

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

SAN RAFAEL CITY SCHOOLS,

Employer,

and

CIVIL SERVICE ASSOCIATION,
LOCAL 400, SEIU,

Employee Organization,

and

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,
CHAPTER #341,

Employee Organization.

Case Nos. SF-R-13
SF-R-128

EERB Decision No. 32

October 3, 1977

Appearances: Richard V. Godino, Attorney (Breon, Galgani and Godino) for San Rafael City Schools; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Civil Service Association, Local 400, SEIU; Greg Dunn, Field Representative, for California School Employees Association, Chapter #341.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

The questions presented for decision by the Educational Employment Relations Board (EERB) are whether the hearing officer correctly concluded (1) that a maintenance and operations field supervisor employed by the San Rafael City Schools is a supervisor within the meaning of Government Code Section 3540.1(m); and (2) that the following employees of the San Rafael City Schools are confidential employees within the meaning of Government Code Section 3540.1(c): administrative secretary to the assistant superintendent for business services, administrative secretary to the director of instruction, intermediate clerk-typist - personnel office. California School Employees

Association (CSEA) filed exceptions to these findings and conclusions; Civil Service Association, Local 400, Service Employees International Union (SEIU), excepted only to the hearing officer's findings and conclusions concerning the maintenance and operations field supervisor.¹ The District argues in favor of rejecting the exceptions and sustaining the hearing officer in all respects. We sustain the hearing officer's proposed confidential-employee decision and reverse the hearing officer's proposed supervisory-employee decision.

The Confidential Employees Issue

Government Code Section 3540.1(c) provides:

"Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

Administrative Secretary to Assistant Superintendent for Business Services

The assistant superintendent for business services is an active member of the District's negotiating team, where he serves as an expert on District finances. His administrative secretary, the disputed position, is responsible for preparing financial projections used during negotiations. She thus has access to information on the positions to be taken by the District at negotiating sessions. This is confidential information relating to the "employer's employer-employee relations", since it is information "that if made public prematurely might jeopardize the employer's

¹ Other issues decided by the hearing officer dealt with SEIU's standing to intervene in the representation proceedings leading to the hearing officer's decision and this appeal, the appropriateness of a unit of classified employees and the confidential status of two other employees. No exceptions were filed by any party in respect to these issues, which are fully discussed in the hearing officer's proposed decision, dated April 1, 1977. The hearing officer's proposed decision also provides the full background of events leading to the representation dispute and its treatment by the EERB preliminary to the hearing.

ability to negotiate with employees from an equal posture."²

CSEA concedes that the administrative secretary to the assistant superintendent for business services has access to the District's financial proposals, and does not deny that this is confidential information. CSEA argues that she spends "only a relatively small percentage of her time typing financial proposals which may be used in negotiations."

Although the administrative secretary to the assistant superintendent for business services spends only a small portion of her time typing financial proposals to be used in negotiations, that is sufficient to make her a confidential employee. Government Code Section 3540.1(c) only requires that an individual have access to confidential matters "in the regular course" of one's duties or to "possess information" relating to employer-employee relations. The frequency with which an employee has access to or possesses information of a confidential nature is not controlling; "possession" or "access" is sufficient if the "access" or "possession" is in the regular course of the individual's duties and is more than a happenstance.

Administrative Secretary to the Director of Instruction

The director of instruction, like the assistant superintendent for business services, is a member of the District's negotiating team. His administrative secretary, whose position is in dispute, performs duties similar to those of the administrative secretary to the assistant superintendent for business services. In typing position papers for the director of instruction, she has access to information concerning the District's position on various topics that arise during the course of negotiations.

² Sierra Sands Unified School District, EERB Decision No. 2, October 14, 1976.

CSEA argues that the confidential information to which she has access relates to certificated and not classified employees. We think that is not controlling since Government Code Section 3540.1(c), by its terms, makes no such distinction but only establishes the criteria of "access" or "possession" in the regular course of duties performed.

Intermediate Clerk-Typist - Personnel Office

The intermediate clerk-typist types and duplicates employer proposals. Last year, she attended all certificated negotiating sessions, kept notes of those sessions and, along with others, typed and collated both proposals and counter proposals. During the period that negotiations are conducted, most of her time is occupied by these duties.

CSEA takes the position that the intermediate clerk-typist is simply a note-taker who is not "attached" to a member of the management team and that her functions can be easily transferred to others. We find, however, that the statutory definition of confidential employee does not make a confidential status hinge on whether an employee's functions may be transferred to others, but rather on the single factual basis of what a disputed individual's work actually entails.

The Supervisory Issue

Government Code Section 3540.1(m) provides:

"Supervisory employee" means 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.³

In prior decisions, we have held that the satisfaction of any one of the supervisory criteria enumerated in the statutory definition is sufficient to make an individual a supervisor.⁴

The Maintenance and Operations Field Supervisor

The hearing officer found that "the record in support of a finding that the maintenance and operations field supervisor is a supervisory employee within the meaning of Government Code [Section] 3540.1(m) is, indeed, weak." She further stated:

The job description indicates he 'may assist in review of job applicants,' but the testimony indicates that an independent determination would be made by the director of personnel. Thus, it cannot be said that his recommendations are routinely followed. The record indicates that he could participate in disciplining or recommending discipline of employees, but not that he has done so in fact, or that it was effective.

The maintenance and field supervisor does, however, replace the director of maintenance and operations when the director is on vacation or ill, he does direct the maintenance mechanics

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As we have noted in prior decisions, the supervisory definition in Gov. Code Sec. 3540.1(m) is an almost exact replica of the definition of supervisor found in Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152 (11). We accordingly look to National Labor Relations Act precedents as an aid in interpreting Gov. Code Sec. 3540.1(m). In our decision in ~~Los Angeles Unified School District~~, EERB Decision No. 5, November 23, 1976, we said:

While we are not bound by N.L.R.B. 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 analogous California legislation. Alameda County Assistant Public Defenders' Assn. v. County of Alameda, 33 CA. 3d 825, 829 (1973); Fire Fighters' Union v. City of Vallejo, 12 C. 3d 608, 615-616 (1974); Social Workers Union Local 535, SEIU, AFL-CIO v. Alameda County Welfare Dept., 11 C. 3d 382, 391 (1974); American Federation of State, etc. Employees, Local 685 v. County of Los Angeles, 58 CA. 3d 601, 605, 606 (1976).

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Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976; San Diego Unified School District, EERB Decision No. 8, February 18, 1977; Foothill-DeAnza Community College District, EERB Decision No. 10, March 1, 1977; Lompoc Unified School District, EERB Decision No. 13, March 17, 1977; Oakland Unified School District, EERB Decision No. 15, March 28, 1977; Los Rios Community College District, EERB Decision No. 18, June 9, 1977.

and ground crew, and make work assignments to them, and he is responsible for inspecting conditions before and after work has been completed. In addition, the maintenance and field supervisor is on an annual salary and is excluded from overtime pay, a secondary indicia of supervisory capacity.

We find that the maintenance and operations field supervisor does not use independent judgment in exercising in a manner that is not routine any of the supervisory criteria in Government Code Section 3540.1(m).

In response to the question whether the maintenance and operations field supervisor recommended anyone for hiring or ever recommended the discharge of an employee, the answer of the District's director of personnel on cross-examination was:

It is not inconceivable, although I don't have a specific instance that he could have recommended a custodian for hire.

Q. And you can't recall any specific instance of a field supervisor recommending that an employee be fired, can you?

A. In the - the answer is the same for hiring.

Q. No?

A. That is correct.

When asked whether the maintenance and operations field supervisor disciplined employees or recommended discipline for employees, the director of personnel's answer was: "He could, yes." But no examples were provided. In answer to the question whether the field supervisor ever interviewed any job applicants within the last year, the answer was:

I couldn't tell you without referring to our records.

To the limited extent that the field supervisor participated in interviews, the record reflects that the principal, the assistant principal and the director of maintenance and operations, who supervises the maintenance and operations field supervisor, also participated in the interviews.

The record also reflects that the field supervisor spends much, if not the majority of his time doing non-supervisory work and functions

"as an experienced employee giving assistance to those less experienced." ⁵

Concerning his purported power to assign or direct, the evidence on direct examination of the District's personnel director is merely the conclusory assertion that he "does direct the work of the ground crew", and that he has the function "of assigning work to employees." The only non-conclusory evidence of the maintenance and operations field supervisor directing other employees revealed that he directs other employees in the planting of trees; that he would receive his instructions from the director of maintenance and operations, go out with a ground crew, give directions and also assist them in the planting of trees. The only evidence indicating supervisory power is the field supervisor's job description, but the Legislature recognized the well-established industrial practice of inflating job descriptions by providing in the first sentence in the definition of supervisor that "any employee, regardless of job description . . ." [Emphasis added]. Counsel for the District was also aware of the unreliability of job descriptions, for he began one sequence of his direct examination of the District's director of personnel by stating:

Realizing the limitation which most job descriptions have, could you perhaps tell us just from your own personal knowledge, what it is that a [maintenance and operations supervisor] really does?

With the exception of the assignment and direction of work, concerning which we find no evidence of the use of independent judgment, there is no evidence that the maintenance and operations field supervisor exercises any other supervisory functions with or without the use of "independent judgment" within the meaning of Government Code Section 3540.1(m).

The record reflects that it is the director of maintenance and operations and not the maintenance and operations field supervisor who exercises some of the

⁵ See New Haven Unified School District, EERB Decision No. 14, pp. 7-8

supervisory functions listed in Government Code Section 3540.1(m), including the power to assign employees. For example, the director of personnel was asked:

And I take it the maintenance and operations field supervisor has the authority, and would in fact assign maintenance mechanics to do repair work.

The answer to the question was:

I question whether he actually does that. I think the director [of maintenance and operations] is involved in that.

The director of maintenance and operations also plans and administers the corrective maintenance programs for District-owned equipment and vehicles, determines where maintenance mechanics work, assigns maintenance mechanics to do plumbing, sprinkler and heating repair work at school sites.

Thus, it appears that the District failed to satisfy its burden of establishing that the maintenance and operations field supervisor directs or assigns employees in a non-routine manner and with the use of independent judgment.⁶

As the hearing officer noted, the maintenance and operations field supervisor replaces the director of maintenance and operations when the director is on vacation or ill. We find that the record says nothing more than that. There is no indication of what he does when he replaces the director of maintenance and operations. The mere substitution for a supervisor without the exercise of supervisory authority does not confer supervisory status.⁷ One who spends most of the working day doing non-supervisory work and who exercises supervisory authority only in the absence of a superior is not a supervisor, as the NLRB has held.⁸

⁶ See Foothill DeAnza Community College District, EERB Decision No. 10, March 1, 1977, pp. 4-6.

⁷ Fred Rogers Co., 226 NLRB No. 175, 93 LRRM 1470 (1976); The Boston Store, 221 NLRB 1126, 91 LRRM 1076 (1975).

⁸ Green Brothers Lumber Corp., 158 NLRB 1642, 62 LRRM 1198 (1966); Muscle Shoals Rubber Co., 157 NLRB 829, 61 LRRM 1460 (1966) decides that a maintenance employee who performs manual work is not a supervisor within the meaning of the NLRA even though he exercises supervisory authority when he substitutes for supervisors, attends supervisory meetings, and his rate of pay is substantially higher than that of other employees.

The District did not sustain its burden of establishing the supervisory status of the maintenance and operations field supervisor.

ORDER

(1) The following are "confidential employees" within the meaning of Government Code Section 3540.1(c):

administrative secretary to the assistant superintendent
for business services
administrative secretary to the director of instruction
intermediate clerk-typist - personnel office

(2) The maintenance and operations field supervisor is not a "supervisory employee" within the meaning of Government Code Section 3540.1(m).

Reginald Alleyne, Chairman

Jerilou H. Cossack, Member, concurring:

I agree that the administrative secretary to the assistant superintendent for business services, the administrative secretary to the director of instruction and the intermediate clerk-typist - personnel office are confidential employees. I also agree that in this case the maintenance and operations field supervisor is not a supervisor within the meaning of the Educational Employment Relations Act (EERA).

I do not agree with the underlying policy of the Chairman's opinion that Section 3540.1(m)¹ should be interpreted as identical with Section 2(11) of the

¹ Gov. Code Sec. 3540.1(m) provides:

"Supervisory employee" means 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.

National Labor Relations Act (NLRA). Rather, I adhere to the basic policy enunciated by a majority of the Board in Sweetwater Union High School District² that supervisors under the EERA must be treated differently than supervisors under the NLRA. The EERA expressly allows supervisors to be represented in a negotiating unit separate from those employees they supervise. The NLRA does not.

In the application of this policy, we must examine each case on its individual merits. The mere fact that a person holds a job, the title of which designates him as a supervisor, is not in and of itself determinative of his status. Furthermore, the fact that a job title is analogous to the job titles of persons found in other cases to be supervisors is also not determinative of his status. In the final analysis, it is the duties which the person actually performs which must determine whether or not he is a supervisor within the meaning of the EERA.

We have previously recognized that the nature of the authority held by public sector supervisors differs considerably from that held by their private sector

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counterparts. Supervisors in the public sector, in contrast to their counterparts in the private sector, do not exercise ultimate authority. That authority is retained by governing boards of districts. Since the field supervisor does not retain ultimate power to exercise any of the indicia of supervisory status outlined by Section 3540.1(m), the effectiveness of his recommendations and the regularity with which they are followed become critical in determining his supervisory status.

In Sweetwater Union High School District the head custodians interviewed applicants for hire; their recommendations were followed 99 percent of the time. They also established the work assignments for crew members; these assignments

²
EERB Decision No. 4, November 23, 1976.

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~~Sweetwater Union High School District~~, supra.

rarely, if ever, were altered by higher authority. In San Diego Unified School District,⁴ building service supervisors prepared work schedules, approved overtime schedules, and approved timesheets. Moreover, their recommendations regarding dismissal, transfer, and suspension of employees had uniformly been followed.

Conversely, in the instant case while there is testimony that the field supervisor may recommend employees for hire, dismissal or disciplinary action, there is no indication that in fact this authority has been exercised or, if exercised, the extent to which the recommendations have been followed. Further, it appears from the record that the field supervisor is merely a conduit from the director of maintenance and operations to the employees in the assignment of work and the determination of priorities among work projects.

Accordingly, I conclude that the field supervisor in the instant case is not a supervisor within the meaning of the EERA.⁵

Jerilou H. Cossack, Member

Raymond J. Gonzales, dissenting in part:

We have unanimously agreed that the exercise of only one of the enumerated criteria set forth in Section 3540.1 (m), if requiring the exercise of independent

⁴ EERB Decision No. 8, February 18, 1977.

⁵ The Chairman's opinion states that the District has not met its burden of proof to establish the field supervisor as a supervisor. I do not think that a discussion of burden of proof and its role in representation proceedings is necessary to resolve the issue raised in this case. Further, no party raised this as an issue here.

judgment, is sufficient to render one a supervisor.¹ While the record is "weak" regarding various criteria mentioned in Section 3540.1(m) and which tend to be focused on by my colleagues, there can be no doubt as to other parts of the record. My colleagues conveniently discount that part of the record where it is undisputedly clear regarding certain powers of the maintenance and field supervisor. These are that the maintenance and field supervisor has the independent authority to direct, assign, and inspect certain employees' work. In so doing, he determines the order in which the work is to be performed and he possesses the authority to tell a crew member to do additional work as needed, which in my view, amply reflects supervisory status, since he has authority "in the interest of the employer...to assign work to and direct" the members of his crew. Thus, for the foregoing reasons essentially stated in the proposed decision, I disagree with my colleagues that the maintenance and field supervisor is not a supervisor within the meaning of Section 3540.1(m). Moreover, such secondary indicia as the maintenance and field supervisor's receiving an annual salary, unlike his colleagues, as well as not being entitled to overtime pay, supports this conclusion.

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I would like to add to this partial dissent a comment regarding the inconsistency of the Board relative to the various supervisory issues that have come before the Board. I feel Sweetwater Union High School District clearly set forth the standard to be used in determining supervisor status, namely the satisfaction of any one of the supervisory criteria enumerated in the statutory definition as noted above. Thus far, both the Board and the Board's hearing officers have been applying this language in a variety of ways based on sometimes less than ideal records of a case. The resulting effect has been a variety of decisions that have gone in many different directions.

In the present case we have again what appears to be a shift in position, or perhaps more aptly stated, a contradiction of our enunciated policy in Sweetwater Union High School District relative to the supervisory issue. Member Cossack, though professing to support the Board's enunciation of supervisory criteria in the ~~Sweetwater Union High School District~~ decision, actually does an about-face. Member Cossack states in her concurrence that in ~~Sweetwater Union High School District~~ we held that head custodians "established the work assignments for crew members." This one factor alone would be sufficient to grant supervisory status since the Board has agreed in previous cases that only one of the criteria

¹ Supra note 4 (Chairman Alleyne's concurring opinion).

in the supervisory definition must be met. Member Cossack lightly dismisses the "assigning work to employees" statement made by the District personnel director in a single sentence of her concurrence when she states that "it appears from the record that the field supervisor is merely a conduit from the director of maintenance and operations to the employees in the assignment of work...." She adds nothing to support her argument that the field supervisor is "merely a conduit". We have here in Member Cossack's statement the very type of conclusory remark objected to by Chairman Alleyne in his separate concurrence.

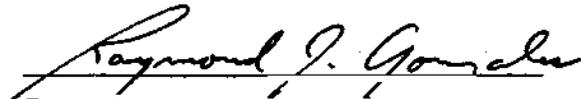
Regarding Chairman Alleyne's rejection of the District's personnel director's testimony concerning the field supervisor's authority to "direct the work of a ground crew" and responsibility "of assigning work to employees," it is my view that it is not in the province of this Board to conclude that these statements are "conclusory assertions". The record indicates that the statements were not challenged by the other parties to the hearing, nor was contrary evidence presented on this question. It is my opinion that the statement as to the supervisor's authority to "assign work" must be taken as fact unless we, the Board, wish to challenge the credibility of the witness, since the statement went unchallenged at the hearing.²

It is my belief that the role of head custodians in Sweetwater Union High School District and of the field supervisors in San Rafael is identical as it relates to the assignment of work and supervision of the crews. For this Board to continue "flip-flopping" as we have done on the supervisory issue, can only lead to continued confusion for the parties. Either we must conclude that we will always have nebulous details and "conclusory statements" on the record to deal with or we must begin to give some guidance and direction to our hearing officer's so they may prepare better records on which to render a decision.

²See e.g., In re Charyn, a recent California case which although clearly distinguishable on the facts, provides some guidance in this area. There, the Court held that "...before a court may disregard uncontradicted testimony either of the following factors must appear: (1) A satisfaction on the part of the factfinder that the witnesses are not telling the truth; or (2) a finding that the testimony is inherently improbable due to inaccuracy, uncertainty, lapse of time or interest or bias of the witness." 71 Cal. App. 3d 355, 366 (1977).

I realize that some individuals may oppose a more vigorous role for EERB hearing officer's at the hearings. I also realize the importance of maintaining neutrality and that questions by the hearing officers may appear to some to violate that neutrality. But I believe the language of our procedural rules is sufficient to grant them the authority needed to prepare the best record possible. Section 39170 (a) of the Board's procedural rules states that the hearing officer has the authority to "inquire fully into all issues and obtain a complete record upon which a decision can be rendered." Unless the supervisory issues arising in future hearings are dealt with in more detail by the parties and the hearing officers, I am afraid the supervisory issues coming before the Board will never lend themselves to precedential decisions by this Board.

Except for the supervisory issue, I concur with the majority in all other aspects of this decision.


By

: Raymond J. Gonzales, Member

Dated: October 3, 1977

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

ORDER

SAN RAFAEL CITY HIGH SCHOOL DISTRICT,)
Employer,)
)
and)
CIVIL SERVICE ASSOCIATION,) Case Nos. SF-R-12³
LOCAL 400, SEIU,) SF-R-128 Employee Organization,)
and) EERB Decision No. 32
)
)
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)
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_____)

The Educational Employment Relations Board directs that:

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administrative secretary to the assistant superintendent
for business services
administrative secretary to the director of instruction
intermediate clerk-typist - personnel office

The maintenance and operations field supervisor is not a "supervisory
employee" within the meaning of Government Code Section 3540.1(m).

Educational Employment Relations Board

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STEPHEN BARBER
Executive Assistant to the Board
10/3/77