

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WASHINGTON UNIFIED SCHOOL DISTRICT,)
)
Employer,)
)
and)
)
CALIFORNIA SCHOOL EMPLOYEES' ASSOCIATION,)
CHAPTER 168,)
)
Employee Organization.)

Case No. S-R-509
PERB Decision No. 56
June 27, 1978

Appearances: O. H. Fifi Zeff, Deputy County Counsel, for Washington Unified School District; and Gerald E. Schwartz, Labor Relations Representative, for California School Employees Association, Chapter 168.

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

OPINION

On September 8, 1977 hearing officer Carol Webster issued the attached proposed decision. Thereafter, Washington Unified School District (hereafter District) filed timely exceptions to the hearing officer's proposed decision which held that cafeteria cook managers, snack bar operators, the fast food operator and buildings and grounds supervisors are not supervisors within the meaning of the Educational Employment Relations Act (hereafter EERA).

We have considered the record as a whole and the attached proposed decision in light of the exceptions filed. We affirm the rulings, findings and conclusions of the hearing officer, as modified herein.

The record shows that cafeteria cook managers hire and fire students, and the parties stipulated that the fast food operator "supervises" students. The student employees are not included in the negotiating unit, and the record does not support a conclusion that cafeteria cook managers and the fast food operator spend any substantial amount of their time in supervising students. Rather, once hired and trained, the students appear to perform clearly delineated functions in a routine fashion.

We decline to exclude the cafeteria cook managers and the fast food operator from the unit on the basis of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest is presented. Nor does the infrequent exercise of supervisory authority over nonunit personnel so ally these employees with management as to create a more generalized conflict of interest. See Adelphi University (1972) 195 NLRB 639, 79 LRRM 1545; Westinghouse Electric Corporation (1967) 163 NLRB 723, 64 LRRM 1440.

ORDER

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

All classified employees including cafeteria cook managers, snack bar operators, the fast food operator, building and grounds supervisors, excluding noon duty supervisors and those positions which are lawfully declared management and confidential.

2. The following job positions are not "supervisory"¹¹ within the meaning of Government Code Section 3540.1(m) and shall be included within the above unit:

Cafeteria Cook Manager
Snack Bar Operator
Fast Food Operator
Building and Grounds Supervisor

Within ten 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 unit.

The regional director shall conduct an election at the end of the posting period if the 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 Government Code 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 the employee organization to demonstrate at least 30 percent support in the unit.

By: Jerilou Cossack Twohey, Member ✓ Harry Gluck Chairperson

Raymond J. Gonzales, Member, dissenting in part:

I dissent from the majority's decision to affirm the hearing officer's conclusion that cafeteria cook managers and building and grounds supervisors are not supervisors within the meaning of the EERA.

In Sweetwater Union High School District,¹ its first case on supervisory issues, the Board decided that since EERA section 3540.1(m)² is written in the disjunctive, the performance of, or effective power to recommend, any one of the enumerated actions is sufficient to make an employee a supervisor. In the same opinion, the Board noted that California's statutory scheme differs from that of the federal Labor Management Relations Act, as amended,³ in that public school supervisors are given negotiating rights, while under federal law, supervisors are not considered employees and thus have no negotiating rights. The Board indicated it would construe the definition of supervisory employees more broadly than the National Labor Relations Board construes its definition.

In recent cases, such as San Rafael City Schools⁴ and Oakland Unified School District,⁵ the majority appears to be moving away from this position. I strongly oppose this trend and will continue to dissent whenever the facts indicate that the employees in question clearly perform at least one of the functions enumerated in the statute.

¹(11/23/76) EERB Decision No. 4.

²The EERA, is codified at Government Code section 3540 et seq. Section 3540.1(m) provides:

"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, 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 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.

³29 U.S.C, sec. 151 et seq. The Labor Management Relations Act amended the National Labor Relations Act.

⁴(10/3/77) EERB Decision No. 32.

⁵(4/14/78) PERB Decision No. 50.

Cafeteria Cook Managers

In the present case, the cafeteria cook managers are responsible for the day-to-day operation of the cafeterias. In their testimony, all the cook managers stated that they have the authority to assign work to and direct their assistants. These assistants see themselves as under the direction of the cook managers. When changes in the menu must be made, the cook managers have authority to make them and to direct their assistants as to the changes. The food services supervisor, a management employee responsible for all the cafeterias of the District, testified that cook managers are "absolutely" called upon to use their judgment in directing their assistants.

In deciding whether an employee is a supervisor, it is imperative that we look at the organizational structure as well as the specific duties of the employees in question. In this case, if the cook managers are not supervisors, then the cafeterias supposedly run themselves without any onsite supervision. Since the food services supervisor disclaims any responsibility for directing them, the cafeteria assistants are claimed to work without supervision. I think this poses an unrealistic situation and would find that the cafeterias are effectively supervised by the cook managers. Federal case law recognizes the importance of onsite supervision. In Vega v. NLRB,⁶ the First Circuit stated:

In this case, we regard it as of considerable importance that if the petitioners were not supervisors, the company's employees were entirely without supervision a large part of the time [citation omitted]. In such circumstances, it was not unreasonable to conclude that even the relatively small amount of supervisory power conferred upon and exercised by petitioners made them representatives of the employer.

⁶(1st Cir. 1965) 341 F.2d 576 [58 LRRM 2439], cert. den. 382 U.S. 862, affg. Crimptex, Inc. (1963) 145 NLRB 452.

In the present case, the work of the cook managers and their assistants may, to some degree, be routine. Nevertheless, events happen -which necessitate changes, and the record shows that it is the cook managers who are responsible to the District for deciding what to do and directing their assistants. I conclude that the cook managers, because of their authority to run the cafeterias on a day-to-day basis, are supervisors within the meaning of the EERA.

The majority notes that the sporadic supervision of non-unit personnel does not make an employee a supervisor within the meaning of the EERA. I agree that this, standing alone, is not enough to remove an employee from the unit, and would therefore affirm the hearing officer's finding that the fast food operator is not a supervisor. However, the fact that cafeteria cook managers have sole authority to hire and fire student assistants, combined with their authority and responsibility in directing cafeteria assistants who are unit employees, strengthens my conclusion that cafeteria cook managers should be considered supervisory employees.

Building and Grounds Supervisors

The two building and grounds supervisors have an effective role in hiring custodians. They have the independent authority to prepare and change work schedules. One building and grounds supervisor testified that he inspects the custodians' work and either corrects faults himself or directs an evening custodian to do so. When he learns of problems from the vice-principal or through his own observation, he uses independent judgment in deciding whether to direct a custodian to do the work, to correct the problem himself, or to refer it to the maintenance department. The other building and grounds supervisor doubted his authority to direct employees, but he had held this position only a short time. Both building and grounds supervisors testified that they would make daily assignments and direct the custodians' work during the summer.

As I stated in my dissent in Oakland, it is my policy to review thoroughly the facts in each case. In the present case, I think that there are sufficient facts to find that cafeteria cook managers and building and grounds supervisors exercise supervisory authority. In addition, I continue to adhere to the philosophy I articulated in Oakland. I believe that public policy considerations lead to the conclusion that independent, viable supervisory units are an important part of the EERA's statutory scheme and are necessary "for the continued peaceful and uninterrupted education process that taxpayers, educators, parents and school children have a right to expect."

Raymond J. Gonzalés, Member



STATE OF CALIFORNIA
 EDUCATIONAL EMPLOYMENT RELATIONS BOARD

In the Matter of:)
)
 WASHINGTON UNIFIED SCHOOL DISTRICT,) Case No. S-R-509
)
 Employer,) ~~PROPOSED~~ DECISION
 and)
) September 8, 1977
 CALIFORNIA SCHOOL EMPLOYEES' ASSOCIATION,)
)
 Employee Organization.)

Appearances: O. H. Fifi Zeff, Deputy Counsel, Sacramento County, for ' Washington Unified School District; Gerald E. Schwartz, Labor Relations Representative, for California School Employees Association, Chapter 168.

Proposed Decision by Carol Webster, Hearing Officer.

PROCEDURAL HISTORY

On April 20, 1976, the Board of Education of the Washington Unified School District (District) received a request for recognition as exclusive representative of a unit of classified employees¹ from the California School Employees Association, Riverview Chapter #168 (CSEA). The parties stipulated that the unit as requested was appropriate except for four positions included in the proposed unit which the District claimed were supervisory. The unit as stipulated to was accepted without inquiry. A hearing was held on Tuesday, March 1, 1977, before Michael Coder, hearing officer for the Educational Employment Relations Board (EERB)

¹The unit for which CSEA requested exclusive representation is composed of approximately 260 classified employees as reflected by the public records of the district. CSEA requested all classified employees be designated as appropriate including but not limited to Food Services, Clerical and Secretarial, Operations and Maintenance to include custodian/maintenance, grounds, instructional aides and transportation. The unit excludes noon duty supervisors, and those positions which are lawfully declared management, confidential and supervisory,

Fifteen employees are involved in the four disputed categories which include: ten cafeteria cook managers, one fast food operator, two snack bar operators and two supervisors of buildings and grounds. Each alleged supervisor oversees the work of one to four employees and in a few cases, up to eight students.

ISSUES

1. Whether a cafeteria cook manager, snack bar operator, fast food operator, and building and grounds supervisor are supervisory employees within the meaning of Section 3540.1(m) of the Educational Employment Relations Act.²

DISCUSSION AND CONCLUSIONS

The EERA defines supervisory employee as:

"...any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."³

In San Diego Unified School District, the Board interpreted the requirements of the supervisory definition by stating that:

"This section is written in the disjunctive; therefore, an employee need not possess all of the enumerated functions or duties to be a supervisor. The possession of any one of the 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."⁴

Each of the disputed positions will be considered separately with a view toward implementing the above interpretation.

²Government Code Section 3540 et seq, hereinafter referred to as EERA or the Act.

³Government Code Section 3540.1(m).

⁴EERB Decision No. 8, at page 9. (February 18, 1977)

1. Cafeteria Cook Manager

The District seeks to exclude the position of cafeteria cook manager from the unit claiming that it is supervisory. CSEA, asks that the position be included in the unit.

The cafeteria cook manager is responsible for the production of meals. She arrives at approximately 6 a.m. and begins the preparation for the day from a predetermined menu. She prepares the main course, does all of the baking and leaves only the preparation of the salad and setting up of dishes and utensils to her assistants. The several incumbents who testified indicated that in addition to the major preparation of food, they were required to remain after the assistants left to count the money and process certain paperwork.

None of the cafeteria cook managers who testified believed that she had the authority to perform those duties outlined in Government Code Section 3540.1(m). A line of questioning intended to show that the cafeteria cook manager had responsibility for activity within the statutory definition of supervisor, i.e., assigning and directing the work of others, did not produce evidence sufficient to support a finding that the cafeteria cook manager has such authority. The record shows that menus were proposed by supervisors and merely posted by the cafeteria cook managers. Even the evaluations prepared annually on the job performances of the assistants appear to be unrelated to job advancement or discharge. Although the witnesses believed that their recommendation of discharge would be considered by their superiors, this appeared to be mere speculation as there was no evidence that this is in fact the practice in the District.

In San Diego Unified School District, the EERB found the area cafeteria managers to be supervisors as defined by the Act. There each area manager was responsible for a cluster of food preparation kitchens and six to eight satellite serving kitchens.⁵ There were between 14 to 20 employees at each cluster kitchen and at each satellite serving facility. Evidence was presented that the area cafeteria managers directly supervised those employed at the satellite facilities; they had authority to assign overtime, adjust grievances and to assign and direct the work of employees in the several locations.

Clearly the authority possessed by incumbents in the analogous position in Sari Diego Unified School District is distinguishable from the cafeteria cook managers in the Washington Unified School District. Here the cafeteria cook managers have a maximum of two cafeteria assistants and sometimes a few students to more or less oversee. The cafeteria cook managers have no authority to adjust grievances or to prepare work schedules. The mere fact that they have sufficient seniority to command a higher salary and perform certain tasks in addition those of cooking and baking does not justify a classification of supervisor under the Act as interpreted by EERB precedent.

While there are similarities in the posting of work schedules in San Diego and this case, the critical difference is that in San Diego, at least initially the work schedules were prepared by the area cafeteria manager. In this case, the cafeteria cook managers do not have a role in selecting the menu or preparing the work schedules of the cafeteria assistants.

⁵Supra, at page 9.

Although Section 3540.1(m) is written in the disjunctive, an employee may be deemed a supervisor if it can be shown that he or she is charged with any one of the duties outlined herein. In the case at hand, there is insufficient evidence that the cafeteria cook manager possesses or effectively recommends any exercise of the authority provided in the section. No evidence shows they have had any role in the selection of assistants. In fact, one cafeteria cook manager testified that replacements were merely sent over to her without the slightest inquiry into her opinion on the matter. These facts lead to the conclusion that cafeteria cook managers are non-supervisory employees- and therefore should be placed in the unit.

2. Snack Bar Operator

The two snack bars in the District sell soda, sandwiches, and other fast food. The snack bar operators usually work alone, or with the part-time support of a cafeteria assistant who replaces inventory as it is sold. The snack bar operator is assisted by students who are paid to work during peak hours.

There was insufficient evidence that the two snack bar operators had any responsibility for directing the work of others, hiring, firing or using independent judgment while executing responsibilities of the job. The one snack bar operator who testified, Lorraine Hall, stated that she did not have an assistant and that she had only a "two hour helper." This helper "knows her duties" according to Ms. Hall and needs no supervision. No other evidence was proffered.

In Foothill-DeAnza Community College District⁶, the Board held that in the absence of sufficient evidence that an employee performs activities

⁶EERB Decision No. 10, March 1, 1977.

enumerated in Government Code Section 3540.1(m), an employee will not be found to be a supervisor within the meaning of the Act. The snack bar operator is found not to be a supervisor.

3. Fast Food Operator

There was no testimony offered at the hearing regarding the job requirements of the fast food operator. There was, on the other hand, a job description, prepared by the District which was introduced into evidence.⁷ The statute, however, emphasizes the actual duties of the employee rather than a summary listed in a job description. It is acknowledged that students do work along with the fast food operator, but there is no evidence whatsoever as to the type of relationship between the fast food operator and the students. For these reasons, the District has not succeeded in showing that the fast food operators are supervisory employees and therefore they shall be included in the unit.

4. Supervisor of Buildings and Grounds

The District seeks to exclude the supervisor of buildings and grounds as supervisory personnel. CSEA asks that the position be included in the unit.

⁷ Among the District exhibits was the following duty description for fast food operators:

Examples of Duties: Working from a prepared menu, plans, supervises, and performs work in preparation and serving of school meals; supervises and personally performs cleaning of kitchen, kitchen equipment, and eating utensils; opens and closes cafeteria; outlines daily duties and work schedules of kitchen staff; estimates needed quantities, and requisitions or purchases food stuffs and supplies; supervises and assists in arranging proper storage of food and supplies; assists in planning menus; works with custodial and maintenance staffs in maintenance and operation of the kitchen and equipment; keeps necessary inventory, costs and sales records; may be required to prepare daily cash receipts for deposit; makes oral and written reports.

The supervisor of buildings and grounds is the only member of the custodial staff who works a day schedule. He reports to the principal at James Marshall High School and to the vice principal at Washington High School. Whenever circumstances require the attention of a janitor during the day, the supervisor of buildings and grounds is notified, usually by his superior, and he normally does the work himself rather than leaving word for one of the evening personnel to complete the task.

The supervisor of buildings and grounds relays messages from his supervisor to the other members of the staff who conduct their major activities in the evening after the supervisor of buildings and grounds is off duty.

The supervisor of buildings and grounds observes the completed product of the custodians' work and fills out performance reports. As the Board held in Foothill-DeAnza Community College District, supra, while the supervisor of buildings and grounds did prepare evaluations, they were reviewed by the next level supervisor who made the ultimate decision. This was held insufficient authority and the Board wrote that in the absence of sufficient evidence that the custodian was actually performing those duties required of an employee for supervisory status as defined by the Act, the position will remain part of the unit.

In this case, a supervisor of buildings and grounds testified that he did not believe that he had the authority to change work schedules of another worker, even though there had been instances where he had ideas which he felt that, if implemented, would have produced a better job.

The evidence also indicated that his alleged subordinates did not see him as having supervisory authority. In one instance where the supervisor of buildings and grounds believed he had a better idea for scheduling the work load, his so-called subordinate told him that he did not have the authority to do so.

The authority of the supervisor must be known to those he or she supervises. In South Station Liquor Store, Inc. d/b/a/ Berenson Liquor Mart⁸,⁹ three assistant store managers were held not to be supervisors by the NLRB⁹ "even though [the] employer's president testified that they possessed supervisory authority since (1) there is insufficient evidence that assistant managers or employees with whom they worked were aware of their alleged supervisory authority; and (2) there is no evidence that assistant managers ever exercised such authority."

We adopt this rule and find that in order for the employee to be classified as a supervisor, he or she must actually perform or effectively recommend the enumerated actions. In this case, it does not appear that such duties were actually performed.

In San Diego Unified School District, supra, the EERB held that "we do not view physical presence during the entire work shift as a condition precedent to the finding of supervisory status."¹⁰ There, the building services supervisor left messages for evening personnel which effectively directed their work schedules. In the case at hand, however, the evidence indicates that after the initial training period, with the exception of the routine relay of messages from the principal or vice principal, the supervisor of buildings and grounds had little or nothing to do with the direction of other employees.

In conclusion, the evidence does not show sufficient cause for designating the supervisor of building and grounds to be a "supervisor" within the meaning of the EERA, and therefore the position shall be included in the unit.

⁸ 223 NLRB No. 159 (1976), 92 LRRM 1083 at 1084.

⁹ In Firefighters Union v. City of Vallejo, the California Supreme Court held that in the interpretation of language in a California statute, cognizance should be taken of the decisions of the National Labor Relations Board interpreting identical or similar language in the Labor Management Relations Act. 29 USC 152(11). The Labor Management Relations Act amended the National Labor Relations Act in 1947.

¹⁰ EERB Decision No. 8, at page 12.

PROPOSED ORDER

It is the Proposed Decision that:

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

All classified employees including cafeteria cook manager, snack bar operator, fast food operator, building and grounds supervisor excluding noon duty supervisors and those positions which are lawfully declared management and confidential.

2. The following job positions are not "supervisory" within the meaning of Government Code Section 3540.1(m) and shall be included within the above unit:

Cafeteria Cook Manager

Snack Bar Operator

Fast Food Operator

Building and Grounds Supervisor

The parties have seven' (7) calendar days from receipt of this Proposed Decision in which to file exceptions in accordance with Section 33380 of the Rules and Regulations. If no party files timely exceptions, this Proposed Decision will become a final order on September 20, 1977, and a Notice of Decision will issue from the Board.

The employee organization shall have the 10 workday posting period of the Notice of Decision in which to demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if the employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Dated: September 8, 1977

Carol Webster
Hearing Officer