STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Employer, and TEAMSTERS UNION, Local 853, PUBLIC EMPLOYEES DIVISION, I.B.T., Employee Organization, and CHILDREN'S CENTER EMPLOYEES UNION, Local 2, Employee Organization, and OAKLAND SCHOOL EMPLOYEES ASSOCIATION, Employee Organization, and OAKLAND, CALIFORNIA UNIFIED SCHOOL EMPLOYEES UNION, Local 257, AFSCME, AFL-CIO, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, OAKLAND CHAPTER #1, Employee Organization, and OAKLAND PUBLIC SCHOOLS PEACE OFFICERS ASSOCIATION, Employee Organization, and UNITED TEACHERS OF OAKLAND, AFT Local 771, AFL-CIO Employee Organization, and AFSCME, Local 2078, Oakland Unified School District Cafeteria Employees Union, Employee Organization.	Case Nos. SF-R-120 SF-R-258 SF-R-273 CONSOLIDATED DECISION PERB Decision No. 50 April 14, 1978

Appearances; William E. Brown, Attorney (Brown and Conradi) for Oakland Unified School District, John Allen for Oakland Public School District Peace Officers Association, Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for United Teachers of Oakland/Aft Local 771, AFL-CIO; V. Roy Lefcourt, Attorney, for Children's Center Employees Union, Local 2; Tom Sinclair, Attorney, for Oakland School Employees Association; Arthur Levine, Attorney, for California School Employees Association, Oakland Chapter #1; Hirsch Adell, Attorney (Reich, Adell, and Crost) for Oakland, California Unified School Employees Union, Local 257, AFSCME, AFL-CIO.

Before Harry Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

This case is before the Public Employment Relations Board on exceptions filed by Oakland Unified School District (District), Oakland School Employees Association (OSEA), and Oakland, California Unified School Employees Union, Local 257, AFSCME, AFL-CIO (AFSCME).[1] OSEA and the District except to the hearing officer's conclusion that children's center paraprofessional instructional assistants constitute a separate appropriate unit. AFSCME excepts to the hearing officer's conclusion that supervising custodians II through V are supervisors.

We sustain the hearing officer's conclusion that children's center paraprofessional instructional assistants constitute a separate appropriate unit. We reverse the hearing officer and find that supervising custodians II through V are not supervisors within the meaning of the, EERA and are, therefore, included in the stipulated building and grounds unit.

I

Both the District and OSEA except to the hearing officer's finding of a separate unit of children's centers paraprofessionals appropriate based in any way on distinctions between the regular school program and the children's center program. We find no merit in this contention.

In finding appropriate a separate unit of children's center paraprofessional instructional assistants, we have neither abandoned nor subordinated the importance of job function in determining appropriate negotiating units. However, job function cannot be divorced from program intent in determining community of interest between and among employees. It is axiomatic that the purpose of the program

[1] Building and Construction Trades Council of Alameda withdrew its exceptions in Case No. SF-R-347. Accordingly, the Executive Assistant to the Board issued a Decision with respect to that case on September 12, 1977 pursuant to which the District granted voluntary recognition on October 20, 1977 in the unit found appropriate by the hearing officer.

dictates in large measure job content 2/.

In the instant case, major differences in the program goals of K through 12 schools and children's centers have resulted in substantially distinct job functions, supervision, hours of work, work years, work locations, hiring practices and certain fringe benefits, among other things. Cumulatively, these differences require a unit of children's center instructional assistants separate from K through 12 instructional assistants.

While the same job description is used to define both groups of paraprofessionals, children's center paraprofessionals perform only part of two of the 13 enumerated duties contained in the common job description: they work with the students individually or in small groups and supervise students at lunch or on the school grounds. Since there is no formal curriculum or instructional program, lesson plans or tests in the children's centers, with the exception of Martin Luther King center, children's center paraprofessionals obviously have no duties with respect to these matters.

The lines of supervision of children's center paraprofessionals are entirely separate from those of K through 12 paraprofessionals 3/. Children's center paraprofessionals are supervised by the children's center head teacher and then the associate superintendent for support services; K through 12 paraprofessionals are supervised by the school principal and then the area superintendent.

2/Member Cossack Twohey notes that the Board has consistently weighed the relationship between job function and program intent when determining appropriate negotiating units. Thus, in Grossmont Union High School District, EERB Decision No. 11, 1 PERC 67 (March 9, 1977), a majority, finding that pupil services employees should be included in an over-all certificated unit, said

> ...teachers and the four disputed classifications share common purposes and goals in their mutual interaction with each other and the community they serve. (p. 7)

In Los Rios Community College District, EERB Decision No. 18, 1 PERC 185 (June 9, 1977), a majority, finding that part-time instructors should be included in the same unit as regular full-time instructors, stated

> The responsibility of both full- and part-time instructors is primarily teaching assigned classes. (p. 6)

3/Member Cossack Twohey notes that in Grossmont, supra., unlike the instant case, a majority of the Board concluded that all but three of the disputed classifications were supervised by a school principal who also supervised all other school certificated employees.

Children's center paraprofessionals have different hours,[4] work years[5] and work locations[6] than K through 12 paraprofessionals. Those paraprofessionals employed in the children's centers work daily in two separate shifts, while those employed in K through 12 schools do not. Those in the children's centers work 12 months a year, while those in the K through 12 schools work 10 months a year. Children's centers are geographically distinct from the regular schools. Thus, while all but six of the children's centers are adjacent to the regular schools, children's center paraprofessionals have little, if any, work-related contact with K through 12 personnel.[7] There is little transfer of paraprofessionals between the children's centers and regular schools.

Even though the minimum qualifications of both groups of paraprofessionals are the same, those employed at the children's center are hired and evaluated by the head teacher, while those employed at K through 12 schools are hired by the principal and faculty 8/. In addition, children's centers are required to employ substitute paraprofessionals when a regular employee is absent; no such requirement exists in the K through 12 program.

Children's center paraprofessionals receive paid vacation based on length of time employed; K through 12 paraprofessionals do not. Only children's center

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4/ Member Cossack Twohey notes that in Grossmont, supra., unlike the instant case, the disputed employees worked the same basic day but 15 minutes longer each day than other certificated employees.

[5]Member Cossack Twohey notes that in Grossmont, supra., unlike the instant case, the disputed employees worked the same basic year, although between 6 and 10 days more each year, as other certificated employees.

[6]Member Cossack Twohey notes that in Grossmont, supra., unlike the instant case, all but three of the disputed employees worked at the same school site as other certificated employees.

[7]Cf. Grossmont, supra.

8/ Member Cossack Twohey notes that in Grossmont, supra., unlike the instant case, school principals had a determinative voice in hiring both those in the disputed classifications and other on-site certificated employees.

paraprofessionals are eligible for Social Security coverage. Finally, due to separate funding sources, children's center personnel are not permitted to share materials with K through 12 personnel.

Accordingly, we conclude that a separate unit of children's center paraprofessionals is appropriate.

II

We agree with AFSCME that the supervising custodians II through V here, unlike the head custodians in Sweetwater Union High School District[9] and the building services supervisors in San Diego Unified School District,[10] are not supervisors within the meaning of the EERA.

Section 3540.l(m) of the EERA defines supervisors 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.

The Board, in its first two cases applying this section to classified employees, Sweetwater and San Diego, concluded that head custodians and building service supervisors, respectively, were supervisors within the meaning of the EERA.

In Sweetwater, head custodians were intimately involved in hiring; they interviewed applicants and their recommendations were followed 99 percent of the time. They prepared custodian work schedules at the beginning of each regular school year, which were rarely if ever altered, and independently altered regular assignments to assign specific tasks for special events. In addition, each morning the head custodians inspected the work and specifically directed correction of any deficiencies. Finally, during the summer session, they assigned and directed work on a daily basis.

In San Diego, building service supervisors prepared work schedules, daily inspected the work performed and instructed the correction of deficiencies.

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[9] EERB Decision No. 4, 1 PERC 10 (November 23, 1976).

[10] EERB Decision No. 8, 1 PERC 33 (February 18, 1977).

They prepared and approved overtime schedules, approved time sheets, and prepared and signed formal evaluations. In addition, building service supervisors recommended transfers, dismissals and suspensions; their recommendations were followed.

In the instant case, supervising custodians II through V play no part in the hiring process. Nor do they play any part in the transfer, lay off, recall or promotion of employees; by District policy and practice, seniority governs in each of these matters.

The acting director of building operations testified that he knew of no circumstance where a supervising custodian had recommended discharge or suspension of an employee. The one employee who testified, a supervising custodian V, stated that he had recommended that the principal terminate an employee once in his sixteen years as a supervising custodian.[11]

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Q. Mr. Cordano, have you ever recommended that a custodian be discharged?

A. Yes, I have, via the principal's office. I explain the situation and I have to have his blessing before I go any further. When we send a written form down to Mr. Pickens' [acting director of building operations] office, we keep one on file, but the principal's signature is on it.

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Q. Are you testifying to only one instance where you've done this? That is, made this kind of recommendation?

A. Yeah. I can recall three or four years ago I had what you call a hard core person. The first hard core employee I've ever had. And he proved to be just what he was called. After we'd given him six months or so, he was found up here and he was found up there and I went to the principal and said, "I think we've given him enough chance. We'd better go through with"—not recommending firing him, but getting him out of Skyline High School.

We did this through channels, with the principal initiating this, with his signature. Every once in a while I put mine down and mine don't mean anything up against the principal's. And they, after a certain amount of time, I would say about two weeks after that letter—we'd already, by the way, sent three letters before that—they started to move and they fired this employee.

One isolated instance of arguable exercise of one of the indicia of supervisory status does not warrant a conclusion that supervising custodians actually effectively recommend discharge of employees, particularly where, as here, the testimony indicates that on other occasions the same witness had made recommendations to the principal which were not followed. Other testimony indicates that this one instance was the exception rather than the rule. The acting director of building operations testified that only he was authorized to give verbal warnings and only his superior, the business manager, was authorized to suspend employees.

With respect to the authority of supervising custodians to assign work to and direct employees, the supervising custodian V testified that he prepares work schedules, which must be approved by the principal. The principal sometimes questions certain assignments, although he has not reversed any assignments. In fact, those custodians who work days report directly to their work area; those who work nights report to the supervising custodian's office where the supervising custodian tells the assistant head custodian of any special requests by the principal. The assistant head custodian, not the supervising custodian, decides who on the evening crew will perform the special assignments. There was no evidence that the supervising custodians here regularly inspect work performed and direct correction of deficiencies. They have no independent authority to authorize overtime, nor do they sign custodian time sheets.

With respect to the adjustment of grievances, the record establishes that supervising custodians are not involved in the resolution of written grievances. Rather, both the acting director of building operations and the one testifying supervising custodian described their involvement in grievances as "problem solving." In fact, in recent years supervising custodians have, on behalf of AFSCME, represented custodians in processing written grievances.

With respect to the evaluation of employees, the record discloses that there are four types of evaluations: probationary, annual,[12] promotional and

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[12] The transcript describes this as "manual"; however, in the context of the discussion it is clear that the parties are discussing annual evaluations.

change in site administrators.[13] Supervising custodians are only involved in probationary and annual evaluations. Each new employee receives three evaluations during the six month probationary period. Since new employees are always assigned a split shift at two different schools, two supervising custodians prepare and sign each evaluation. The evaluations are also signed by either a field supervisor or an assistant custodial operations supervisor and by the director of building operations. These probationary evaluations, according to a supervising custodian, are

> ...presented in total form to the employee to show his progress or his shortcomings or whatever at the end of the period. And then the director [of building operations] signs it as a total example or illustration of knowing what the problem is or what's going on.

They are then signed by the employee. The annual evaluations are prepared by the supervising custodian and sent to the school principal. According to the acting director of building operations,

> ...in a lot of cases [the principal] calls the custodian in and at least discusses[.] [T]o what extent he involves the supervising custodian in making out the...appraisal, I couldn't tell you. Some are a lot more involved than others. I'm talking about the [principal] now.

The supervising custodians' participation in the evaluation process is hardly independent. Nor is there any evidence that the evaluations provide them with any authority, routine or otherwise, to meaningfully reward excellent employees or effectively reprimand substandard employees.

Since supervising custodians possess none of the indicia of supervisory status, we conclude that they are employees and should be included in the negotiating unit.

ORDER

The following units are appropriate for the purpose of meeting and negotiating provided an employee organization is selected as the exclusive representative:

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[13] The record is silent regarding the meaning of this type of evaluation. A common sense explanation would be that it is an evaluation which occurs when there is a new school principal.

Paraprofessional Unit: Including all regular school instructional assistants, community assistants and health assistants. Excluding children's center instructional assistants, substitutes, management employees, supervisory employees and confidential employees.

Children's Center Paraprofessional Unit: Including all children's center instructional assistants. Excluding substitutes, management employees, supervisory employees and confidential employees.

Custodial and Buildings and Grounds Unit: Including all custodial and buildings and grounds employees, including assistant supervising custodians and supervising custodians I through V. Excluding all other employees, management employees, supervisory employees and confidential employees.

Within 10 workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director at least 30 percent support in the custodial unit stipulated to be appropriate by the parties.

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. Voluntary recognition requires majority proof of support in all cases. See Sections 3544 and 3544.1.

The date used to establish the number of employees in the above units shall be the date of this decision unless another date is deemed appropriate by the Regional Director and noticed to the parties. In the event another date is selected, the Regional Director may extend the time for employee organizations to demonstrate at least 30 percent support in the units.

By: Jerilou Cossack Twohey, Member

Harry Gluck, Chairperson, concurring:

I did not participate in deliberations or the decision concerning the

establishment of the children's center paraprofessional unit. I did participate in all other aspects and concur in the reasoning and decision reached by Member Cossack Twohey.

Harry Gluck, Chairperson

Raymond J. Gonzales, dissenting in part:

I dissent from the majority's conclusion that supervising custodians II, III, IV and V are not supervisory employees. I would affirm the hearing officer's finding, based on the Board's precedents of Sweetwater Union High School District[1] and San Diego Unified School District[2] that these employees are supervisors.

The Board, in Sweetwater, San Diego and numerous subsequent cases,[3] has held that the possession of any one of the authorities

[1] EERB Decision No. 4, November 23, 1976.

[2] EERB Decision No. 8, February 18, 1977.

[3] See, for example, Foothill-De Anza, EERB Decision No. 10, March 1, 1977 and Sacramento City Unified School District, EERB Decision No. 30A, October 19, 1977.

listed in Government Code Section 3540.l(m) is sufficient to make an employee a supervisor within the meaning of that section of the Educational Employment Relations Act. In the present case, the supervising custodians II through V have several of the listed authorities, including the authority to assign and direct the work of other custodians, to adjust informal grievances of other custodians and to recommend them for an opening on a more desirable shift. Generally, the only distinction among the supervising custodians II, III, IV and V is the level of school at which they work and the number of employees they supervise. Based upon these facts and the Board precedents cited above, I find, as did the hearing officer, that the supervising custodians II through V are supervisory employees.

In all cases coming before the Board, it is my policy to thoroughly review the facts. However, there are issues such as those presented by the supervisory question and others where the facts of a given case are not the only compelling elements upon which to base a decision. Questions of significant policy considerations have been and will continue to be of great importance.

In my previous dissent in San Rafael City High School District,[4] I expressed my concern about the Board's failure to reasonably deal with the supervisory issues coming before it. I indicated that "for this Board to continue 'flip-flopping' as it has done on the supervisory issue can only lead to continued confusion by the parties." I am afraid that the Board is still wrestling with the supervisory issue and is no firmer in its position than at the time the San Rafael case came before us.

In the present case, the majority once again relies on whether or not the record was "clear" and such conclusory and unsupported statements as: "The supervisory custodians' participation in the evaluation process is hardly independent" to reach the decision that supervising custodians II through V are not supervisory. The weakness of such conclusory statements and the constant reference to "unclear records" and "unsupported statements" by the witnesses have left us in the quagmire of confusing and directionless decisions in supervisory questions.

Not wanting to mislead the parties as to my own firm convictions on the supervisory issues arising from the language of the Educational Employment Relations Act ("EERA"), I feel I must make a definitive statement in this dissent as to why I lean very heavily in favor of establishing minimal requirements within the language of the statute for the qualification of an individual as a supervisor.

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[4] EERB Decision No. 32, October 3, 1977.

I must state here that in my opinion the supervisory question in this and every case that has or will come to the Board is one of basic educational philosophy, not merely a simple question of labor relations. I believe it is to the benefit of the taxpayers, educators, and most especially students, that a significantly constituted unit of supervisory employees exists in nearly every school district in the state whose size makes it feasible. Such units will tend to assure the continued operation of a school district in the event of a strike by the non-supervisory employees. Further, such units will assure the supervisory employees that they have the full exercise of their rights under the EERA through sufficient strength of numbers.

Under the National Labor Relations Act, as amended,[5] which regulates private sector collective bargaining, supervisors are excluded from the definition of "employee" and therefore have no bargaining rights.[6] Because bargaining rights are denied supervisors, employees under the NLRA are not lightly declared supervisory and are therefore relatively few in number compared to the nonsupervisory employees.

Because supervisors are not totally aligned with management, it has been suggested that they, as well as the nonsupervisory employees, should have negotiating rights. However, supervisors also are not totally aligned with the employees they supervise.

[5] 29 U.S.C. Section 151 et seq.

[6] 29 U.S.C. Section 152(3).

This divided loyalty is acknowledged in the only legislative history available on the EERA, the Final Report of the Assembly Advisory Council on Public Employee Relations, issued on March 15, 1973, in anticipation of a comprehensive collective bargaining bill authored by then Speaker of the Assembly, Bob Moretti:

> The chief argument of those who, although advocating that supervisors be given the statutory right to bargain collectively, oppose allowing them either to be included in a bargaining unit with nonsupervisory employees, or to be represented by an organization that also represents nonsupervisory employees, is that when the two groups are represented by the same organization, an inevitable and irreconcilable conflict of interest is created. They contend that the supervisors' loyalty thereby becomes divided between management and the organization representing the nonsupervisory employees (at p. 95).

Were the Legislature to deny negotiating rights to supervisors under the EERA, large units of nonsupervisory employees would be created with few supervisors excepted, as under the NLRA. In the event of a strike or other concerted activity, few employees would remain to keep open the schools. Thus, I believe that the strong policy reason underlying the Legislature's choice in establishing supervisory units is that the Legislature wished to assure that in the public sector the community at large would have some guarantee that no single employee organization could exercise such power as to virtually shut down an institution by means of a strike or other concerted activity.[7]

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[7] This opinion is not intended to address the question of the legality or illegality of strikes.

In an obvious decision to guarantee the integrity and independence of the supervisory unit, the Legislature declared in Government Code Section 3545(b)(2) that, "A negotiating unit of supervisory employees ... shall not be represented by the same employee organization as employees whom the supervisory employees supervise." Of course, there is no guarantee that both units might not choose similar drastic action. This probability, however, is much less likely when the two units are separate and independent.

If a school district is to be protected from the possible concerted activity of its nonsupervisory employees, then, the unit of supervisors must be composed of more than a few individuals. But it is also true that supervisors will in practical effect have few rights under the EERA, if they do not have sufficient numbers to negotiate effectively. If too small in size, the employee organization representing the supervisory unit may attempt to align itself with the employee organization representing the nonsupervisory unit. Or the supervisory unit might simply be incapable of exercising any influence. Thus, the Legislature must have intended that supervisory units be viable entities, with membership substantial enough to assure themselves an effective voice in the negotiating process.

The language of the EERA allows the establishment of supervisory units of viable size. Although the definition of

"supervisor" under the EERA[8] is nearly the same as under the NLRA,[9] the NLRA precedent on supervisors cannot be strictly followed. Since supervisory units are authorized under the EERA, the language of the EERA should be more broadly construed to find more employees supervisory as compared to the NLRA. Such broad construction is easily supported by the facts regarding the supervisory hierarchy in the schools. Authority is more disbursed vertically. As the Board stated in Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976:

> This statutory scheme recognizes that public and private sector supervisors differ in the nature of the authority they possess. In the public school districts, decisions regarding hiring, firing, discipline and salaries of employees are generally ultimately reserved for decision-makers far removed from the employee's immediate supervision. This type of authority and the different California statutory scheme lend themselves to a broader construction of the definition of supervisor contained in the Act (at p.13).

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[8] Government Code Section 3540.l(m): "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.

[9] 29 U.S.C. Section 152(11): The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Acknowledging the need for diffusion of power and a large supervisory unit, the Board in Sweetwater employed the test that, "The performance of any one of the enumerated actions [in Section 3540.l(m)] or the effective power to recommend such action is sufficient to make one a supervisor within the meaning of the Act."

In conclusion, it is because of the right of the public to the educational services of the schools, guaranteed by the California State Constitution, that the creation of substantial and viable supervisory units in school districts is a desirable goal. Article IX, Section 1 of the Constitution, on education, in essence provides a mandate that the public schools shall remain operative and provide an education to the children in the state:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

It is my belief that the Legislature recognized this, the school boards recognized this, and the professional employee organizations recognized this when the creation of supervisory units was negotiated in the legislative process. The unique departure from the NLRA in California is proof that this significant interest was at play when the collective negotiating process was brought into the public sector. The existence of independent and viable nonsupervisory and supervisory units in the public sector is the best safeguard contained in the EERA against disruption of the educational process of a school district. If we hope to ensure a minimum of disruption

in the school district in this particular case and indeed in the entire system of education throughout the state, then this Board must realize that it is not dealing only with simple questions of employer-employee relations such as are found in the private sector. Rather, it must recognize that there is a greater social good that it must respond to. Consequently, it is my belief that the existence of separate supervisory units with significant membership is a necessity in most school districts for the continued peaceful and uninterrupted educational process that taxpayers, educators, parents and school children have a right to expect.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

In the Matter of:	)	
	)	
OAKLAND UNIFIED SCHOOL DISTRICT,	)	Case Nos. SF-R-120
	)	SF-R-258
Employer,	)	SF-R-273
and	)	
	)	
TEAMSTERS UNION, Local 853, PUBLIC EMPLOYEES DIVISION, I.B.T.,	)	
	)	~~CONSOLIDATED PROPOSED~~
Employee Organization,	)	DECISION'S
and	)	
CHILDREN'S CENTER EMPLOYEES UNION,	)	July 7, 1977
Local 2,	)	
Employee Organization,	)	
and	)	
OAKLAND SCHOOL EMPLOYEES ASSOCIATION,	)	
Employee Organization,	)	
and	)	
OAKLAND, CALIFORNIA UNIFIED SCHOOL EMPLOYEES UNION,	)	
Local 257, AFSCME, AFL-CIO,	)	
Employee Organization,	)	
and	)	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Oakland Chapter #1,	)	
Employee Organization,	)	
and	)	

OAKLAND PUBLIC SCHOOLS PEACE OFFICERS ASSOCIATION,

Employee Organization,

and

UNITED TEACHERS OF OAKLAND, AFT Local 771, AFL-CIO,

Employee Organization,

and

BUILDING AND CONSTRUCTION TRADES COUNCIL OF ALAMEDA COUNTY,

Employee Organization,

and

AFSCME, Local 2078, Oakland Unified School District Cafeteria Employees Union,

Employee Organization.

Appearances: William E. Brown, Attorney (Brown and Conradi) for Oakland Unified School District; John Allen for Oakland Public School District Peace Officers Association; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg, & Roger) for Building and Construction Trades Council of Alameda County; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg, & Roger) for United Teachers of Oakland/AFT Local 771, AFL-CIO; V. Roy Lefcourt, Attorney, for Children's Center Employees Union, Local 2; Tom Sinclair, Attorney, for Oakland School Employees Association; Arthur Levine, Attorney, for California School Employees Association, Oakland Chapter #1; Hirsch Adell, Attorney (Reich, Adell, and Crost) for Oakland, California Unified School Employees Union, Local 257, AFSCME, AFL-CIO.

Before Terry Filliman, Hearing Officer.

OPINION

PROCEDURAL HISTORY

The Oakland Unified School District is composed of 62

elementary schools, 14 junior high schools, 8 senior high schools, 23 children's centers and has an average daily attendance of 60,282 students.[1] The District employs approximately 3500 classified employees excluding substitutes, short-term and exempt employees. During the period of April to October, 1976, the above listed organizations filed 13 separate requests for recognition and interventions seeking to become the exclusive representative in 11 separate yet overlapping negotiating units[2]. The organizational petitions are summarized by the nature of the unit proposed therein.

On April 1, 1976, the Teamsters Union, Local 853, Public Employees Division, I.B.T. (Teamsters) filed a request for recognition in a unit consisting of 15 warehousemen. On April 12, 1976, the Oakland School Employees Association (OSEA) intervened for a unit of 8 storeroom warehousemen in the central office of the District warehouse.

On April 1, 1976, Oakland, California Unified School Employees Union, Local 257, AFSCME, AFL-CIO (AFSCME) filed a request for recognition in a unit consisting of 280 custodial employees, including custodians, supervising custodians, and aides to handicapped children. No interventions were filed.

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[1] 1/Annual Report, Financial Transactions Concerning School Districts of California, Fiscal Year 1975-76; 1976 California Public Schools Directory.

[2] While all parties of record to the original hearings are named herein, several parties are not directly affected by the consolidated decisions due to prior settlements. (Cases SF-R-27, 252, 277, 292, and 528).

On April 13, 1976, the Building and Construction Trades Council of Alameda County (Trades Council) filed a request for recognition in a unit consisting of approximately 219 *craft,* gardening, and maintenance employees. The unit descriptions included certain foremen and assistant foremen. No interventions were filed.

On April 1, 1976, the Children's Center Employees Union, Local 2 (CCEU) filed a request for recognition for a unit consisting of 220 instructional assistants and substitutes in children's centers. On April 19, the Oakland School Employees Association (OSEA) intervened, claiming that a unit of 1000 paraprofessionals covering all District facilities was appropriate. On May 10, 1976, the United Teachers of Oakland, AFT Local 771, (UTO) also intervened, claiming the broader unit of paraprofessionals was appropriate.

On April 13, 1976, the Brotherhood of Teamsters and Auto, Truck Drivers, Local 70 (Local 70) filed a request for recognition for a unit of 11 truck drivers. No interventions were filed.

On April 1, 1976, California School Employees Association, Oakland Chapter #1 (CSEA) filed a request for recognition seeking 12 peace officers within the security department. On April 8, 1976, OSEA filed an intervention challenging the appropriateness of the the peace officer unit and claiming an 845 person office technical unit. The proposed unit consisted of all security department members and additional employees in the following

sections: community schools, clerical, fiscal, secretarial, data processing, and technical professions. On April 19, the Oakland Public Schools Peace Officers Association (POA) filed a competing claim for the 12 peace officers.

On October 14, 1976, OSEA filed a request for recognition for a unit of 550 cafeteria workers. On November 8, 1976, AFSCME Local 2078, Oakland Unified School District Cafeteria Employees Union (AFSCME, Local 2078) filed an intervention claiming the cafeteria workers and all substitutes.

The hearing officer met with the parties in a pre-hearing conference on October 13, 1976, to seek resolution of the numerous unit disputes. During the period of October 18-21 and December 6-8, 1976, settlements were reached over many disputed issues and testimony was taken regarding the remaining disputes. During the course of the hearing, the District and the employee organizations agreed to at least 8 appropriate units. Prior to the issuance of this decision, the parties have agreed upon action which has resulted in either voluntary recognition, a consent election, or the conversion of the dispute into a unit clarification following establishment of an exclusive representative in the following units: peace officer unit; office technical unit; truck driver unit; warehouse unit; and a cafeteria unit.

As a result, only three unrelated issues remain. In two instances, the parties have agreed upon an appropriate custodial and buildings and grounds unit, but dispute certain supervisors. In the third case, the parties dispute whether one or two paraprofessional units are appropriate. These issues constitute

separate cases with the District being the only common party. The hearings, decisions and orders have been consolidated for administrative convenience.

CASES SF-R-120, 273

(Paraprofessionals)

Parties: United Teachers of Oakland, AFT Local 771, AFL-CIO (AFT); Children's Center Employees Union, Local 2 (CCEU); Oakland School Employees Association (OSEA); Oakland Unified School District (District).

ISSUES

1. May a unit of children's center instructional assistants appropriately be separated from a "public school" paraprofessional unit?

2. If so, should the unit include substitute children's center instructional assistants?

DISCUSSION

Unit Placement

All parties agreed that a paraprofessional unit should include at least the following employees: instructional assistants, community assistants and health assistants in "public schools"3/. This stipulation is accepted without further inquiry. The District, UTO and OSEA further contended that instructional assistants in children's centers should be included within the

[3]A11 parties agreed to describe paraprofessionals serving in District classes other than children's centers as instructional assistants in public schools.

same unit. CCEU has petitioned to create a separate unit consisting of instructional assistants and substitute instructional assistants employed in children's centers.

The District employs approximately 1000 instructional assistants including 138 who work in 23 children's centers. Of the approximately 50 community assistants and 40 health assistants employed in the District, none appear to be claimed by CCEU for inclusion in the proposed children's center unit.

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The parties collectively called 14 witnesses relating to this issue. Of the 23 children's centers, Martin Luther King Center appears to operate under a philosophy more akin to a regular elementary school than do the other 22 facilities. Most witnesses called by the District, OSEA and UTO were employed at the Martin Luther King school. Witnesses called by CCEU were employed at other children's centers. Much of the general testimony given was contradictory because of the major distinction between two existent philosophies in the operation of children's centers.

Children's centers are a separate, optional program which may be offered by a school district which meets certain federal and state requirements. The centers are open five days a week year-round, or for approximately 255 days per year. They are open from approximately 6:30 a.m. until 6:00 p.m. each day. Children who attend the centers range in age from 6 months to 12 years. The program is funded by specially earmarked

federal and state funds, a local tax override which may be imposed upon the community, and fees paid by parents.

Generally speaking, the programs are established to provide child care including a loosely defined educational component for parents who work or are undergoing training to qualify for employment. The children engage in activities designed to develop sensory, motor, perceptual discrimination and language skills. Pre-school children are taught basic developmental techniques. School-age children engage in more progressively complex developmental activities when not attending regular school classes.

II

Section 3545 (a) of the EERA establishes criteria for determination of appropriate negotiating units as follows: (1)...community of interest between and among employees; (2)...their established practices including (a) the extent to which such employees belong to the same employee organiz-tion and (b) the effect of the size of the unit upon the efficient operation of the school district.

In interpreting the community of interest criteria, the EERB has adopted several standards established by the National Labor Relations Board to assist in making a specific determination. They include 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 function of

other employees, and interchange with other employees.[4]4

In Pittsburg Unified School District,[5] the Board found that paraprofessional employees including all instructional aides constituted an appropriate separate negotiating unit. The unit was distinguished from other classified employees based upon a finding that the primary function of paraprofessionals involved working with students, either at an instructional or disciplinary level.

Since the employer in Pittsburg did not operate any children's centers and the Board found that all or almost all instructional aides employed in that District worked an identical number of hours per day ten months per year, and served under the direct supervision of school principals at each school site, that decision does not appear binding in the present case. Furthermore, in Sweetwater Unified School District[6] the Board was not presented an issue regarding children's center paraprofessionals as distinguished from paraprofessional generally.

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[4]See [4]Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976.

[5]EERB Decision No. 3, October 14, 1976.

[6]EERB Decision No. 4, November 23, 1976

Among the criteria considered in determining community of interest in its early decisions the EERB has placed primary emphasis upon the job functions of the employees in question.[7] In its presumptively appropriate units, the Board has grouped together employees who are paid from different funding sources, who work varying hours, and who work both at school sites and at central locations provided that the employees' mainline service was broadly either related to one of the following categories: students, record-keeping or physical environment.

Despite extensive testimony attempting to distinguish the authority, functions and purposes of instructional aides in children's centers from those in public schools, it is found that the fundamental job function of all paraprofessionals within both programs is nevertheless similar in providing "assistance" to children. Just as the philosophical approach within children's centers differs regarding an emphasis on academic materials, the range of philosophies regarding traditional or experimental approaches to instruction must differ within the public schools of the District. A separate community of interest cannot be established based upon job function alone.

Notwithstanding its prior decisions cited above, the Board was impressed with factors regarding the Oakland Children's Center system beyond job function of the employees when it created a separate unit for certificated children's center teachers in

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[7]See Pittsburg, Sweetwater, Fremont Unified School District, EERB Decision No. 6, December 16, 1976, San Diego Unified School District, EERB Decision No. 8, February 18, 1977.

Oakland Unified School District.[8] The Board stated "We find compelling those facts which clearly indicate the separate and distinct nature of the children's center program." (emphasis added)

It would appear based upon the facts which are virtually identical to the present case that the Board in Oakland moved away from a determination based primarily upon job functions toward a distinction based upon the nature of the programs in which the employees served. The distinction was found in part to be based upon the fact that 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."..."if the program is so unique that separate administration is considered more efficient, separate negotiations would likewise appear more efficient."

Each of the factors listed above relating to the distinct nature of the children's center program are recognized by the hearing officer as a determination by the Board which apply to this case. The Oakland decision provides a foundation for finding a separate-community of interest by all children's center employees in the Oakland Unified School District. In addition, and equally important, notwithstanding the broad similarity of job function, instructional assistants in children's centers have had in practice a sufficiently distinguishable history of employment conditions as to justify a community of interest distinct from paraprofessionals in the public schools. The

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[8]EERB Decision No. 15, March 28, 1977.

record indicates enough unique characteristics of the children's center employees as to hazard them to an inequitable bargaining relationship if merged into the much larger, overall paraprofessional unit.

Without question, the similarities between all paraprofessional employees cannot be overlooked. All instructional assistants are included within one job classification by the District. The employees are paid an hourly wage uniformly on the salary schedule. Both public school and children's center assistants must have identical educational requirements, e.g., "a combination equivalent to graduation from high school and some experience working with young people." All instructional assistants are the only classified employees who receive salary step increases as the result of completing additional college courses. The employees uniformly receive the same medical benefits, sick leave, occupational leave, jury duty leave, and holidays as other classified employees. The benefits are prorated based upon the number of hours worked. No credential is required for employment as an instructional assistant in either a children's center or a public school, although several assistants in both programs have such certificates. Each instructional assistant works in a classroom setting at a school or a center.

Several other apparent similarities disappear when scrutinized more closely. Most children center instructional assistants work 3% hours per day. Generally, public schoolroom assistants work 3-4 hours depending upon the needs of the school. Children's centers are maintained up to 11 hours per day in order to provide day care for the children of working parents. This length of operation requires the employment of instructional assistants in two shifts on a daily basis, While public school assistants may have staggered starting times, no testimony revealed that they regularly work two distinct shifts. A conflict regarding differential pay may arise if the employees are lumped together.

Children's center instructional assistants work 12 months per year, whereas public school assistants are employed for 10. This difference alone does not indicate a separate community of interest. On the other hand, the resulting effect upon the employees' interest in paid vacation and seniority rights may. Public school instructional aides do not work when schools are closed, and their only paid time off is pre-established by the school calendar for such times as Christmas and Easter vacations. Children's center instructional aides receive paid vacation based upon length of time in service. Whether an employee is entitled to 2, 3, or 4 weeks of paid vacation for a given length of service applies only to children's center instructional aides.

The testimony relating to job seniority and layoffs was confusing at best. While the District contends that job seniority is controlled by the Education Code and is identical for all employees in the instructional assistant classification, the fact remains that no children's center instructional aides have ever been laid off, while public school instructional aides have. This was explained on the basis that children's center instructional assistants acquire more seniority while working 12 months combined with a District uncertainty about the date on which layoffs should have been considered to take place for purposes of determining seniority in 1974-75. While it appears clear that the District does not maintain two seniority lists, the practical effect of children's center instructional assistants gaining more seniority each year than their counterparts places the two groups in conflict when the District is faced with cutbacks.

Distinctions are apparent in the hiring process. Public school instructional assistants are hired at the school site by the principal and faculty but under criteria established by a school advisory committee. The school advisory committee is a committee of parents and community persons prescribed to oversee specialized state and federal programs. The need for additional instructional assistants depends upon the resources and requirements of the particular program involved. Children's center instructional assistants are hired only by the head teacher of each center. On an informal basis, each center has

established a requirement for service as a substitute instructional assistant during a "probation period" prior to employment as a regular instructional assistant. No similar substitute requirement was mentioned in the public schools. Based upon federal adult-child ratios prescribed in children's center programs, the substitute is always called to work to replace an absent instructional assistant. No such general requirement exists in the public schools. In summary, the process of hiring an instructional assistant is different and may be based upon different needs in the public schools and the children's centers, dependent upon the funding and regulatory requirements involved.

While all paraprofessionals receive similar fringe benefits, only children's center employees are entitled to be covered by Social Security, when they work less than the four hours per day necessary to belong to the Public Employees Retirement System. Normally only those employees eligible for the retirement system are eligible for Social Security. The eligibility for Social Security by one segment of part-time employees that is denied to part-time assistants in public schools is another incident of conflicting interests.

The lines of supervision and levels of grievance extending beyond the site level are dissimilar. The children's center instructional assistant would report through the head teacher up to the autonomous director of children's centers who in turn reports to the associate superintendent for support services. The supervision of a public school instructional assistant

would be channeled through the school principal up to an area superintendent. While the associate superintendent for support services and the two area superintendents have equal rank, they have differing responsibility and differing lines of authority. The avenues for processing grievances also follow the differing paths of the lines of supervision.

The interchange between the employees is infrequent. Approximately 15-20 public school instructional assistants substitute in children's centers during the summer. On the other hand, the District admitted that a prior experience in allowing children's center assistants to simultaneously work in the public schools proved disastrous. Since the job description is identical for all instructional assistants, transferring is undoubtedly legally possible on a permanent basis. In practice, transfer from the public schools to the children's centers occurs only infrequently. Whether this is due to a hierarchial attitude by employees in the District or due to a distinction in job function cannot be concluded. The District presented witnesses establishing that the public school and children's center instructional assistants visit each other, participate in assemblies, and go on picnics or excursions , attend staff meetings and parent meetings at the public schools. Each of these witnesses related specifically to the relationship between Martin Luther King children's center and public school. At best, the testimony could be expanded to 3 of the 23 children's centers. On the other hand, CCEU presented testimony describing 3 other children's centers where there was no contact between the center and its attendant public schools.

Given the geographic distance between many centers and the public schools, the different hours of operation of the centers, and the fact that no organized program of interchange or regular in-service training exists to provide interaction between the two groups, it cannot be concluded that any substantial amount of contact exists between the employees.

Based upon the finding of the Board regarding the uniqueness of the children's center program and the additional factors relating to the competing interests of the children's center paraprofessional employees as against other instructional assistants, it must be concluded that the inclusion of the children's center employees in the larger unit would produce conflicting bargaining interests and impede the bargaining process for both groups in the absence of overwhelming contrary conclusions about efficiency of operation and extent of organization.

Instructional assistants in the children's centers have indicated some support for each of the organizations a party to the hearing. CCEU was recognized by the District in October, 1975, as representing children's center employees. Because of its recent recognition, it did not participate in meet/confer sessions in 1975-76 and has no history of negotiating. Approximately 54% of the children's center instructional assistants are dues-paying members of CCEU. The other organizations did not present membership testimony. The result reached based upon community of interest is not

altered on the basis of the foregoing extent of membership and history of bargaining testimony.

The District contends that the formation of a carve-out children's center unit would be detrimental to its efficient operation. The Board found in Oakland that the creation of a separate certificated children's center unit would not seriously impair the District's efficiency of operation. In light of its size and the fact that the District has previously agreed upon 8 appropriate classified negotiating units, it is concluded that the District's operations will not be seriously impaired.

Substitutes

CCEU has also requested the inclusion of substitute children's center instructional assistants in its proposed negotiating unit. It contends that all substitutes have a significant community of interest with the regular employees in the proposed unit. The contention is based upon the argument that substitute children's center instructional assistants are not simply replacing absent personnel but are in addition undergoing an informal probationary period prior to being employed as a regular instructional assistant. Unlike public school instructional assistants who are replaced only based upon absence due to illness, children's center instructional assistants receive paid vacation and are absent on a regular continuing basis of several weeks per year. Finally due to federal requirements of adult-student

ratios, the need for substitutes is mandatory on a continuing basis. The director of children's center operations testified that a substitute might be employed for more than one consecutive month at a particular center.

To date, the Board has issued no decision considering the community of interest of classified substitutes. Yet it is apparent from cases affecting certificated employees that the Board finds no community of interest in substitutes who have no expectancy of future employment. In Belmont Elementary School District (EERB Decision No. 7, December 30, 1976); Petaluma City Elementary (EERB Decision No. 9, February 22, 1977); and Oakland Unified School District (EERB Decision No. 15, March 28, 1977), the Board excluded long-term certificated substitutes who worked 75% or more of the school year on the basis that they did not accrue seniority, received no fringe benefits and worked without a contract.

The record reveals only that each head teacher retains approximately 3-6 substitutes at a center to fill in for employees absent from service. In the absence of any information regarding the frequency of service by substitutes, the probability that they would be employed as regular instructional assistants, and their ability to receive fringe benefits, substitutes cannot be determined to have a community of interest with regular children's center instructional assistants. Therefore, they are excluded from the unit.

CASE SF-R-258

(Supervising Custodians)

Parties: Oakland, California School Employees Union, Local 257, AFSCME, AFL-CIO (AFSCME); Oakland Unified School District (District).

ISSUE

1. Are the following custodial job classifications "supervisory employees" within the meaning of the EERA: assistant supervising custodian; supervising custodian I; supervising custodian IV; supervising custodian III; supervising custodian IV 5 and supervising custodian V.

DISCUSSION

I

A supervisory employee is defined by Government Code Section 3540.l(m) as one"having authority in the interest of the employer to hire, transfer, suspend, layoff, 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 to 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." The Board has determined that the possession of any one of the above enumerated duties or the effective authority to recommend such action through the use of independent judgment is sufficient to make one a supervisor within the meaning of the Act.

A most difficult determination is required when the employee in question serves as a "working foreman" or "leadman", In these cases, a differentiation must be made between the exercise of independent judgment in directing other employees and the routine passing on of orders issued by a superior. A determination of the authority to assign and direct employees is made even more important under the Act due to the general proposition that few, if any, supervisors have the effective authority to hire, promote, discharge, reward, or discipline other employees in the context of the public school setting.

II

AFSCME filed a request for recognition to represent a unit of 314 custodial employees. The organization and the District agree that the unit should consist of at least 211 employees in the following classifications: custodian (107); custodian children's center (21); custodian II (matron) (5); leadman (12); aide to handicapped children (55); and substitute custodian (11). This stipulation is accepted without further inquiry. The District has designated the additional 103 employees in the job classifications of assistant supervising custodian and supervising custodian I-V as supervisory employees. These positions are in dispute.

Each of the five classifications of supervising custodians has a virtually identical job description. Five of the six classifications are differentiated by the size of the school

where the custodial crew assisting the "supervisor" works.[9] The sixth classification, assistant supervising custodian, was established as a training position and the incumbents work at the high schools under the direction of supervising custodian V's.

The positions are compensated in direct relationship to the number of employees assigned and the percentage of time the incumbent spends in actually performing his own work as indicated by the following table: (Custodian salary - $841).

Employees	Title of Custodian	u ol ∞ o cos	Custodians Assigned	% Time Working With Tools	Time Worked
6	Asst.Supvr. Custodian	$ 863	Under direction of Supvr. Custodian V	100%	Night
33	Supvr. Custodian I	$ 886	Supervises 0-% people	100%	Day
20	Supvr. Custodian II	$ 935	Supervises 1-2 people	90%	Day
17	Supvr. Cus-todian III	$ 981	Supervises 1-2 people	90%	Day
21	Supvr. Custodian IV	$1026	Supervises ~~ people	80%	Day
6	Supvr. Custodian V	$1073	Supervises up to 10.5 people	--	Day

[9] Supervising custodian I's work at small elementary schools; II's and Ill's serve at medium and large elementary schools and other District facilities; supervising custodian IV's are assigned to jr. high schools and large elementary schools; supervising custodian V's work at the six high schools.

Considering the number of job classes in dispute and the number of individuals to be affected, the testimony given by the director of buildings and grounds and one supervising custodian V was extremely broad and non-specific. In general, the custodian supervisors work a 7-% hour day shift, either alone or in conjunction with one or more custodial employees. The main custodial crew reports to work during the last half hour or following the work day of the supervisor.

In its precedent Sweetwater decision, the Board found head custodians to be supervisory employees based upon their authority to recommend the hiring of custodians, authority to assign and direct the work of custodians serving under them, and authority to correct work improperly performed. In San Diego Unified School District,[10] custodial building services supervisors III-IV were determined to be supervisory following the precedent of Sweetwater.

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[10] EERB Decision No. 8, February 18, 1977. In that case, the District had four classifications of custodial supervisors based upon school size analogous to the present situation. The custodial building services supervisors I and II were stipulated as part of the custodial unit. The supervisors III and IV were assigned between 5-15 employees each. The Board clarified its view of the power to assign work by stating "We do not view physical presence during the entire work shift as a condition precedent to the finding of supervisory status." New criteria upholding supervision were found including the authority to prepare work schedules for crew leaders, approval of overtime schedules, approval of time sheets, authority to recommend transfer and dismissal, and the preparation of work performance evaluations. The Board stated "The judgment required by such work is not routine merely because the work performed by these subordinate employees is manual labor."

In a later decision,[11] the Board found custodial foremen not to be supervisors based upon an apparent distinguishing of the facts from the Sweetwater and San Diego cases.

In the present case, all supervising custodians except assistant supervising custodian and supervising custodian I are found to be "supervisory employees" within the meaning of the Act and are excluded from the custodial unit.

Each of the supervising custodians II-V is responsible for from 1-10 full-time custodians. Each prepares a regular work schedule and makes adjustments in the work schedule to compensate for emergencies or for special meetings or functions conducted at the particular school. The supervising custodian V who testified stated that special assignments at the secondary level occur on the average of three times per week due to special group meetings under the Civic Center Act.

The supervising custodians formally evaluate each new assistant custodian. A new custodian is required to be evaluated three times during his initial six months of employment. The evaluation is completed by the supervising custodian and is signed by a field supervisor and the director of the department. While each supervising custodian discusses each evaluation with the principal, no testimony showed that a principal has ever made any changes in the evaluations.

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[11] Foothill-DeAnza Community College District, EERB Decision No. 10, March 1, 1977.

While promotion is based strictly on seniority, positive recommendations by supervising custodians have been placed in the workmen's personnel files. A supervising custodian may recommend a change from the night shift to the day shift for a particular custodian because of his good performance. The recommendation has normally been accepted.

Supervising custodians adjust informal grievances prior to the filing of a formal written grievance. The director of buildings and grounds testified that he becomes involved with the grievance only if the supervising custodian is unsuccessful at resolving the problem. When automatic overtime is authorized due to an absence, the supervising custodian may assign individuals to perform the work.

Unlike Sweetwater, the supervisory custodian plays no role in recommending the hiring of new employees. Regular positions are filled by substitute custodians who gain that position on the basis of examination and selection by the assistant supervisor of building operations. Substitute custodians work full-time and are assigned a regular position on a seniority basis.

Nevertheless, based upon their authority to assign and direct work, to adjust grievances, to evaluate employees, and to recommend an employee for an opening on a more desirable shift, supervisory custodians II-V are determined to be supervisory employees under the precedent of Sweetwater and San Diego.

The assistant supervising custodian is the first promotional position beyond custodian. Each of the six employees in this job are assigned to the night shift at a high school working with the custodial crew. The position was originally conceived as a temporary training assignment for persons who would then promote into the regular supervisory I-V positions. Due to a cutback of approximately 85 positions within the custodial department during the past 8 years, the position appears to be a full-time working assignment now. While the director of buildings and grounds testified that the assistant supervising custodian is responsible for five men including the direction and assignment of their work, it must be concluded that this responsibility is conducted under the direction of the supervising custodian V at the site.

The assistant supervising custodian earns only $22 per month more than the top salary of a custodian ($863-$841). He does not make out an evaluation form for the custodians. The evaluation is filled out and signed by the supervising custodian V. The supervising custodian V normally makes assignments to the assistant and the custodial crew at the commencement of their shifts. While the supervising custodian V testified that the assistant might choose the men to carry out a specific assignment or call the police in an emergency situation, it cannot be concluded, based upon these facts alone, that these duties require independent judgment in light of the entry-level nature of the position and its placement on the salary

schedule below that of a supervising custodian I which has also been determined not to be a supervisory position.

The supervising custodian I's attend custodial duties at 33 small elementary schools. They normally work alone during the day shift. In some schools, they receive no assistance and in other schools they are helped by a part-time employee who works anywhere up to 20 hours per week in the evening cleaning the classrooms.

As mentioned earlier, the size of the custodial crew has decreased significantly over the past eight years. The District raises two contentions as to why these custodians are supervisory although it is evident that they are currently not directing employees. First, it is argued that Section 3540.l(m) speaks in terms of the "authority" to perform one or more of the listed duties of a supervisor. This contention is intended to show that in the future, the size of the custodial staff at small elementary schools may increase again requiring direction of a crew of men. The second contention is that since at a majority of these elementary schools at least a part-time employee is "supervised" that the job classification should be treated as a whole.

It must be noted that the size of the custodial staff has decreased over an extended period of time and there are no facts to indicate a future increase of custodians at the small elementary schools. Furthermore, no testimony was addressed at supervising custodian I's except for the two statements by

the director of buildings and grounds. His testimony revealed that they spend "almost 100% of their time working with the tools of their trade" and that part-time help comes in either as the supervising custodian I is leaving or after he has left,

In the absence of a showing that the work of at least one employee is actually directed, an evaluation performed, a grievance processed, or an inspection made, supervising custodian I's cannot be found to be "supervisory employees."

In considering the supervisory status of the assistant supervising custodian and supervising custodian I, the highly disproportionate ratio of custodial supervisors claimed by the District was taken into consideration. Of the 314 employees proposed in the unit, 55 are aides to handicapped children. These employees appear to have no line of direct supervision with other custodial employees. Excluding them, the number of custodial employees is 259. If each of the supervisory job classifications proposed by the District are accepted, 156 custodians and matrons would be supervised by 103 custodial supervisors. Following the exclusion of these two classifications, the remaining three-to-one ratio is a rank and file employee to supervisory employee breakdown.

CASE SF-R-347

(Buildings and Grounds Supervisors)

Parties; Building and Construction Trades Council of Alameda County (Trades Council) and Oakland Unified School District (District).

ISSUE

1. Are the following buildings and grounds unit employees "supervisory" employees within the meaning of the Educational Employment Relations Act: glazier foreman; carpenter assistant foreman; locksmith assistant foreman; gardener assistant foreman; electrician assistant foreman; painter assistant foreman; furniture refinisher; furniture refinisher foreman; roofer foreman; and mill foreman.

DISCUSSION

The Trades Council and the District stipulated to an appropriate buildings and grounds unit excepting certain disputed supervisory positions.[12] This stipulation is accepted without further inquiry.

The classifications disputed as supervisory are: carpenter assistant foreman (including locksmith); glazier foreman; gardener assistant foreman; electrician assistant foreman; furniture refinisher foreman; roofer foreman; mill foreman; and painter assistant foreman.

The director of buildings and grounds and the assistant director are management employees who oversee the craft operations. Within the buildings and grounds department, there are seven crafts which have foremen who are also designated

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[12]The unit consists of the following job classifications: carpenter; electrician; equipment operator; furniture refinisher; gardener; glazier; laborer, skilled; locksmith; millwright; mechanic; painter; plasterer; plumber; roofer; sheet metal worker I; sheet metal worker II; steamfitter; and truck driver II.

"management". They are: carpenter, electrician, steamfitter, plumber, gardener, laborer and painter. These foremen are paid monthly, report for work in suits and ties, and work with tools only in an emergency. In three crafts (electrician, gardener, and painter) the foreman is aided by one or more assistant foremen. The carpenter craft is subdivided into four specialities. In the general carpentry area, the general foreman is assisted by an outside carpenter assistant foreman. The other three areas are headed up by three sub-foremen: furniture refinisher foreman, mill foreman, and roofer foreman. The glazier and locksmith crafts, because of their small size, do not have regular foremen comparable to the other crafts. These disputed positions are paid an hourly wage on a basis equivalent to assistant foremen within the other crafts. Whether a particular craft or specialty area has an assistant foreman is dependent upon the size of the crew and the skill required by that craft. Irrespective of the title, the above positions are disputed.

DISCUSSION

I

A supervisory employee is defined by Government Code Section 3540.l(m) as one having authority in the interest of the employer to hire, transfer, suspend, layoff, 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 to 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. Possession of any one of the above enumerated duties or the effective power to recommend such action through the use of independent judgment is sufficient to make one a supervisor within the meaning of the Act.

None of the assistant foremen[13] have the authority to hire or fire or effectively recommend hiring and firing of crafts employees. These functions are effectively initiated and carried out by either foremen in each craft by the director of buildings and grounds. Generally, the craft foremen prepare written evaluations and sign them. An assistant foreman may informally counsel an employee but any report recommending disciplinary action is made by the foreman, who is expected to have made an independent evaluation prior to reporting to the director. No assistant foreman may authorize a leave of absence, issue a written reprimand, grant time off, or authorize overtime.

Schedules for craft employees except for the glaziers are prepared by the craft foreman. Employees in the disputed positions are paid for overtime work.

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[13]For purposes of this discussion, all of the disputed supervisors will be called assistant foremen, notwithstanding the official designation of the glazier, furniture refinisher, mill and roofer personnel as foremen.

Each of the assistant foremen in some manner instructs journeymen on the job and reviews, their work in conjunction with regular inspections by the foremen. This duty taken alone in view of the final responsibility of the foreman for assignment and inspection is not sufficient to establish supervisory status. The glazier foreman, carpenter assistant foreman, locksmith assistant foreman, and furniture refinisher foreman have in practice been delegated additional authorities with respect to their journeymen to require a finding of supervisory status.

A specific determination for each job classification is treated separately as follows:

Glazier Foreman

The glazier foreman is responsible for distributing work orders and assigning glaziers to jobs replacing glass, shades, drapes, and Venetian blinds within the District. Unlike other foremen, he is not paid a monthly salary and is not aided by an assistant foreman. He is responsible for seven glaziers, who generally perform their duties in pairs. On a daily basis, he receives work orders from the director of buildings and grounds, determines the materials and time necessary to do each job and assigns a team of glaziers to perform the job. He spends approximately three hours per day using the tools of the trade in taking measurements for future jobs. Generally, he remains at the shop, ordering material and making out time cards. He meets with principals and site administrators to determine the nature of their requests for work. He has the authority to decide which jobs will be done on a particular day and which men will be assigned to the job. He schedules vacations determining according to the workload whether more, than one glazier should be absent at any one time. He files a formal evaluation on each glazier, which is passed on to the director.

The glazier foreman inspects work performed by the glaziers to make sure it is being properly undertaken and brings any deficiencies to the workers' attention.

The glazier foreman possesses several of the criteria listed in Section 3540.1(m) sufficient to make him a supervisor under the Act.

Gardener Assistant Foreman

The gardening department consists of one gardener foreman, one assistant foreman, and 27 gardeners.

The permanent assistant gardener is injured and on disability and the acting assistant spents 100% of the time working with the tools. The director of buildings and grounds testified as to the normal duties of the assistant gardener. Approximately 65% of his time is spent preceding the gardening crew at each District site to determine beforehand what additional pruning, trimming, watering or lawn maintenance needs to be done or whether the use of insecticides is necessary. This information is passed back to the foreman not directly to the crew. He also makes contacts with school principals to determine whether work they request to be done is feasible or not. This is reported to the foreman. The assistant foreman job description requires maintenance of the District greenhouse as an additional duty.

While the assistant foreman may assume the duties of the foreman when absent, no evidence showed the frequency of such an occasion. It is apparent that his primary responsibilities

are independent of the gardening crew. Only on rare occasions in the absence of the foreman does he direct or assign work. He does not evaluate other employees, set work schedules or vacation schedules, process grievances or perform any other supervisory duties on a regular basis. The assistant foreman gardener is not a supervisory employee.

Assistant Foreman Electrician

The electrician section consists of one foreman, two acting assistant foremen, and 11 electricians. One assistant electrician foreman testified that he worked either alone or as part of a two-man crew actually performing electrician's work five hours per day. In the remaining three hours he performs paperwork, keeps records and makes material requisitions. From the paperwork, approximately one hour per day is spent determining how much time is spent on each job. The assistant foreman does not assign men to a particular job. At a job site, if he is working with a crew, he may determine how the job is to be done, but he does not determine which jobs to do nor which men should be assigned to a particular job. The assistant foreman does not fill out an evaluation of employees, does not assign overtime without the foreman's approval. In general, he assists the foreman as a skilled leadworker and performs certain paperwork which is unrelated to supervising the electricians. He is not a supervisor.

Assistant Foreman Painter

The painting department consists of one foreman, four assistant foremen, and 17 painters. The assistant foremen work with the crew 90% of the time using the tools of the trade. They mix paint, match colors, check safety equipment, check progress of the job, and make minor decisions on job requests given by principals. Work assignments are made by the foreman and the assistant foremen assign a particular man to a task while on the job. For example, some men are assigned to trim windows because of their speed, while others paint walls.

The assistant foreman does not evaluate the individual job or overall performance of other painters. He does not adjust grievances as part of his job. He is not involved in purchasing equipment or making major repairs.

It must be concluded that the direction of work by an assistant painter is purely of a routine nature. He must be considered as a leadman rather than as a supervisor. His power to recommend is limited to an ability to pass on information to the general foreman. The assistant painter foreman is not a supervisory position.

Carpenter Assistant Foreman-Locksmith Assistant Foreman

The carpenter assistant foreman job classification actually includes two separate positions: the general carpenter assistant foreman and locksmith assistant foreman. These two positions, in addition to the furniture refinisher foreman, the mill foreman, and the roofer foreman, serve under the authority of the general carpenter foreman. The general carpenter assistant foreman receives job assignments from the carpenter foreman, orders materials, tools, and equipment needed for a particular

job, and assigns carpenters to a particular project. In conjunction with the foreman, the assistant foreman determines priority to be assigned various requests for repairs and small jobs that come in from school sites. The general carpenter assistant foreman does not work with the tools of the trade; rather his function is to see to it that jobs are properly set up and scheduled. He may inspect the site to check job progress. In addition, he checks time cards to allocate the time spent on a particular job to the appropriate financial category.

The carpentry crew consists of 27 men with a variety of skills. Because the assistant carpenter foreman works more closely with the crew than does the foreman, he plays an important role in making recommendations and informally adjusting grievances.

It is found that the assistant carpenter foreman has the authority to recommend evaluations and adjust grievances in addition to making regular inspections of work performed. He is a supervisory employee.

The second assistant carpenter foreman specializes in locksmith work. He is responsible for five locksmiths to repair the breakage of locks and lockers throughout the school district, change combinations on lockers, and repair safes. The locksmith assistant foreman signs the formal evaluations. The locksmith assistant foreman is not supervised by the carpenter foreman. He reports directly to the director of buildings and grounds. He schedules employees to various sites in the District to perform their work, but does not assign overtime. He does not adjust grievances nor make reprimands. In the past, he has been involved in interviewing apprentice locksmiths, but the final employment decision was made by the director.

Based upon his authority to schedule and evaluate employees, the locksmith assistant is a supervisor.

Roofer Foreman

The roofer foreman works in conjunction with the general carpenter foreman to repair, replace, reseal and plan the work on roofs of District facilities. The director of buildings and grounds establishes the priorities for roofing jobs and priorities cannot be altered without his consent. Once the priorities are established, the job information is given to the general carpenter foreman, who then relays it to the roofer foreman. The roofer foreman works with two roofers approximately 65% of his work week. In addition, he orders materials for roofing and for tile floors. While he might be questioned about the skills of a person or a potential job applicant, the final decision would be made by the director with consultation from the carpenter foreman. Because the roofing section is a part of the carpentry department, the evaluation for the roofers is actually made by the carpentry foreman. The director testified that any recommendation for discharge would require an independent investigation prior to being put into effect. Given the percentage of time he performs routine work, his hourly pay, the fact that he is supervised by the carpenter foreman, and the small size of the roofing crew, it must be concluded that the roofing foreman is not a supervisor under the Act.

Furniture Refinisher Foreman

The furniture refinisher foreman is actually a specialized assistant foreman who reports directly to the director of buildings and grounds. He is responsible for the finishing of furniture, small carpenter jobs, and repairs to upholstery and sandblasting of furniture. According to the director, "...the maximum he could spend (actually working with the tools) would be about 30% because the supervisory duties would

preclude his doing any more..." Because the furniture refinisher foreman works directly for a management employee rather than another crafts supervisor, he initiates and makes recommendations regarding the evaluation of furniture refinishers. While the director has the authority to change the foreman's evaluations, he has never done so. Unlike other assistant foreman who work under a foreman, he is solely responsible for inspecting completed jobs. Based upon his authority to effectively recommend the evaluation of employees and the authority to inspect the work of his crew, the furniture refinisher foreman is a supervisory employee.

Mill Foreman

The mill foreman is a speciality sub-foreman under the jurisdiction of the general carpenter foreman. He spends no time working with a hammer or other tools of the trade, but his work relates to getting ready for a carpentry job and does not primarily involve supervising carpenters. He is required to obtain an inventory of carpentry material, including lumber and plywood. In addition, he determines the amount of material used for a job and distributes the material list to each carpenter performing a particular job. He also dispatches two truckdrivers within the carpentry department to deliver materials to various jobs. He makes sketches and interprets blueprints for cabinetry and shelves commonly used within the District. Evaluations are signed by the general carpentry foreman and no testimony shows that the mill foreman makes an effective recommendation. No testimony demonstrated that the mill foreman actually assigns or inspects work of carpenters beyond his job description, which was placed into evidence. On the basis of the above facts the mill foreman is found not to specifically possess any of the supervisory criteria.

CASES SF-R-120,273

PROPOSED DECISION

As relating to the representation dispute between the UNITED TEACHERS OF OAKLAND, AFT Local 771, AFL-CIO; CHILDREN'S CENTER EMPLOYEES UNION, Local 2; OAKLAND SCHOOL EMPLOYEES ASSOCIATION: and OAKLAND UNIFIED SCHOOL DISTRICT, it is the proposed decision that:

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

Paraprofessional Unit - All instructional assistants, community assistants, and health assistants in public schools; excluding instructional assistants in children's centers, substitutes, management, supervisory, and confidential employees.

Children's Center Instructional Assistants Unit - All instructional assistants in children's centers excluding substitutes, management, supervisory, and confidential employees.

The parties have seven calendar days from the receipt of this proposed decision in which to file exceptions in accordance with Section 33580 of the Board's Rules and Regulations. If no party files timely exceptions, this proposed decision will become a final order on July 19, 1977 and a Notice of Decision will issue from the Board.

Within 10 workdays after the employer posts the Notice of Decision, the employee organization 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.

Date: July 7, 1977

CASE SF-R-258

PROPOSED DECISION

As relating to the representation dispute between OAKLAND, CALIFORNIA UNITED SCHOOL EMPLOYEES UNION, Local 257 AFSCME, AFL-CIO and OAKLAND UNIFIED SCHOOL DISTRICT, it is the proposed decision that:

1. The employees in the following job positions are "supervisors" within the meaning of Section 3540.l(m) of the Act and are excluded from the custodial unit stipulated to be appropriate by the parties: supervising custodian II, supervising custodian III, supervising custodian IV, and supervising custodian V.

2. The employees in the job positions of assistant supervising custodian and supervising custodian 1 are not "supervisors" and shall be included in the custodial unit.

The parties have seven calendar days from the receipt of this proposed decision in which to file exceptions in accordance with Section 33580 of the Board's Rules and Regulations. If no party files timely exceptions, this proposed decision will become a final order on July 19, 1977, and a Notice of Decision will issue from the Board.

Within 10 workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director at least 30 percent support in the custodial unit stipulated to be appropriate by the parties. 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. Voluntary recognition requires majority proof of support in all *cases*. See Sections 3544 and 3544.1.

Date: July 7, 1977

Terry Filliman
Hearing Officer