

Appearances: William E. Brown, Attorney, and Gerald A. Conradi, Attorney
(Brown and Conradi) for Oakland Unified School District; Sharrel J. Wyatt,
Attorney, for Oakland Education Association, CTA/NEA; Stewart Weinberg and
Wilma Rader, Attorneys (Van Bourg, Allen, Weinberg and Roger) for United
Teachers of Oakland, AFT Local 771, AFL-CIO; V. Roy Lefcourt, Attorney,
for Children's Center Employees Union, Local 2; Thomas C. Agin, Director,
California Pupil Services Labor Relations, Oakland Personnel and Guidance
Association.

Amici Curiae: Rubin Tepper, Attorney, Marin County Substitute Teacher
Association and Santa Clara County Substitute Teachers Association.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

I

On April 1, 1976, Oakland Education Association (OEA) and United Teachers
of Oakland (UTO) filed separate but similar requests for recognition as the exclusive
representative of almost all Oakland Unified School District certificated employees,

The Oakland Unified School District is composed of 99 school sites and has an
average daily attendance of 60,282 students. (Annual Report, Financial Transactions
Concerning School Districts of California, Fiscal Year 1975-76, published by the State
Controller, State of California, and the 1976 California Public School Directory,
published by the Superintendent of Public Instruction, State of California.)

including certificated employees of children's centers operated by the district.¹ Also on April 1, 1976, the Children's Center Employees Union (CCEU) filed a request for recognition as the exclusive representative of the district's certificated children's center employees.² On April 9, 1976, the Oakland Personnel and Guidance Association (OPGA) filed a request for recognition as the exclusive representative of counselors employed by the district.³

Subsequently, the district declined to recognize any of the employee organizations seeking recognition, and took the position that an appropriate unit would consist of all classroom teachers, including those employed in children's centers, and all children's center teacher assistants; but excluding psychologists and substitute teachers without a contract in both regular school and children's centers. These conflicting unit contentions and other disputed unit matters raise

¹The OEA describes its requested unit as follows: "All regular certificated teachers who work full or part-time; teachers on special assignment (TSA); counselors, psychologists, nurses, librarians, substitutes on contracts and long term substitutes as defined as having worked 75% of the school days between September 4, 1975 and April 1, 1976; children's center teachers and teacher assistants, contracted adult day and evening teachers, excluding superintendent, deputy superintendent, assistant superintendents, regional superintendents, directors, administrative assistants, administrative aides, coordinators, instructional consultants, principals, and vice principals."

The UTO describes its requested unit as follows: "All contracted certificated employees who do not serve in management or confidential positions and who are employed by the Oakland Public Schools on a half-time or more contract, and all substitute teachers who have taught more than 75% of the teaching days in the Oakland Public Schools during 1975-1976 school year prior to the date of the Collective Bargaining election."

²The CCEU describes its requested unit as follows: "All certificated personnel in positions of head teachers, senior teachers, teachers, teacher's assistants, and certificated substitutes for the foregoing categories of employees employed in Children's Centers located within and/or operated by said school district."

³The OPGA describes its requested unit as follows: "All employees holding a valid Pupil Personnel Services Credential with Counseling Authorization currently involved in on-site counseling (i.e., counselors) including all employees on special assignment who are performing on-site counseling and who hold a valid Pupil Personnel Services Credential with Counseling Authorization (i.e., teachers on special assignment)."

We assume that, as required by the Act, all parties intend to exclude from the requested unit confidential, supervisory, and management employees.

the following issues for decision by the Board:

(1) Is a separate unit of children's center certificated employees appropriate?

(2) Is a separate unit of counselors and TSA counselors (teachers on special assignment) appropriate?

(3) Are psychologists management employees within the meaning of the Educational Employment Relations Act (EERA)?

(4) If psychologists are not management employees within the meaning of the EERA, what is the appropriate unit placement for psychologists?

(5) Should an appropriate unit of certificated employees include substitutes who teach in the regular school for 75% or more of the school year?

(6) Should an appropriate unit of certificated employees include substitutes in the children's centers who teach more than 50% of the school year?

(7) Are children's center assistant supervisors "supervisors" within the meaning of the EERA?

The criteria for resolving the appropriate unit issues in this case are contained in Government Code Section 3545(a), which provides:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

In our decision in Los Angeles Unified School District,⁴ a case involving certificated employees, we discussed the EERA's Section 3545(a) criteria. There

⁴ EERB Decision No. 5, November 24, 1976.

we said:

In defining what constitutes a community of interest among and between employees, there are several factors which have been established by the National Labor Relations Board: qualifications, training and skills, job functions, method of wages or pay schedule, hours of work, fringe benefits, supervision, frequency of contact with other employees, integration with⁵ work functions of other employees, and interchange with other employees.

We apply the above criteria, where applicable, in this case.⁶

The Requested Counselors Unit

The district employs 92 counselors, of whom about 80-84 work full-time.

The district also employs approximately 12 TSA counselors (teachers on special assignment).⁷ A counselor's primary duties are to assist in the placement of children, course selection, career planning and personal adjustment.

OPGA seeks a separate unit of counselors; OEA and UTO would include counselors in the regular certificated unit; the district and CCEU take no position on this issue.

OPGA bases its argument for a separate counselors unit on differences between the training and responsibilities of counselors and those of teachers. What is critical, however, for community of interest purposes are not so much those factors

⁵See Kalamazoo Paper Box Corp., 136 NLRB 134, 49 LRRM 1715 (1962).

⁶In reliance on the California Supreme Court decision in Fire Fighters' Union Local 1186, IAFF v. City of Vallejo, 12 Cal. 3d 608, 617, 87 LRRM 2453, 2457 (1974), we said in our recent decision in Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976: "While we are not bound by NLRB decisions, we will take cognizance of them, where appropriate. Where provisions of California and federal labor legislation are parallel, the California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analagous California legislation."

⁷A teacher on special assignment (TSA) is, as the name implies, a teacher on special assignment for which he or she receives a special stipend. One of the duties a TSA might be assigned is that of a counselor. The TSA position is a one year assignment but may be renewed on an annual basis.

In addition, the district has TSA personnel, some of whom perform work identical to that of counselors. Some TSAs hold Pupil Personnel Services Credentials with Counseling Authorization and some do not. Those who do not hold Pupil Personnel Services Credentials with Counseling Authorization would be excluded from OPGA's proposed counselors unit. However, they perform the same work and enjoy the same wages, hours, and other conditions of employment as TSAs with Pupil Personnel Services Credentials with Counseling Authorization.

but similarities or differences in the terms and conditions of teachers' and counselors' employment, and the extent of their interaction with each other.

In our Los Angeles Unified School District⁸ decision, we found that counselors and other certificated employees shared a community of interest and were properly included in the same unit. Here, as in that case, we find that counselors and other certificated employees have similar common employment interests.

Both counselors and teachers are paid on the same salary schedule, receive⁹ the same fringe benefits and are governed by the same tenure standards. Counselors sometimes teach classes on career planning; they confer with teachers, nurses, and psychologists on student-related matters. Counselors work 8 more days per year than certificated teachers, 4 days before the teachers' school year begins and 4 days after the teachers' school year ends. They are compensated for these extra 8 days. While one can become a counselor for the district without being a teacher or holding a teaching credential, the vast majority of counselors presently employed with the district do hold teaching credentials and have teaching experience. Counselors, like teachers, have a conference period, attend faculty meetings and have extra duty assignments.

OPGA has represented counselors in the past, but never as an exclusive representative and not even as part of the Certificated Employees Council (CEC)¹⁰, since OPGA had no seat on the nine-member CEC which operated under the Winton Act. Therefore, no established practice within the meaning of the Act's Section 3545(a) criteria outweighs the conclusion we reach on the basis of community of interest findings, to include counselors in the unit of certificated teachers and other

⁸ EERB Decision No. 5, November 24, 1976. See also Grossmont Union High School District, EERB Decision No. 11, March 9, 1977.

⁹ See Ed. Code Sections 13304, 13306 et seq.

¹⁰ Repealed 1975 Stats, Chap. 961, Section 1, effective July 1, 1976.

certificated employees.

Psychologists

The district and OPGA contend that psychologists are management employees and for that reason are not eligible for inclusion in any negotiating unit. They argue in the alternative that if psychologists are not management employees, they do not share a community of interest with regular certificated employees and for that reason should not be included in the unit of certificated employees.¹¹ OEA and UTO argue that psychologists are not management employees and that on the basis of their community of interest with other certificated employees should be included in the certificated employees¹ unit.

The district employs approximately 40 to 48 psychologists. They evaluate and diagnose learning and behavior problems of district pupils, decide on a program to meet the students' needs and then make a placement recommendation to an admissions committee. They consult with administrators, teachers, parents, children, and act as liaisons to various public and private agencies in the evaluation and treatment of these problems. Some psychologists write and submit proposals to government agencies for funding, but in doing so they do not have authority to independently bind the district.

Management Status—Government Code Section 3540.1(g) defines a management employee as:

any employee in a position having significant responsibilities for formulating district policies or administering district programs.

In determining whether an employee is a management employee we must take cognizance of the fact that since managerial employees are not considered employees

¹¹OPGA would place psychologists in a unit with counselors.

for purposes of the Act¹² and have no negotiating rights, great care must be exercised in determining who shall be considered a management employee.

On the basis of the statutory criteria, we determine that psychologists are not management employees within the meaning of the EERA. They exercise discretion only within their areas of expertise, which is not the same as a manager's authority to formulate district policy. While they have considerable discretion in implementing the district's testing program, this is no more administering policy than teachers administer policy because they have considerable discretion in implementing a teaching program. The psychologists' authority is exercised on a localized basis, not on a district-wide basis. And finally, psychologists are part of a large group having no intimate relationship with high level district officials.¹⁴

~~Unit Placement~~—Psychologists are compensated on a salary schedule different from that of classroom teachers.¹⁵ Psychologists must have a Pupil Personnel Services Credential with a specialty in psychology. This is the same credential required of counselors, although counselors have a specialty in counseling not psychology. Their work day is ten days longer than a teacher's regular school year. However, they share the same fringe benefits as other certificated employees, and, like other certificated employees, are evaluated under the Stull Act.¹⁶ Psychologists

¹²Gov. Code Sec. 3540.1(j).

¹³Gov. Code Sec. 3543.4.

¹⁴

See ~~Lompoc Unified School District~~, EERB Decision No. 13, March 17, 1977.

¹⁵The salary range for psychologists is \$15,810 to \$20,739; the salary range for teachers is \$8,773 to \$17,481. Psychologists are compensated on the administrative salary schedule but are not required to hold an administrative credential as defined in Title V of the Administrative Code.

¹⁶Ed. Code Sec. 13485 et seq.

achieve tenure under the same statutory standards as do other certificated employees.¹⁷ They constantly interact with other certificated employees in their common concern for the welfare of students.

On the basis of the foregoing, we find a community of interest between psychologists and other certificated employees. Since there was no evidence of an established practice in favor of a separate unit of psychologists, we shall include psychologists in the certificated unit.¹⁸

Substitutes

UTO seeks to include in the regular certificated unit substitutes who work at least 75% of the school year. OEA seeks to include in the regular certificated unit regular school substitutes who work at least 75% of the school year and children's center substitutes who work at least 50% of the children's center school year. CCEU argues that children's center substitutes who work more than 50% of the school year should be included in a separate children's center unit. CCEU takes no position in respect to K through 12 substitutes. The district seeks to exclude all substitutes from the regular certificated unit.

A. Substitutes Who Teach In The Regular School For 75% Or More Of The School Year

K through 12 substitutes have no expectation of future employment.¹⁹ Further, these substitutes do not accrue tenure; they receive no sick leave or other fringe benefits; they work without a contract and there is no district policy that they attend faculty meetings. K through 12 substitutes may work for more than one school district during the school year.

¹⁷ See Ed. Code Sec. 13306 et seq.

¹⁸

See Grossmont Union High School District, EERB Decision No. 11, March 9, 1977.

¹⁹

Ed. Code Sec. 13445 provides that the governing board of the school district may, at any time, dismiss a substitute teacher.

²⁰ Ed. Code Sec. 13336.5.

As in our Belmont Elementary School District²¹ decision, we decide here that long-term substitutes in this district do not share a community of interest with regular certificated employees and should, therefore, be excluded from the unit of regular certificated employees. We find in the record no evidence of an established practice that might alter this result.

B. Children's Center Substitutes Who Teach 50% Or More Of The Children's Center -School Year

For the same reasons that we exclude K through 12 substitutes from the unit of regular certificated employees, we also exclude children's center substitutes from the K through 12 certificated unit and the children's center unit. The conditions of employment of children's center substitutes are essentially the same as those of K through 12 long-term substitutes.““

Children's Center Assistant Supervisors

The district, CCEU and UTO argue that the 18 children's center assistant supervisors are supervisory employees within the meaning of the EERA and should, therefore, be excluded from any unit containing non-supervisory employees. OEA claims that children's center assistant supervisors are not supervisors within the meaning of the EERA and should be included in the regular unit of certificated employees.

²¹EERB Decision No. 7, December 30, 1976; accord, Petaluma City Elementary and High School Districts, EERB Decision No. 9, February 22, 1977.

²²There are some distinctions between K through 12 substitutes' and children's center substitutes' conditions of employment. They are hired at different sites; the substitute lists from which they are hired are separately maintained; and there are differences in their pay structure. With the exception of the differences in the pay structure, these distinctions have little bearing on the statutory community of interest criteria. The differences in the pay structure alone, are not determinative in light of our other community of interest findings.

Government Code Section 3540.1 (m) defines a supervisory employee as:

any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

We have decided in previous decisions that the satisfaction of any one of the criteria listed in Government Code Section 3540.1(m) is sufficient to make an individual a supervisor under the EERA.²³

Children's center assistant supervisors act as assistants to the children's center supervisors.²⁴ The children's center assistant supervisors assist the children's center supervisors in such areas as curriculum, staff development, and instruction. The children's center assistant supervisors have no regular teaching duties.

Considering the criteria contained in Government Code Section 3540.1(m), the record discloses that the children's center assistant supervisors have no independently exercised authority to hire. They may participate on an interviewing committee. The committee interviews applicants and then makes three recommendations to the director of the center who then interviews and makes the final choice. Thus, the children's center assistant supervisors, as members of an interviewing committee, exercise no independent judgment in making a hiring decision.

23

Sweetwater Unified School District, EERB Decision No. 4, November 23, 1976; San Diego Unified School District, EERB Decision No. 8, February 18, 1977.

24

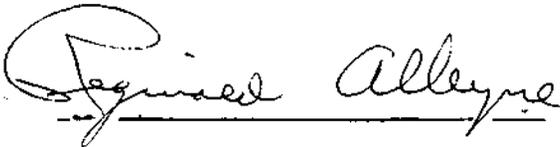
Although the status of the children's center supervisor was contested during the hearing, the parties have subsequently agreed that the children's center supervisor is a supervisor within the meaning of the Act and should be excluded from the certificated unit. All parties at the hearing also stipulated that the only "management issue" was in respect to psychologists.

The children's center assistant supervisors have no authority to transfer employees. They do not evaluate employees, except when it is not possible for the children's center supervisor to evaluate a substitute; and even in that case, if the evaluation of the substitute is unsatisfactory, the children's center supervisor must make another evaluation. It is undisputed that the children's center assistant supervisors have no authority to discharge employees, assign or direct the work of other certificated employees or to exercise any of the other supervisory powers noted in Government Code Section 3540.1(m).

We conclude that children's center assistant supervisors are not supervisors within the meaning of the EERA. We shall accordingly include the children's center assistant supervisors in the unit of children's center certificated employees..

II

I dissent from the order in this case to the extent that it permits a separate unit of children's center certificated employees. On this issue, rather than delay further the issuance of an order directing an election, I reserve the right to file a dissenting opinion at a later date.

A handwritten signature in cursive script that reads "Reginald Alleyne". The signature is written in dark ink and is positioned above a horizontal line.

Reginald Alleyne, Chairman

Raymond J. Gonzales, Member.

I am in accord with the order issued in this case in all respects except as it relates to the inclusion in Unit A of counselors, psychologists, and teachers on special assignment who are performing on-site counseling in the Oakland Unified School District (District). I agree with Chairman Alleyne (1) that psychologists are not management employees within the definition of

Government Code Section 3540.1(g), (2) that substitutes employed in the regular school program or the children's center program, or both, are to be excluded from any negotiating unit, and (3) that children's center assistant supervisors (senior teachers) are not supervisors within the meaning of Government Code Section 3540.1(m). Member Cossack and I agree that a separate unit of children's center non-classified personnel is appropriate for negotiating purposes. However, unlike Member Cossack, I would not include substitute teachers in the children's center unit.¹

Unit Placement of Children's Center Employees

Opposing a separate unit of children's center staff are the District, the Oakland Education Association, CTA/NEA (OEA), and the United Teachers of Oakland/AFT Local 771 (UTO).² They argue that the children's center employees are "classroom teachers" within the meaning of Government Code Section 3545 (b)(1).³

¹At the March 1, 1977 public meeting of the Educational Employment Relations Board (EERB), Ms. Barbara Bissel of the United Teachers of Oakland and Ms. Jan Mendelson of the Oakland Education Association made statements to the Board concerning the Oakland Unified School District case. At the time of the public meeting I objected to their presentation on the grounds that I considered their comments ex parte communications. I instructed the Board staff to serve all parties to the case with copies of the statements by Ms. Bissel and Ms. Mendelson. On March 11, 1977, the EERB served on all parties a verbatim transcript of the meeting proceedings relating to the statements.

My position and action on this matter are determined by EERB Resolution 11 regarding ex parte communications. It states that an ex parte request "is any communication by one party which may be expected to affect the interest of another party to a case." I objected to any statements regarding this case since not all parties were present at the public meeting nor had they been notified that the statements would be presented at the meeting.

²The District would exclude non-contract substitute teachers from its proposed overall unit while OEA and UTO would include them.

³Gov. Code Sec. 3545(b)(1) provides:

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

Further, they argue that even if children's center personnel are not classroom teachers, they share a community of interest with the District's kindergarten through grade 12 (K-12) certificated employees and should accordingly be included in their unit. The children's center Employees Union, Local 2 (CCEU), on the other hand, disagrees and claims that a separate unit for the children's center employees, including substitutes, is appropriate.

There are 24 children's centers operating in the Oakland Unified School District. The centers are open weekdays year-round, approximately 255 days, 11 hours per day. The approximate enrollment of children, who range in age from six months to 12 years, is 2,000. Of these, 1,100 are of preschool age.

Children's centers are a separate program and not part of the regular District educational program. Article IX, Section 5, of the California State Constitution states;

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

Further, Article IX, Section 6, provides in pertinent part:

The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

Article IX, Section 6, does not include children's centers as part of the state's public school system. That children's centers are not a part of this state's public school system is also evident from the California Supreme Court's recent Serrano v. Priest decision, which dealt with the constitutionality

of the state's public school financing system. In that decision, the Court stated, "the California public school financing system for public elementary and secondary schools...is invalid as being in violation of...the equal protection of the laws provisions of our state Constitution."⁴ Finally, the separate treatment of children's centers in the Education Code highlights the distinction between the children's center program and the District's regular school program.⁵

Children's centers are regulated by both federal and state law.⁶ The basic purposes of the program are stated in 42 U.S.C. Section 1397 and Education Code Section 16701.⁷ The purposes stated in these sections indicate that children's centers are basically a social welfare rather than an educational program. The basic purpose of children's centers is to provide child care services for parents who are working or being trained for work. Education Code Section 16721 underscores the social welfare purpose of the children's center program by providing

⁴18 Cal. 3d 728, 755-756 (1976).

⁵Moretti-Lewis-Brown-Rodda Child Development Act, Ed. Code Sec.16700 et seq.

⁶42 U.S.C. Sec. 1397 et seq. This citation is to Title 42 of the United States Code, The Public Health and Welfare; Chapter 7, The Social Security Act; Title XX, Grants to States for Services.

45 C.F.R. Sec. 228 et seq., set forth the federal regulations pertinent to "Social Services Programs for Individuals and Families: Title XX of the Social Security Act."

Ed. Code Sec, 16700 et seq., the Moretti-Lewis-Brown-Rodda Child Development Act.

22 Cal, Admin, Code Secs. 30019 and 31191 et seq. These state regulations were promulgated by the Department of Health, citing authority in Sections 10552, 10553, 10554, and 10604 of the Welfare and Institutions Code.

⁷42 U.S.C. Sec. 1397 states in pertinent part:

For the purpose of encouraging each State, as far practicable under the conditions in that State, to furnish services directed at the goal of --

(1) achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency,

(2) achieving or maintaining self-sufficiency, including reduction or prevention of dependency,

job opportunities and training for recipients of public assistance. It is understood by both the federal government and the State Health and Welfare

(3) preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families,

(4) preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care, or

(5) securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individuals in institutions,

there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter...

Ed. Code Sec. 16701 provides:

The purpose of this division is as follows:

(a) To provide as a concomitant part of the educational system an integrated plan for the care and development of children in the absence of their parents which places primary emphasis upon: 1) the preparation of preschool-age children for effective matriculation in the educational programs of their community when they reach school age, and 2) the improved educational performance of children of school age with particular emphasis upon those children who require special assistance including bilingual capabilities to attain their full potential.

(b) To provide parents with an opportunity to: 1) attain the capacity to provide support for their family through employment, 2) undertake educational activities which will assist them in providing an improved level of parental care and supervision of their children, and 3) participate with the child development program in assisting in provision of the full range of child development services contemplated by this division. It is the intent of the Legislature that any parent who enrolls his child in any child development program authorized by this division shall be allowed to participate in the planning, evaluation, and modification of child development programs.

(c) To provide a comprehensive system of child development services for prekindergarten and school-age children and their parents that includes a full range of education, supervision, health, and social services through full- and part-time programs.

8 ED. Code Sec. 16721 provides;

The Department of Education shall assist the State Departments of Employment Development, Benefit Payments, and Health by offering training and job opportunities in local child development programs for recipients of public assistance and to those persons who qualify under federal regulations as former, current or potential recipients of public assistance.

Agency that child care programs are primarily social service programs with an education component, rather than an education program solely. The fact that the federal government insists on funding the program through the State Health and Welfare Agency rather than through the Department of Education attests to this conclusion. Numerous federal audits have also supported this position.

Funds for the children's center program are partially derived from the federal government pursuant to 42 U.S.C. Section 1397 et seq. The funds are received by the Department of Health, Health and Welfare Agency, which is the single state agency responsible for the federal funds and social services. Education Code Section 16700 et seq. further regulate the spending of federal monies to which the state adds its own funds. The federal funds are transferred from the Department of Health to the State Department of Education which, under state law, is assigned responsibility for regulating child care services in the state.¹² All children's center funds received by the District must be kept in a separate fund. The District cannot tap this money for support of its regular kindergarten through 12 program. In addition to federal and state funds, a

⁹Child Care: A Final Report, at 176, Office of Educational Liaison, Health and Welfare Agency (December, 1975).

¹⁰These sections are a small part of the federal Social Security Act which provides funding for numerous social welfare programs.

The federal statutes and regulations do not require a state to provide child care services with the funds received, nor do they require an educational component to the child care program. Rather, they require that the purpose of the children's center program be consistent with certain national goals set by Congress which are set forth in 42 U.S.C, Sec. 1397, supra note 6.

¹¹See 42 U.S.C. Sec. 1397b(d)(1)(C) and (G); 45 CFR Sec. 228.6; Ed. Code Secs. 16703-16705; Comprehensive Annual Services Program Plan for the State of California, at 18, Department of Health (June 30, 1976).

¹²Ed. Code Sec. 16703 provides:

The Department of Education is hereby designated as the single state agency responsible for the promotion, development and provision of care of children in the absence of their parents during the workday or while engaged in other activities which require assistance of a third party or parties.

¹³Ed. Code Sec. 16749.

separate tax override may be imposed on the local community.¹⁴ Revenue derived from this source may go only toward the purchase of real property and fixtures, alterations or additions to existing buildings, or the purchase of furniture, apparatus or equipment for children's center facilities.¹⁵

In line with the separate and predominantly non-local funding scheme supporting the children's center program, ultimate supervision over the program, as with other child development services, is shared at the state level by the Department of Health, the Department of Education, and the Superintendent of Public Instruction,¹⁶ resulting in multidepartmental administration of the program. Additionally, the Department of Employment Development and the Department of Benefit Payments have an interest in local child development programs.¹⁷

Children's centers are not located on any public school sites. Some are located adjacent to the schools and some are located blocks away from the school. Three centers are located outside District boundaries. These are a part of the Peralta District Community College which has delegated to the District administrative authority to operate the centers.

¹⁴Ed. Code Sec. 16750.

¹⁵Id.

¹⁶Ed. Code Secs. 16702, 16703, 16705, 16722, 16724, 16727, 16728.

The question as to whether or not children's centers are ultimately supervised at the state level by the Department of Health or the Department of Education has been the source of a longstanding feud between the Department of Education and the federal Department of Health, Education and Welfare. Correspondence between state Superintendent of Public Instruction, Wilson Riles, and Caspar Weinberger, Secretary of Health, Education and Welfare, during the Nixon Administration illustrates this point. Weinberger wrote that "any major violation of the state plan requirements could jeopardize the total federal IV-A (now Title XX) funding regardless of who was responsible and whether the plan was administered by a single state agency or two state agencies under a waiver." The waiver Weinberger refers to was the request by Riles to have the social service funds for child care go directly to the Department of Education rather than the Department of Health. This entire controversy is described in: Child Care: The Final Report at 39-45, Office of Educational Liaison, Health and Welfare Agency (December, 1975).

¹⁷Ed. Code Sec. 16721.

Enrollment in the children's center program is predicated on certain parent financial requirements which are not applicable to enrollment in the regular public schools of the District.¹⁸ To qualify for the program, parents of children in the program must be recipients of Aid to Families with Dependent Children or Supplemental Security Income/State Supplemental Program, qualify on the basis of a family income below the median income for a family of four in the state, or qualify based on a prorated payment schedule that reflects economic need.¹⁹ Waiting lists exist at all the centers.

Children's centers are staffed, in total, by 111 fully-credentialed teachers, 11 partially-credentialed teachers, 60 teacher assistants, 24 children's center supervisors (head teachers) and 18 children's center assistant supervisors (senior teachers). Additionally, there are seven members of the staff who are located in a central office.²⁰ State law does not require that a person hold a standard teaching credential in order to be employed at a children's center while a valid teaching credential is required to teach in the K-12 program.²¹

The unique position of teacher assistant exists at the children's center because no teaching credential is required of center staff. These employees hold permits issued by the Commission for Teacher Preparation and Licensing. No such position exists in the K-12 program. This is the position which was created to serve as a job opportunity for persons receiving public assistance

¹⁸ 42 U.S.C. Sec. 1397a; Ed. Code Secs. 16702, 16728, 16729; Comprehensive Annual Services Program Plan, for the State of California, Department of Health (1976). See also Ed. Code Secs. 16702 and 16729.

¹⁹ Id.

²⁰ These are the director of the children's center, two assistants to the director, a research assistant, a consultant, a nursing supervisor, and a head teacher on special assignment.

²¹ Ed. Code Sec. 13055.

who need employment.²² Teacher assistants are not actually assistants to teachers. They have greater responsibility and autonomy. In a typical center the teacher and assistant work together as a team. They are jointly assigned a group of children, one taking full responsibility for the group during the early shift, and the other taking full responsibility for the second shift. Despite the degree of autonomy teacher assistants exercise in the performance of their duties, they are not eligible for a public school teaching position because they do not possess the requisite teaching credential.

Hiring in the District for positions in the children's centers is separate from hiring in the K-12 program. An interview committee consisting of at least three staff members from the children's center central office and a head teacher or senior teacher, or both, interview and make recommendations to the director of the children's center program. The director then interviews the recommended applicants and makes the final choice. The number of adults hired per child is higher than that found in the regular public school program.²³

Children's centers employees are required to supervise and instruct children enrolled in the program. One aspect of the program is to teach preschool-age children some degree of independence. Sometimes members of the staff act as surrogate parents to the preschool-age children. They ensure that the children eat and nap at the center. The children engage in activities to develop sensori-motor, perceptual discrimination and language skills. School-age children are similarly engaged in developmental activities when they are not attending regular school classes. The children may choose to garden, cook, do a science project, or interact with adults and other children in game activities. The staff, however,

²²Ed. Code Sec. 16721.

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In the K-12 program the approximate adult-child ratio is one adult to 27 children, (~~California Public Schools Selected Statistics~~, California Department of Education (1976)). In the children's center program, the ratio varies from one adult to four children for the youngest enrollees to one adult to 20 children for the oldest enrollees. 42 U.S.C. Sec. 1397a (a) (9) (A) (ii) and 22 Cal. Admin. Code Sec. 31243.

attempts to encourage and aid this age group with school work, provided the children are receptive to this additional educational service. No specific course guidelines or specific academic material are required by the federal government or the state to be taught these children as in the regular public school classes.²⁴ Some centers operate on an "open classroom" concept. This means that the children are not separated according to age.

As noted previously, children's centers are open 11 hours a day from 7:00 a.m. to 6:00 p.m. approximately 255 days per year. Center employees work one of two seven-hour overlapping shifts each day, from approximately 7:00 a.m. to 2:00 p.m. or from 10:00 a.m. to 6:00 p.m. Included in this seven-hour shift is a half-hour duty-free period, and a half-hour preparation period. These hours are different from the hours of a teacher in the K-12 program, which are approximately 9:00 a.m. to 3:00 p.m. Excluding weekends and seven national holidays, children's centers are open on days when the regular public school is not in session. For example, the children's centers are open throughout the summer vacation, Christmas vacation, and Easter vacation. Fully-credentialed teachers work 180 days just as the regular school teaching staff, but the 180 days are generally not the same 180 days that the K-12 schools are open. Center teachers with partial credentials work approximately 220 days, and teacher assistants work year-round with 25 days of paid vacation each year and eight additional days off to compensate for state or local holidays when they are required to work.

²⁴42 U.S.C. Sec. 1397a(a)(9)(ii) specifically provides in pertinent part:

No payment may be made under this section with respect to any expenditure in connection with the provision of any child day care service, unless -- ... (ii) in the case of care provided outside the child's home, the care meets the Federal Interagency day care requirements as approved by the Department of Health, Education and Welfare and the Office of Economic Opportunity on September 23, 1968; except that (I) subdivision III of such requirements with respect to educational services shall be recommended to the States and not required....

Fully-credentialed teachers are paid according to the regular public school teachers' salary schedule. Partially-credentialed teachers and teacher assistants are paid according to a separate salary schedule, and receive less than the fully-credentialed teachers.

Children's centers are administered separately from other parts of the District's educational program. The public school teachers report to their on-site principal, who in turn reports to either an area A or area B superintendent. Children's center employees report to an on-site head teacher, who in turn reports to the children's center director. The director reports to the associate superintendent for support services. The associate superintendent is on the same administrative level as the area superintendents.

Regular District teachers and fully-credentialed children's center teachers achieve tenure on the same basis. Partially-credentialed teachers working in the public schools must work 75 percent of the 180-day school year to earn a year's credit toward tenure while partially-credentialed center teachers must work 75 percent of a 220-day school year to earn a year's credit toward tenure. No evidence was presented regarding whether or not teacher assistants are eligible for a similar job security provision.

Separate layoff procedures exist for the children's center employees as compared to the regular school teachers.²⁵ In 1974-75, public school teachers were laid off by the District. The District's regular public school teachers attempted unsuccessfully to have children's center employees included in the layoffs on the basis of seniority. The District's director of certificated personnel testified that he had been advised by a Deputy County Counsel of Alameda County that center teachers were in a separate program and their seniority could not be considered in laying off public school teachers. He

²⁵Ed. Code Sees. 16766 and 13447.

cited the separate funding of the program and the fact that average daily attendance is calculated separately for the children's centers. In each year the issue was taken to a hearing examiner who ruled that children's center employees could not be laid off based upon a reduction in the District's average daily attendance.

There is some contact between the children's center staff and regular District teachers concerning school-age children. The evidence was conflicting as to the degree of interaction, but in only one children's center, the Martin Luther King children's center, did there appear to be considerable contact between center employees and K-12 employees. Children's center employees are not given release time to attend faculty meetings at the companion school sites. They hold their own faculty meetings. Two children's center teachers testified as to "conflicts" with the regular school teachers who do not consider children's center teachers to be professional. The "elitism" of the regular teachers was expressed by one of the witnesses:

Those of my friends who are public school teachers always give me the run-around and 'when are you going to come back to the regular classroom - to a classroom,' and I say, 'Well, I'm in a classroom,' and they say, 'Well, you know what I mean.'

Fully-credentialed teachers in the children's center program, unlike other center staff, may teach in the K-12 program. Fully-credentialed teachers have transferred from a children's center to a regular District school and from a regular District school to a children's center. However, the director of the District's certificated personnel testified that it was not "common practice" for a person to voluntarily transfer from the public schools to the children's centers or vice versa. He could recall only one person who had applied for such a transfer in the 1975-76 school year. Additionally, fully-credentialed

²⁶This center also was the only program with a particularly strong academic focus as compared to other centers.

teachers who are "consolidated," meaning their position has been cut due to either declining enrollment or a reduction of certain services by the District, cannot be assigned to a children's center program without proper notification since such a change could constitute an adjustment in their work year.

Children's center employees are entitled to the same fringe benefits as the District's K-12 staff, including certificated, classified, management or non-management. Further, both fully-credentialed and partially-credentialed teachers in children's centers and regular certificated teachers in the regular District public schools are evaluated under the same procedures.²⁷

Evidence on established practices showed that organizational representation via the Certificated Employee Council under the former Winton Act²⁸ existed in the District beginning in the 1970-71 school year. The CCEU has never held a seat on the nine-member council. Proposals on behalf of the children's center employees were the subject of the meet and confer process through OEA and UTO who were members of the Council. The CCEU has handled grievances concerning compensation and time-off matters on behalf of center employees, both before and after July 1, 1976. The record is silent as to the extent of children's center staff membership in any of the employee organizations.

No evidence was submitted relating to the effect of one or two units on the efficient operation of the District. However, the facts show that the District presently separately administers the children's center program.

On the basis of the foregoing facts, a separate unit of children's center personnel is clearly appropriate.

Children's center teachers are not classroom teachers under the majority

²⁷Ed. Code Sec. 13484 et seq.

²⁸Former Ed. Code Sec. 13080 et seq., repealed July 1, 1976. See particularly former Ed. Code Sec. 13085.

interpretation of Section 3545(b)(1) in Belmont Elementary School District. As the Belmont majority viewed this code section, "the legislature limited the language 'classroom teachers' to only the regular full-time probationary and permanent teachers employed by a district" who comprise "the core of the certificated staff of the district,"³¹ i.e., those who teach full-time in the regular K-12 program. The ~~Belmont~~ majority expressly pointed out that employees thus included within the statutory meaning of "classroom teachers" would, as among themselves, ~~invariably~~ share a community of interest and their joinder in a single unit would ~~invariably~~ not burden the efficient operation of the employer.³² Teachers not employed on a regular full-time probationary or permanent basis in the core of a district's certificated staff cannot in all cases be said to share a community of interest with the core group and to be employees whose joinder with that group would never burden the employer's efficient operation.³³ Therefore, we are free to address the criteria set forth in Government Code Section 3545(a) in determining whether or not a separate unit of children's center employees is appropriate.³⁴

²⁹ Supra note 3.

³⁰ EEB Decision No. 7, December 30, 1976.

³¹ Id. at 10.

³² Id. at 11. See Gov. Code Sec. 3545(a) which provides:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

³³ References to "classroom teacher(s)" in the Education Code neither reinforce nor detract from the construction accorded that term in Belmont. (See, e.g., Ed. Code Secs. 321, 6481, 13315, 13315.1, 17200, 1750375)

³⁴ Supra note 32.

Our decision to allow a separate unit of children's center employees is determined primarily by the community of interest criterion. We find compelling those facts which clearly indicate the separate and distinct nature of the children's center program.

Specifically, we find persuasive that the basic purpose of the children's center program is to provide child care for parents who are working or being trained for work rather than to provide education for the children. This is indicated by the federal and state statutes and regulations which emphasize the separate and social service nature of the program and give no direction as to the specifics of any educational component of the program, by the federal government's insistence on providing funding through the State Health and Welfare Agency, by the long hours and year-round operation of the centers which accommodate parents' work schedules, by the lack of a requirement that children's center employees be fully credentialed as regular public school teachers must be, by the low-income requirements for parent eligibility for the program, by the low-income requirements for employment eligibility for some center employees, and by the fact that the District is not required to operate children's centers as part of its educational program.

And, while the developmental education of low-income children is one aspect of the children's center program, the type of education varies substantially from that offered in the regular District schools. The education provided is geared to the six month to 12 year age level of the children enrolled in children's centers. Preschool-age children are engaged in a variety of activities aimed toward their total development. School-age children are kept at the children's center both before and after their regular school day. There are no tests, grades or structured curriculum, as there are in the formal school setting.

Further, the program has a separate budget, a separate administration, a separate average daily attendance count, and the center sites are separate from

the regular school sites. The staff is separate from the regular District staff as indicated by a separate hiring process, few transfers between programs, little contact between the staff of the two programs, a different adult-child ratio, separate faculty meetings, different hours of work, the year-round program which does not coincide in length or holidays with the regular school calendar, the unique qualifications required of center teacher assistants, a different salary schedule for teacher assistants and partially-credentialed teachers, and a separate seniority and lay-off system.

The community of interest criterion indicates that a separate unit of children's center employees is appropriate. This determination is not altered by the sparse evidence on established practices, nor does it appear that the existence of two units will place a burden on the efficient operation of the school district. Regarding the latter criterion, it is notable that the District apparently has already found that separate administration of the children's center program is more efficient than an administration combined with the regular District program.. Undoubtedly, this is the result of the required separate budget and the statutes, rules and regulations of both the federal and state governments which apply to children's centers and not to the public schools. If the program is so unique that separate administration is considered more efficient, separate negotiations would likewise appear more efficient.

The result in this case is consistent with our decisions in Petaluma City Elementary and High School Districts,³⁵ Lompoc Unified High School District,³⁶ and New Haven Unified School District,³⁷ where we found that adult education teachers were not appropriately placed in a unit of regular classroom teachers because of their unique status.

³⁵EERB Decision No. 9, February 22, 1977.

³⁶EERB Decision No. 13, March 17, 1977.

³⁷EERB Decision No. 14, March 22, 1977.

I dissent from the majority opinion in this case concerning the disposition of counselors, teachers on special assignment who are performing on-site counseling (TSA's) and psychologists. I shall not enter into a lengthy discussion regarding these issues here. I refer the parties to my extensive dissent in Grossmont Union High School District.³⁸ In that dissent I relied on the community of interest and established practices criteria. In this case I base my decision primarily on the community of interest standard.

I state here, as I did in Grossmont, that:

I also find it curious that the majority opinion completely ignores the fact that, unlike in Los Angeles Unified, there is a complete separation of job functions between teachers and PPS employees. In this case counselors, TSA's and psychologists; this omission is important especially because distinctions in job function have been considered important in previous decisions of this Board. For example, in Pittsburg Unified School District, we allowed a separate unit for instructional aides since their primary functions involve dealing directly with students either at the instructional or disciplinary level, whereas other classified employees are primarily charged with providing a physical environment for students.

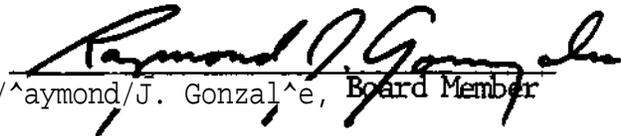
I recognize the slight factual differences between this case and Grossmont; nonetheless, I am compelled by the argument that significantly dissimilar job functions clearly demonstrate an absence of a community of interest between the counselors/psychologists and the other certificated employees in the overall unit described by the majority.

In reference to the Chairman's statement that, "I reserve the right to file a dissenting opinion at a later date," I respectfully object. Section 33440 of the EERB rules on the issuance of decisions makes no provision for the issuance of any document after the final decision is issued.³⁹ To allow for a belated dissent would leave all parties in limbo as to what the final thinking of the Board might be. A situation could occur where two members issued tardy dissents

³⁸EERB Decision No. 11, March 9, 1977 (Gonzales dissenting in part).

³⁹8 Cal. Admin, Code Sec. 33440.

and in their dissents agree upon the same rationale which would then become the majority rationale of the Board and would thus alter and make confusing the entire decision. Additionally, any member issuing a tardy dissent could conceivably receive input on the case from the parties on the losing side of the issue, thus violating the rights of the parties who argued the majority side of the decision. Finally, the issuance of a tardy dissent would result in two EERB decisions on the same case having to be dealt with by various publications that print the official EERB decisions.


/ Raymond J. Gonzalez, Board Member

Jerilou H. Cossack, Member.

I agree with Chairman Alleyne that counselors, psychologists and teachers on special assignment should be included in the K through 12 certificated unit. I agree with Member Gonzales that children's center teachers and assistant teachers constitute a separate appropriate unit for the reasons he has articulated. I disagree with the majority on the following issues: the exclusion from the K through 12 certificated unit of regular K through 12 substitute teachers who teach 75 percent or more of the school year; the exclusion from the children's center certificated unit of children's center substitute teachers who teach 50 percent or more of the children's center school year; and the conclusion that children's center assistant supervisors are not supervisors within the meaning of the Act.

While I agree that psychologists are not management employees within the meaning of Government Code Section 3540.1(g), Chairman Alleyne's opinion requires further amplification.

In interpreting Government Code Section 3540.1(g), the Board concluded in Lompoc Unified School District¹ that a person must possess both of the functions delineated in that section in order to be excluded as a management employee from negotiating rights otherwise accorded employees by the Act. In the instant case, psychologists possess neither of these functions.

The district contends that psychologists formulate district policy by participating in processes which result in the making of policy. In support of its management designation, the district relies on the psychologists' drafting of grant proposals and their participation in the placement of a child in an educational environment in which the child will best realize learning potential. The record, however, discloses that psychologists participate largely at the individual school site level drafting proposals as part of a team also composed of teachers and other persons included in the certificated unit. These proposals are drafted in conformance with guidelines established by the funding agency. The Consultant in Pupil Services for Area B, a district witness, testified as follows:

Q. As a general rule, is the function of the psychologist any different from the role of a classroom teacher in the drafting of a proposal or the formulation of a proposal?

A. I can see several teachers writing the classroom component, the curriculum component. The psychologist would be more apt to write the guidance, motivation, behavioral objectives component.

Q. Do you know of any role which is played by psychologists in formulating District policies?...

A. In Oakland, I'd say only as part of a team....

¹
EERB Decision No. 13, March 17, 1977.

The Board concluded in Lompoc that the language defining a management employee should be narrowly construed. It is clear that the psychologists' participation in policy formulation is, at most, advisory and almost solely as part of a team which includes teachers and others in the certificated unit.

The district also contends that psychologists have significant responsibilities for administering district policies. The district relies on the psychologists' role in the testing and placement of students in special education programs, their maintenance of confidential student files, and their role in liaison with various local governmental agencies. The record, however, discloses that their testing and placement of children is in conformance with established district policies and most often in conjunction with other unit certificated personnel as part of a committee or team. Their participation is no greater than that of unit members of the committee. No one urges that teachers or other clearly unit personnel who participate in these committees are therefore management employees. Further, the record discloses that the confidentiality of student files is mandated by district policy and that psychologists possess little, if any, discretion in this area. Teachers and nurses, classifications clearly within the certificated unit, also occasionally review the student files either in whole or in part. Finally, the evidence of the extent of psychologists' interaction with local governmental agencies was very sparse. Their function appears to be that of relaying information.

In determining that psychologists should be included in the overall certificated unit, the Chairman's opinion ignores two of the three criteria enumerated in Government Code Section 3545(a) as providing the basis for this Board's decisions on unit placement: established practices of the employees and the effect of the size of the unit on the efficient operation of the school district.

With respect to the established practices of employees, the record discloses that under the "meet and confer" process of the Winton Act,² psychologists were among the certificated employees represented by the Certificated Employees Council (CEC) in their employment relationship with the school district. The CEC also represented all others included in the certificated unit. Such history, although of little weight,³ serves only to reinforce other evidence supporting their integral relationship with the larger unit. In April 1976, coincidental with the effective date of the representation portions of the Act, the district designated psychologists as management employees. At some uncertain time, apparently subsequent to the effective date of this Act, at a meeting of the Oakland School Psychologists Association attended by approximately 19 of the 45 district psychologists, a majority of the 19 attending psychologists voted to align themselves with the Administrators Association. The recent vote of a minority of the psychologists to align themselves with the Administrators Association in no way nullifies the functional cohesiveness of psychologists with those included in the overall certificated unit.

With respect to the effect of the size of the unit on the efficient operation of the school district, the district argues merely that psychologists possess interests adverse to those of persons in the overall unit because the psychologists' salary range is higher. I do not find the salary differential, standing alone, sufficient to outweigh the common goals which the psychologists share with the overall certificated unit. Nor do I find that the salary differential is relevant to the criterion of size of the unit.

²
Education Code Sections 13080-13090, repealed July 1, 1976 by Section 1, Chapter 961 of the Statutes of 1975.

³
Grossmont Union High School District, EERB Decision No. 11, March 9, 1977.

For the reasons set forth in my dissent with respect to the exclusion of substitute teachers from the certificated unit in Belmont Elementary School

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District and Petaluma City Elementary and High School Districts, I would include K through 12 substitutes who teach 75 percent or more of the school year in the K through 12 certificated unit. For the same reasons, I would include children's center substitutes who teach 50 percent or more of the children's center year in the children's center certificated unit. No useful purpose would be served by further belaboring the issue here.

With respect to the supervisory status of children's center assistant supervisors, the majority has failed to analyze the statutory requirements and to consider fully the facts elicited at the hearing. While National Labor Relations Board (NLRB) decisions are not controlling, we will take cognizance of them where appropriate. The NLRB has long held that persons who perform supervisory duties for a fixed and substantial period of time during the course 7 of their weekly employment are excluded from units of non-supervisory employees. The NLRB has further held that persons who exercise supervisory authority full-time for a portion of the year and perform unit work for the remainder of the

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EERB Decision No. 7, December 30, 1976.

5

EERB Decision No. 9, February 22, 1977.

6

Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976.

7

The Texas Company, 85 NLRB 1211, 24 LRRM 1540 (1949); United States Gypsum Company, 127 NLRB 134, 45 LRRM 1529 (1960).

year are excluded from the unit for the portion of time they perform supervisory
8

work. In adopting this approach both the NLRB and the approving courts have recognized that under the scheme of the Labor Management Relations Act (LMRA) ...the [NLRB] has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the [LMRA] is intended to protect.^{9/}

In the instant case, children's center assistant supervisors assume all of the duties and responsibilities of children's center supervisors full-time for three months out of each year and for four hours each day during the rest of the year. In this respect, the testimony of the Longfellow Children's Center Supervisor is illuminating:

THE HEARING OFFICER: ...for at least three periods of a month at a time you're away from the center totally, and during that time the [assistant supervisor] would be serving in your capacity making the decisions you make?

THE WITNESS: Yes.

This same witness also testified:

THE HEARING OFFICER: ...Now, you had testified...that you worked a seven hour day. At what time would you report for work in the morning?

THE WITNESS: My schedule varies from day to day. Normally, Monday, and Tuesday, and Wednesday, I come in at quarter of seven, and leave when I can, anytime after quarter of two, which is usually later.

8
The Great Western Sugar Company, 137 NLRB 551, 50 LRRM 1186 (1962); Westinghouse Electric Corporation, 163 NLRB 723, 64 LRRM 1440 (1967), enf'd 424 F.2d 1151, 74 LRRM 2070 (C.A. 7), cert. denied 400 U.S. 831, 75 LRRM 2379 (1970).

9
Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 74 LRRM 2070 (C.A. 7 1970).

THE HEARING OFFICER: And on those days, we'll take those as an example -

THE WITNESS: Yes.

THE HEARING OFFICER: - what time would the childrens center close?

THE WITNESS: At quarter of six.

THE HEARING OFFICER: Okay, and between sometime around 2:00 o'clock, or thereafter, until 6:00 o'clock, who would have responsibility for the operation of the childrens center?

THE WITNESS: When I leave the childrens center, the [assistant supervisor] has responsibility for what happens.

All of the parties have agreed that children's center supervisors are supervisors within the meaning of Government Code Section 3540.1(m) and thus excluded from any negotiating unit at issue here.¹⁰ Based on the above testimony, assistant supervisors are also supervisors within the meaning of Government Code Section 3540.1(m) for three months a year and approximately four hours a day during the remainder. This Board has recognized that the Act requires a broader construction of the definition of supervisors than that of the LMRA since, unlike the LMRA, the Act extends its protection to supervisors and allows them to be represented in negotiating units separate from employees they supervise.¹¹ Even under the more restricted LMRA standard, however, children's center assistant supervisors are supervisors.

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The parties are in disagreement as to whether children's center supervisors are management employees within the meaning of Government Code Section 3540.1(g). While I would prefer to do so, it is unnecessary to resolve the question of their management status.

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Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976.

Independent of their assumption of the responsibilities of children's center supervisors, assistant supervisors possess some of the indicia of supervisory status enumerated in Government Code Section 3540.1(m). The testimony of the Director of Children's Centers and Preschool Programs, while admittedly conclusionary, is illuminating on these points:

Q. Does the Assistant Supervisor have any authority in regard to directing the work of persons who work in Children's Centers?

A. Yes.

Q. Do [assistant supervisors] assign persons to do tasks within the scope of their employment?

A. This is a staff matter. I mean, I believe that the Center Supervisor, the Assistant Supervisor and staff have their goals and objectives for the children in that Center and together they decide how the day in that Center is organized, the lesson plans, the learning experiences of the children. I just - I think it's a cooperative effort in the Centers and then the Supervisor and the Assistant Supervisor help facilitate reaching these goals and objectives.

Q. In the absence of the supervisor, would the Assistant Supervisor in the Children's Center have any part to play in adjusting the grievances of employees that work in the Children's Center, and by that, I don't mean formal written grievances. I mean complaints or friction or - I don't mean the filing of...formal written grievances, but I mean, would they have some part to play in adjusting the complaints or gripes or grievances?

A. Yes.

Thus, the majority misstates the evidence adduced at the hearing when it says, "It is undisputed that the children's center assistant supervisors have no authority to...assign or direct the work of other certificated employees or to exercise any of the other supervisory powers noted in Government Code Section 3540.1(m)." The fact of the matter is that for a substantial portion of each workday, at times when no one of higher authority is present, the

assistant supervisor is the only person with authority at the children's center. He or she performs no assigned teaching function at any time and is, like the supervisor, paid an additional stipend. Accordingly, I conclude that children's center assistant supervisors are supervisors within the meaning of the Act.

Finally, Chairman Alleyne's proposed belated dissenting opinion is unauthorized. I object to it.

Terrence H. Cossack, Board Member

ORDER

The Educational Employment Relations Board directs that:

1. The following units are appropriate for the purpose of meeting and negotiating providing an employee organization becomes the exclusive representative:

Unit A All certificated employees, including counselors, psychologists, and teachers on special assignment; excluding children's center teachers, children's center teacher assistants, children's center assistant supervisors, K-12 and children's center substitute teachers, management, supervisory and confidential employees.

Unit B Children's center teachers, children's center teacher assistants, children's center assistant supervisors; excluding K-12 and children's center substitute teachers, management, supervisory, confidential and all other employees.

2. Children's center assistant supervisors are not supervisors within the meaning of Government Code Section 3540.1(a).

3. Psychologists are not management employees within the meaning of Government Code Section 3540.1(g).

4. Within 10 workdays after the employer posts the Notice of Decision, the employee organizations shall demonstrate to the Regional Director at least 30 percent support in the above units. The Regional Director shall conduct an election at the end of the posting period if: (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Educational Employment Relations Board

by

Stephen Barber
Executive Assistant to the Board

3-28-77

Dated

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT,)
Employer,)
)
 and)
)
CHILDREN'S CENTER EMPLOYEES)
UNION, LOCAL 2,)
Employee Organization)
)
 and)
)
OAKLAND EDUCATION ASSOCIATION, CTA/NEA,) Case Nos. SF-R-119
Employee Organization) SF-R-200
) SF-R-400
)
 and)
)
EERB Decision No. 15
)
UNITED TEACHERS OF OAKLAND,)
AFT LOCAL 771, AFL-CIO)
Employee Organization)
)
 and)
)
)
OAKLAND PERSONNEL AND GUIDANCE)
ASSOCIATION,)
Employee Organization)
)
)

DISSENTING OPINION

Reginald Alleyne, Chairman, dissenting in part:

In this case, the Board decides that children's center teaching personnel should not be included in a unit with teaching personnel and other certificated employees in the Oakland public schools. In the recent Grossmont¹ case, the Board decided that pupil services employees, consisting of counselors, psychologists, school nurses, and social workers, must be included in a unit with teachers and other certificated employees.²

¹EERB Decision No. 11, March 9, 1977.

²See also Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976, where counselors were included in a unit with other certificated employees.

I think that the Board's decisions in Grossmont and this case cannot be reconciled. Indeed, this case is a stronger case than Grossmont in favor of a single integrated unit.

Here, unlike in Grossmont, the disputed classifications are all teacher classifications. I do not believe that teachers and non-teachers (Grossmont) can have a community of interest greater than the community of interest among regularly employed full-time teachers (Oakland). I think that, generally, the employment conditions used in applying the statutory community of interest criterion should be those having an effect on bargaining relationships. That is what the community of interest standard was intended to enhance. The Board so determined in the Sweetwater³ case, and so applied that standard in the Grossmont case, but departs from both the rule and its application in this case.

In Grossmont, the Board focused on those criteria having a bearing on the quality of the bargaining relationship, stating in part:

The four disputed personnel services classifications have many things in common with teachers and other certificated persons included in the overall unit. All are required to attend faculty and staff meetings. All receive the same fringe benefits, including sick leave, vacation and sabbatical leave, holidays, retirement benefits, life, medical and dental insurance, vision care and accidental death and disability insurance. All are entitled to tenure.

All of these similarities in employment conditions of pupil services employees and other certificated personnel in the Grossmont Union High School District exist in respect to children's center certificated employees and other certificated unit personnel in the Oakland Unified School District.

In finding a community of interest between pupil services employees and other certificated employees in Grossmont, the Board also relied on the fact that the same certificated salary schedule existed for the two groups; that "all certificated employees are evaluated pursuant to the Stull Act"; and that "while the credential

³ See Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976, pp. 11-12.

requirements for teachers are different than those of other non-teacher certificated employees, . . . they possess more similar than dissimilar components." The conclusion reached was that "any credential differences between teachers and other certificated personnel are no greater than those between teachers themselves or between the various pupil services classifications themselves." In this case, as in Grossmont, the disputed classifications are paid on the same salary schedule (with the exception of children's center teacher assistants who are paid on a different but similar salary schedule). Here, as in Grossmont, all disputed employees are evaluated pursuant to the Stull Act. Of the 122 teachers in children's centers, 111, or 91%, have the same teaching credential as K-12 teachers in district schools. The credential requirements for children's center teacher assistants are different than those of regular teachers, but children's center teacher assistants possess a credential which entitles them to give instruction and supervision to students in children's centers.⁴

In Grossmont, the Board relied heavily on interaction between the pupil services employees and other certificated personnel in ordering a single integrated unit. In this case, interaction is not as important a factor since substantially different employee classifications are not involved, as they were in Grossmont. In any case, the record discloses that children's center teachers utilize the services of psychologists and nurses employed in the regular district schools and consult with regular teachers on matters relating to the educational development of the children's center students. Many children's center students attend class in regular elementary school.

In this case, there is evidence of interchange between children's center employees and their counterparts in other district schools. Fully credentialled teachers have transferred from children's centers to regular schools and from regular schools to children's centers. Some regular certificated teachers teach in children's centers

⁴ Pursuant to Ed. Code Section 16766, a teacher assistant is considered to be employed in a position requiring certification qualifications.

during the summer.

The decision of the Board, in favor of a separate unit of children's center certificated employees, is based chiefly on its contention that children's centers are primarily child care centers and for that reason children's center teachers do not share a community of interest with certificated personnel in the regular schools, where the primary mission is not child care but the education of children. I think this argument is refuted by the record. There are few, if any, distinctions between the educational component of a kindergarten class in the regular public schools and the educational component of the children's centers; and there is even less of a distinction between the educational component in the children's centers and the pre-school classrooms in the other district schools. For example, when asked to describe the distinction between K-12 teachers and the children's center teachers, the director of the children's center replied that:

The only difference I see is that the children's center teacher, by and large, sees each parent at least once a day . . . has the opportunity to see the total child develop . . . has more help to provide this kind of service to children because of our staffing structure.

Further, in this same line of questioning:

Q Are children's center teachers expected basically to perform a different function than the function performed by teachers in grades K-12?

A I don't believe so.

It is undisputed that like kindergarten and pre-school children in other district schools, the children enrolled in children's centers engage in activities to develop sensorimotor, perceptual discrimination and language skills.

The majority opinion also relies on the fact of federal government funding for the children's center programs. I think that, in and of itself, federal aid has no bearing on community of interest. The majority opinion does not state what conclusions ought to follow from the fact that there is federal funding for children's center programs.

I also fail to see how the fact that the "children's center program is predicated on certain parent financial requirements which are not applicable to enrollment in the regular public schools of the district", relates to employment conditions and, consequently, the EERA's community of interest standard.

Finally, the majority opinion states that children's centers are not located on any public school sites. I find this fact irrelevant since it is unusual to find any two or more public schools located on the same site. And, as the majority concedes, some children's centers are located adjacent to regular district schools.

In sum, I believe that not all differences in employment conditions have a bearing on the EERA's community of interest standard and that among those that do, some have a more direct bearing than others. This is because of the differing effect that different employment-conditions factors are likely to have on the success of a bargaining relationship. Those employment conditions having a close effect on the quality of collective bargaining—like the criteria used in Grossmont and Los Angeles Unified⁵—should be properly weighted as factors for consideration in applying the community of interest criteria. Here, I think the Board uses inappropriate criteria to reach an incorrect result.

Reginald Alleyne, Chairman

Dated: April 19, 1977

⁵ EERB Decision No. 5, November 24, 1976. In Los Angeles Unified, the community of interest factors considered relevant were: "qualifications, training and skills, job functions, method of wages or pay schedule, hours of work, fringe benefits, supervision, frequency of contact with other employees, integration with work functions of other employees, and interchange with other employees."