

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FOOTHILL-DeANZA COMMUNITY COLLEGE DISTRICT,)
Employer,) Case Nos. SF-R-20
and) SF-R-79
SERVICE EMPLOYEES INTERNATIONAL UNION,) PERB Decision No. 79
LOCAL 715,)
Employee Organization,) December 18, 1978
and)
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)
Employee Organization.)

Appearances: Donald H. Ewing, Director of Educational Services, for Foothill-DeAnza Community College District; Robert Bezemek, Attorney (Van Bourg, Allen, Weinberg & Rogers) for Service Employees International Union, Local 715; Robert Boileau, Field Representative, for California School Employees Association.

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

DECISION

In the initial Foothill-DeAnza Community College District case,¹ the Educational Employment Relations Board² determined, despite the contentions of Service Employees International Union, Local 715 (hereafter SEIU), that the

¹(3/1/77) EERB Decision No. 10.

²On January 1, 1978, the Educational Employment Relations Board became the Public Employment Relations Board (hereafter PERB or Board). Government Code section 3541, as amended by Statutes 1977, chapter 1159, section 7.

positions of custodial foreman, construction foreman, and grounds foreman were not supervisory and were specifically included in a skilled crafts and trades unit. In this case, SEIU is attempting to bring the same issue before the Board for a second time. At the representation election in that unit, SEIU challenged the ballots of four employees who occupy those positions³ on the grounds that the positions were, in fact, supervisory at the time of the election, notwithstanding the Board's decision.⁴ After a hearing on the challenged ballots in which testimony was taken on the supervisory issue, the hearing officer concluded that SEIU could not relitigate the status of these positions. SEIU has excepted to this decision. The Board affirms the hearing officer's conclusion and holds that employee organizations cannot use ballot challenges to relitigate issues specifically decided in a pre-election unit determination proceeding.

To allow relitigation in a case of this kind would permit parties to delay certifications unreasonably, thereby depriving employees of representation for meeting and negotiating. Parties have the opportunity to litigate fully all issues involving the status and unit placement of classifications at a unit determination hearing before the election. This

³The job titles of these positions have been changed to eliminate reference to gender. The new job titles are head custodian, head carpenter, and head gardener.

⁴The election was held on May 20, 1977. The results were: SEIU - 43, CSEA - 41, No Representation - 0, challenged ballots - 6. The challenged ballots are determinative of the outcome, so no exclusive representative has been certified.

opportunity is sufficient; they do not have the right to litigate the same representation issues again by challenging ballots. To allow this would make a mockery of the unit determination hearing since no issue would be finally resolved until after the election.

SEIU argues that the supervisory issue was not fully litigated at the unit determination hearing, noting that the Board acknowledged in its decision in that case that the record was scant. This argument misses the point. An issue is fully litigated, not when every relevant fact is revealed, but when every party has had an opportunity to present its case. SEIU was a party to the unit determination hearing and could have presented more evidence on the supervisory status of these positions. It cannot now take advantage of the lack of evidence at that hearing to delay certification after an election has been held.

SEIU also appears to argue that since the hearing officer allowed a new record on the supervisory issue to be made, the Board should not disregard that record in making its decision. However, the Board's decision on the legal question of whether the status of these positions can be relitigated makes the factual record irrelevant. In future cases, no record will be made since PERB agents will know that challenges to ballots of employees whose positions were specifically included in the unit in unit determination proceedings should be dismissed without an additional hearing. However, a hearing might be appropriate if, for example, the challenging party can show

that crucial evidence exists which was unavailable at the first hearing or that the duties of the classification have been dramatically altered.

SEIU also wishes to reopen the record in this case to introduce evidence taken at an unfair practice hearing on the supervisory status of a particular employee who cast one of the challenged ballots. The Board denies this request. However, the Board notes that a decision in a representation case, which resolves the supervisory status of particular classifications, is not binding in an unfair practice case which may involve the supervisory status of specific individuals. It is possible to show that an individual exercises greater authority than his/her classification would indicate.

Since no party has filed exceptions to the hearing officer's findings as to two positions which were not at issue in the original unit determination hearing, the Board affirms his decision that the head electrician is a supervisory employee and the construction inspector is properly placed in the residual unit rather than the skilled crafts and trades unit.

ORDER

Based on the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that the Regional Director open the ballots of Harold Hayes,

George Kammersgard, Anton Mlasko, and John Wiles, and certify an exclusive representative for the skilled crafts and trades unit of the Foothill-DeAnza Community College District or hold a runoff election as appropriate.

By: Raymond J. Gonzalez, Member Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

FOOTHILL-DeANZA COMMUNITY
COLLEGE DISTRICT,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 715,

Employee Organization,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION,

Employee Organization.

Case Nos. SF-R-20
SF-R-79

PROPOSED DECISION ON
CHALLENGED BALLOTS

(12/2/77)

Appearances: Donald H. Ewing, Director of Educational Services, for Foothill-DeAnza Community College District; Robert Boileau, Field Representative, for California School Employees Association; Robert Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 715.

Before Franklin Silver, Hearing Officer.

PROCEDURAL HISTORY AND ISSUES

In this case it is necessary to resolve challenges to the ballots of six classified employees of the Foothill-DeAnza Community College District (District). The ballots were challenged during a representation election on May 20, 1977 for a skilled crafts and trades unit which had been determined to be appropriate by the Educational Employment Relations

Board (EERB) in its Decision No. 10 (March 1, 1977).¹

In that decision, the EERB rejected the contention of the Service Employees International Union, Local 715, AFL-CIO, (SEIU):, that employees in the positions of custodial foreman, construction foreman, and grounds foreman were supervisory, and those positions were specifically included in the skilled crafts and trades unit.²

Four of the employees who cast challenged ballots occupy positions determined in the original unit determination proceeding not to be supervisory. These four employees were challenged by SEIU on the grounds that they were supervisors at the time of the election notwithstanding the EERB decision. California School Employees Association (CSEA) and the District contend that the EERB decision controls and that the challenges should be disallowed.

Two of the employees whose ballots were challenged occupy positions which either had not been created or were not in issue at the time of the original unit determination hearing. Both of these employees - the head electrician and the construction inspector - were challenged by the EERB agent conducting the election because their names did

¹The results of the elections were: SEIU - 43, CSEA - 41, No Representation - 0, challenged ballots - 6. Because the challenged ballots are determinative of the outcome, no exclusive representative has been certified.

²The job titles for these positions have been changed to eliminate reference to gender. The new job titles are head custodian, head carpenter, and head gardener.

not appear on the voter, eligibility list. SEIU contends that the head electrician is a supervisor, while CSEA and the District contend that he occupies a parallel position to the positions previously determined by the EERB to be non-supervisory. SEIU contends that the construction inspector properly belongs in the second unit determined by the EERB in its decision - a unit defined as including all classified employees not included in the skilled crafts and trades unit. CSEA contends that the construction inspector belongs in the skilled crafts and trades unit, and the District's position is unclear.

Thus, the issues are:

1. May the supervisory status of the head custodian, head carpenter, and head gardeners be relitigated in a hearing on challenged ballots, and, if so, were those positions supervisory on the day of the election?
2. Is the position of head electrician supervisory?
3. Should the position of construction inspector be included in the skilled crafts and trades unit?

A. The positions previously determined not to be supervisory.

SEIU takes alternative positions with respect to whether it is entitled to a new ruling on the three positions previously determined not to be supervisory. First, it argues that these employees were given additional supervisory responsibilities during the period between the unit determination hearing on August 26, 1976 and the election on May 20, 1977.

Second, it argues that even if there were no additional responsibilities given to these employees, if they were in fact supervisors on the day of the election they must be excluded from the unit. In support of the second argument SEIU notes that EERB Decision No. 10 states that there was little evidence introduced at the unit determination hearing upon which to determine whether the positions were supervisory, and it is therefore argued that it is proper to make a new determination on the more complete record now available.³ It is concluded that SEIU may not through challenged ballots relitigate the supervisory status of the four disputed positions under either of its theories. It is quite apparent that to allow relitigation in a case like this would create a means for parties to delay certifications and impede meeting and negotiating. SEIU had a full opportunity to present evidence at the unit determination hearing and it cannot now claim that the EERB decision was made on the basis of insufficient evidence. Furthermore, the record of this case shows that SEIU made no effort to bring any evidence of changed circumstances to the attention

³SEIU was allowed to make a record at the hearing on challenged ballots on the job duties of these three positions. Because of the conclusions reached herein it is not necessary to make findings of fact based upon that evidence.

of the EERB prior to the election. In such circumstances, it is inappropriate to allow a party to relitigate unit issues by means of challenged ballots. Rockwell Mfg. Co., 122 NLRB 798, 43 LRRM 1202 (1958); Stokely-Bordo, 121 NLRB 937, 42 LRRM 1511 (1958). Cf. NLRB v. Howard Johnson Co., 398 P.2d 435, 68 LRRM 2 895 (3d Cir., 1968).

SEIU argues that there is federal precedent indicating that supervisory issues determined in a prior representation case may be relitigated in an unfair labor practice proceeding. Eidal International Corp., 224 NLRB No. 128, 93 LRRM 1230 (1976); Clothing Workers v. NLRB, 365 P.2d 898, 62 LRRM 2431 (D.C.Cir., 1966). These cases, however, recognize the normal rule which precludes relitigation of an issue determined in a representation hearing in a "related" unfair labor practice hearing. Thus, a party may not make a new record on unit issues when an employer refuses to bargain in order to challenge the validity of a prior unit determination. As the cited cases establish, however, the NLRB will at times reconsider unit issues in connection with a totally unrelated unfair labor practice charge, such as unlawful interference with protected employee rights.

Since the issue in the present case, however, is the validity of the original unit determination, the cases cited by SEIU do not support its position.

Since the positions previously determined to be supervisory may not be relitigated, the ballots of the four employees occupying those positions - Anton Mlasko,⁴ George Kammergard, Harold Hayes, and John Wiles - should be opened and counted.

B. The head electrician.

In the fall of 1976 the District created the position of head electrician and hired Derek Werrett to fill the position. Mr. Werrett reports to the district maintenance supervisor, George Parkhurst, who in turn reports to the manager of plant services, Mr. Galipaux. The head electrician position was created in part to relieve Mr. Parkhurst of many of his responsibilities which resulted from his being the only person with a sufficient technical background to fully evaluate the various electrical systems in district facilities for purposes of preventive maintenance and to respond to frequent emergency situations. Because

⁴ There was testimony that Anton Mlasko had retired shortly before the hearing on challenged ballots. It is not contended that Mr. Mlasko was not employed on the day of the election, and therefore his ballot is valid.

emergency situations often occur outside of regular working hours and it was contemplated that response to these situations would be a major part of the job duties of the head electrician, the position was created as being exempt from receiving overtime and the salary was adjusted to compensate for the irregular hours. There are no exempt positions in the skilled trades and crafts unit found by the EERB.

The District employs six electricians. Prior to the time that Mr. Werrett was hired as head electrician, all electrical work was performed under Mr. Parkhurst's supervision. At that time, the leadman, Fred Ferris, cleared such matters as overtime, personal leaves, and job assignments through Mr. Parkhurst. Because of those responsibilities, Mr. Ferris did not spend all of his time working with tools. After Mr. Werrett was hired, Mr. Ferris went back to working with tools full-time, and Mr. Parkhurst was relieved of the responsibility for supervising the day-to-day operations of the electrical department. Werrett now establishes the priorities in terms of the jobs that need to be done and then leaves it to Ferris to make individual job assignments among members of the crew. Werrett does not work with the crew, and the one electrician who testified, James Ayers, has never seen Werrett work with tools. Werrett, however, does check the job site at least once a day to see how the work is coming along.

Mr. Werrett has a desk in the electrical shop. He makes first level evaluations of the electricians, and the evaluations are then approved at three successively higher levels of management.

The job description for the head electrician states that he has the responsibility under the general direction of the maintenance supervisor "to plan, organize, and supervise all related electrical work in the District both maintenance and construction." In addition he "(a)ssigns approved work orders for construction and maintenance to appropriate personnel and inspects completed work." Although job descriptions alone have not been considered by the EERB as sufficient to establish supervisory status,⁵ in this case the description supports the testimony at the hearing with regard to Mr. Werrett's supervisory responsibilities.

On the basis of the foregoing evidence, it is concluded that the head electrician exercises independent judgment in the assignment of work and the day-to-day supervision of the electrical department. Except for his response to emergency situations, he does not work with tools. He plans and assigns jobs related to preventive maintenance, and his assignments are carried out through a leadman in charge of the crew. For these reasons, Derek Werrett is a supervisor, and his ballot should be disallowed.

⁵Foothill-DeAnza Community College District, supra, EERB Decision No. 10 at page 6; San Rafael City Schools, EERB Decision No. 32 (October 3, 1977) at page 7.

C. The construction inspector.

Leo Holm was hired as construction inspector in August, 1976. The primary function of that position is to satisfy the California Office of Architecture and Construction (OAC) that the requirements of the Field Act have been met in construction projects undertaken by the District. Although he reports to the staff architect-planner, the inspector works primarily with consulting architects on construction projects which are contracted out. There were three such contracts being performed at the time of the hearing. The inspector has the responsibility of determining whether the architects' specifications are being met. In this connection, he makes daily inspections and reports on the progress being made. In addition, he is responsible to the OAC for testing concrete which is poured and for making monthly reports for purposes of compliance with the Field Act.

Small projects which do not require an outside contract are performed by the District's own building trades employees, and inspection is performed by the manager of plant services, Mr. Galipaux. Since the construction inspector has no responsibility with respect to these internal projects, he has no work-related contact with employees in the skilled crafts and trades unit. The construction inspector reports to the architect-planner who in turn reports to the director of business services.

The District's building trades employees are responsible to Mr. Galipaux who in turn is also responsible to the director of business services. The staff architect-planner is considered to be a member of the District's "residual" unit, which includes all employees of the District who are not part of the skilled crafts and trades unit and are not management, confidential, or supervisory employees.⁶

To perform his job, the construction inspector must be approved by the OAC and must have the necessary technical competence. He is salaried and is exempt from receiving overtime. In general, exempt positions in the District fall into the "special services" category and include management positions, programmers, executive secretaries, the architect-planner, and the construction inspector.

From the above, it is concluded that the construction inspector has no work-related contacts with members of the skilled crafts and trades unit and has similar working conditions to certain employees within the "residual" unit. For these reasons, he more properly belongs in the "residual" unit, and his ballot should be disallowed.

⁶The "residual" unit was formally designated by the EERB in its unit determination decision as "unit B."

PROPOSED DECISION

It is the proposed decision that:

1. The non-supervisory status of the head custodian, the head carpenter, and the head gardeners was previously determined by the EERB and may not be re-litigated by means of challenged ballots.

2. The head electrician is a supervisor within the meaning of Government Code Section 3540.1Cm).

3. The construction inspector is a member of unit B as previously determined by the EERB.

4. The following employees casting challenged ballots are employees within the skilled crafts and trades unit eligible to vote and their ballots shall be counted: Anton Mlasko, George Kammersgard, Harold Hayes, and John Wiles.

The parties have seven (.7) calendar days from receipt of this proposed decision in which to file exceptions in accordance with EERB Regulation 33380. If no party files timely exceptions, this proposed decision will become final on December 16, 1977, and a Notice of Decision will issue from the Board. At that time the Regional Director is further instructed to open each of the challenged ballots consistent with this decision, and to certify an exclusive representative of the employees in the skilled crafts and trades unit or to conduct a runoff election as appropriate.

Dated: December 2, 1977


Franklin Silver, Hearing Officer