

The Board is in substantial agreement with the hearing officer's findings of fact and conclusions of law. The Board is also in substantial agreement with the decision as a whole, except insofar as the hearing officer proposes the manner in which Dinuba could assign work to its clerical staff, and how Dinuba can achieve the goal of keeping its principals involved in negotiations without revealing confidential negotiating materials to their secretaries. The scope of the Board's jurisdiction does not extend to suggesting or directing the manner in which employers and employee organizations maintain the confidentiality of negotiations. The formulation of such strategies is within the sole discretion of the employers and the organizations, and the Board expressly disavows any discussion of the hearing officer relating to these matters.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, except as hereinabove noted, it is hereby ORDERED that the five school secretaries are not confidential employees within the meaning of Government Code section 3540.1(b) and are therefore properly included with the classified employees' bargaining unit.

By: Harry Gluck, Chairperson

Raymond J. Gonzales, Member

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

DINUBA PUBLIC SCHOOLS,)	
)	
Employers,)	Representation
)	
and)	Case No. S-R-171
)	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)	
DINUBA CHAPTER NO. 152,)	
)	<u>PROPOSED DECISION</u>
Employee Organization.)	(6/13/78)

Appearances: James C. Romo, Attorney (Paterson and Taggart), for the Dinuba Public Schools; Richard Sanchez, Field Representative, and Forrest D. Fauchier, Field Director, for the California School Employees Association, Dinuba Chapter No. 152.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This unit clarification case raises the issue of whether five school secretaries are confidential employees.

In this case, the parties by mutual agreement already have excluded from the negotiating unit the secretary to the superintendent, the secretary to the assistant superintendent, and the secretary to the business manager and the secretary who takes minutes during the negotiating sessions. The employer desires also to exclude five secretaries to the building principals. The employee organization opposes this plan.

Because the parties were unable to agree on the proposed exclusion of the five secretaries, they submitted the dispute to the Public Employment Relations Board.¹ A hearing was conducted in this matter in Dinuba on January 5, 1978.

FINDINGS OF FACT

There are two school districts involved in this case: the Dinuba Elementary School District and the Dinuba Joint Union High School District.² The Districts are common administration school districts which have two separate boards of education but share the same superintendent and the same assistant superintendent. Each district pays one-half of the salary of the two common administrators. At the start of the hearing, the Districts and the California School Employees Association, Dinuba Chapter No. 152,³ entered into the following stipulation:

That the Dinuba Joint Union High School District and the Dinuba Elementary School District are employers within the meaning of Government Code Section 3540.1(k)⁴ and

¹The hearing was conducted under the authority of 8 California Administrative Code 33260, as a petition for a change in unit determination.

²Hereafter, the Dinuba Elementary School District and the Dinuba Joint Union High School District will be referred to as the "Districts."

³Hereafter, the California School Employees Association, Dinuba Chapter No. 152, will be referred to as "CSEA."

⁴Government Code section 3540.1(k) provides as follows:

"Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

that for the purpose of negotiations the Boards of Education for each District combine to negotiate with the classified employees of the Districts as a joint employer and that the classified employees desire to continue to negotiate with the Districts as a joint employer and therefore join in this stipulation.⁵

The Districts recognized CSEA as the exclusive representative of a negotiating unit of all regular classified employees, with various named exclusions, at a joint board meeting on May 11, 1977.⁶

The Districts are located in the central portion of the San Joaquin Valley. They cover a geographical area of between 25 and 30 square miles. In the 1976-77 school year, the elementary district had an average daily attendance of about 2,020 students and the high school district had an average daily attendance of about 1,130 students. Collectively, the

⁵Because of the complicating factor of the two employers, the hearing was closed with the "understanding [that] the record of today's proceedings is concluded subject to a possible reopening of the record later." The parties were provided with this notice that the hearing officer would reopen the case if it became necessary to take further evidence on the status of the two employers.

⁶The recognition agreement, signed by the parties on that same date, provides in part as follows:

It is also agreed that the Chapter 152 will request the Employer Employee Relations Board to make a determination of the appropriateness of building principals secretaries as confidential employees. Both parties to this agreement will uphold any decision made by the Employer Employee Relations Board.

In accord with this agreement, CSEA filed a request with the Sacramento Regional Director on June 14, 1977, asking that a hearing be held to determine the status of the five secretaries.

Districts employed 152 certificated and 157 classified employees to operate five elementary schools, a high school and a continuation high school.

In their claim that the five secretaries are confidential employees, the Districts rely heavily on the relationship the secretaries have to members of the Districts' management and negotiating teams.

The management team is a 20-person body which meets bi-weekly to discuss various matters involving the operation of the Districts. Topics of discussion range from the advisability of hiring a teacher's aide at a particular school to the Districts' budgets. One subject regularly discussed is negotiations. At management team meetings, various administrators give reports about activities which they supervise. It also is common that the management team members engage in a kind of roundtable discussion about any matter affecting the Districts and that they discuss various policies affecting the operation of the Districts.

The members of the management team are: the superintendent and assistant superintendent, the high school principal and vice principal, the principal of the continuation high school, the high school dean of students, three elementary school principals, the junior high school principal and vice principal, the business manager, the director of finance, the director of federal and special funded projects, the supervisor of building and grounds and the supervisor of transportation, the director of food services and three high school counselors.

The management team is used as a source of ideas for management negotiations proposals and as a sounding board for advice about employee organization proposals. Principals, for example, have been asked to review the existing contract between the Districts and the Dinuba Teachers Association and offer suggestions about changes. Principals have responded with suggestions both in writing and orally at management team meetings. When such suggestions are offered, the 20 members of the team discuss the proposals, deciding which ones have sufficient merit to be pursued. The proposals found meritorious are passed onto the boards of education which then decide whether or not to instruct the negotiating team to pursue them.

Sometimes, the Districts' negotiator, David Creighton, has attended the meetings of the management team. On those occasions he has talked about "possible strategies" for negotiations, although he has never been so explicit with the management team members as to give them a written copy of this strategy. While Mr. Creighton gets information from the management team which he uses to develop proposals for the Districts, he receives the negotiating parameters directly from the boards of education.

The assistant superintendent, Clinton Cates, said some of the information discussed at the management team meetings is considered by the Districts to be confidential information while other information is not. He said all matters relating to negotiations are considered confidential. After each

meeting of the management team, Mr. Cates prepares a set of minutes about occurrences at that meeting. Each principal and each member of the team receives a copy of those minutes, if possible by the day after the meeting. The minutes are not posted for general information. Other written materials which have been sent to principals and members of the management team include such documents as a letter from Mr. Cates encouraging all principals to keep careful records about faculty members who do not attend faculty meetings or who arrive late.

The Districts have two negotiating teams, one to deal with certificated employees and the other to deal with classified employees. One person, David Creighton, belongs to both teams. He is a private consultant hired by the Districts to assume the principal responsibility for negotiations.

In addition to Mr. Creighton, the members of the 1977 certificated negotiating team were the dean of students, the federal projects director and the principal of an elementary school who substituted for the federal projects director during two months when she was absent. When the federal projects director was present, she took minutes of the negotiating sessions. During the two months she was absent, her replacement -- elementary school principal Wendell Bayless -- took the minutes. In addition to Mr. Creighton, the members of the 1977 classified negotiating team were the director of maintenance and operations and a secretary who took the minutes. The secretary who took the minutes has been excluded from the classified unit by agreement of the parties.

The certificated negotiating team held about 22 meetings with employees during 1977. Mr. Bayless attended approximately eight to ten of those sessions, all during the summer. At the time Mr. Bayless served on the negotiating team, his secretary Bertha Terry was away on her summer vacation.

Although Mr. Bayless was the only principal who served on a negotiating team in 1977, the District produced evidence to show that at least one other principal had a significant input to the negotiating process. The District also produced evidence to show that all principals have access to information which is considered confidential, although it does not necessarily relate to meeting and negotiating.

The Districts' principals are the chief administrators in each school. A principal is responsible for everything that occurs in a school. Principals evaluate all certificated employees and provide information for the evaluation of those classified employees who do not work directly under the supervision of the principals. They also are responsible for curriculum development in their schools.

Aside from Mr. Bayless, principals have become involved in the negotiating process only through recommendations to the negotiators and the boards of education. However, the recommendations of Dinuba High School Principal Bill Asher had a considerable impact on negotiations with certificated employees in 1977. By a direct appeal to the boards of education, Mr. Asher got the boards to rescind an understanding

Mr. Creighton had reached with certificated employees about class size. Using the public records of the Districts, Mr. Asher prepared an analysis of class size in the spring of 1977. The analysis shows the teaching loads of various teachers and departments in the high school. This information was typed for Mr. Asher by his secretary, Syndyl Mullen. Mr. Asher presented it to the boards of education in an executive session.

Principals also handle grievances at the first level. For grievances involving teachers, the aggrieved person is required to present the grievance in writing to his/her principal or designee within ten days after the occurrence giving rise to the grievance. The principal is required to reply in writing within ten days. If the grievant is not satisfied with the principal's response, he/she can next appeal to the superintendent or designee. For classified employees, the process is similar except that the only classified employees who would appeal to the principal are instructional aides and secretaries who work within a school. If a classified employee is dissatisfied with a principal's resolution of a grievance, that employee must appeal to the business manager and then the superintendent.

School secretaries would type whatever material is prepared for the principal's participation in the grievance. Exactly how this process works in practice is unclear because Mr. Asher, the only principal to testify, has never had a grievance from either classified or certificated employees.

The five secretaries whose status is at issue in this case all work for school principals. According to the job description for secretary, which was substantiated by testimony at the hearing, a school secretary:

Types correspondence, reports, and stencils from various rough draft materials; on referral by supervisor or after personally screening correspondence, answers routine requests for information by enclosing materials or sending form letters; inserts and extracts materials from subject matter files, classifies material by subject matter and prepares new file folders as needed; assists students and faculty or the public by referring them to sources of information or from personal knowledge; gives out standard forms and explains the means of completion; as required, receives dictation involving technical terminology [sic] of case reports, records and correspondence, and transcribes; answers requests for factual information by consulting various available sources or personal knowledge; maintains informational or operational records; may collect cafeteria money; may administer minor first aid in absence of school nurse; screens reports for completeness and accuracy; may assist in the compilation of routine reports from a number of established sources; may supervise the work of student assistants. Personnel serving in this class who are working directly for the building Principal, Vice-Principal or Dean may be required to perform clerical tasks relating to employer supervision, evaluation or other items of a nature requiring access to information regarding employer-employee relations.

In essence, a school secretary does whatever has to be done, from bandaging a student's cut finger to speaking for the principal when the principal is absent. Two of the five secretaries testified during the hearing. Mrs. Terry, secretary to negotiating committee member Wendell Bayless, testified that

she had very little to do with preparation or filing of any of his negotiating committee materials. She said Mr. Bayless does his own typing and he personally prepared all his negotiating materials. She said he does not even ask her to type finished copies from his rough drafts. Likewise, she said, Mr. Bayless prepares evaluations of certificated employees, doing the typing himself. Although she does not type either negotiating materials or evaluations, Mrs. Terry said the materials are kept in a filing cabinet in the principal's office and she has access to that filing cabinet. She said she files the evaluations and she has access to the filing cabinet in which Mr. Bayless keeps his negotiating materials. She said she has seen handwritten notes Mr. Bayless kept during negotiations. Mrs. Terry testified that Mr. Bayless "probably" had discussed negotiations with her a few times.

Mrs. Mullen, secretary to Mr. Asher, testified that she has typed teacher evaluations for him and various letters and documents relating to teacher evaluations. The only negotiating material she has typed is the class size report which Mr. Asher prepared for the boards of education.

The Districts contend that the five secretaries are confidential employees because school secretaries have access to confidential materials. In general, the evidence shows that the types of allegedly confidential materials to which school secretaries have access are: Evaluations of school employees, personnel records, student records including psychological reports, and minutes from management team meetings.

Mrs. Terry, secretary to negotiating committee member Mr. Bayless, also had access to the Districts' negotiating minutes. The parties entered the following stipulation about the negotiating minutes:

That the District[s] conducted negotiations with certificated employees and that these negotiations were not open to the public but were just open to the members of the two negotiating committees; that the District[s] kept minutes of those negotiating sessions; that the minutes were intended to be an accurate reflection and summary of what occurred at those negotiating sessions; that the minutes . . . were circulated to all members of the negotiating team; that some copies of the minutes were circulated also to all certificated management employees; that Mr. Bayless who is the principal for whom Mrs. Terry works was a member of that negotiating committee; that he received all copies of those minutes, approximately 20 in number; and that Mrs. Terry as part of her responsibility kept a file of those minutes and had access to them.

There was no evidence that any principal's secretary other than Mrs. Terry had access to negotiations' minutes.

The Districts have a strike plan about which both Mrs. Mullen and Mrs. Terry have knowledge. Mrs. Mullen testified that she knew the plan was kept in Mr. Asher's desk, in a place she described as "his personal . . . area for keeping things." She learned of the strike plan when Mr. Asher told her about it. She said it did not come across her desk at any time. She testified she had never seen the plan, although she knew where it was kept. Mrs. Terry said Mr. Bayless also has a copy of the strike plan but she does not know where it is located.

Minutes of the management team meetings are sent to the Districts' principals and in the normal course of events would be opened by the secretaries at most schools. There was evidence that at least one secretary knew in advance the parameters which the boards of education had given the negotiator as the "bottom line" for salaries. Mr. Creighton said the secretary had been given that information by a board member. He said she was a social friend of the board member and the information was not given to her in connection with her job. That same secretary and possibly one other secretary also were told the salary negotiating parameters by their building principal who provided the information so they would be kept abreast of what he was involved with.

On rare occasion, both Mr. Asher and Mr. Bayless have received materials marked "confidential." There appears to be no uniform policy in the Districts about how principals' secretaries should treat such information. Mrs. Mullen said when she gets an envelope marked "confidential" she opens it in front of Mr. Asher and hands him the envelope. She said he sometimes tells her what was in the envelope after he examines it. Mrs. Terry said she opens envelopes marked "confidential" and Mr. Bayless has never instructed her to the contrary.

Although only two of the school secretaries testified, the uncontradicted evidence is that all five secretaries have duties like the two who testified.

LEGAL ISSUES

Are the five school secretaries confidential employees as that term is defined in Government Code section 3540.1(b)?

CONCLUSIONS OF LAW

Under the legislative scheme of the Educational Employment Relations Act⁷ an employer is allowed to have confidential employees who are excluded from all negotiating units.⁸ As defined in Government Code section 3540.1(b):

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

Persons found to hold "confidential" jobs are not employees within the meaning of the EERA.⁹

⁷Government Code section 3540 et seq.

⁸Government Code section 3543.4 reads as follows:

No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employee, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position.

⁹Government Code section 3540.1(j) provides as follows:

"Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

The Public Employment Relations Board has considered the meaning of these sections in four decisions. In Sierra Sands Unified School District (10/14/76) EERB Decision No. 2, the board wrote:

The assumption is that the employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purposes of employer-employee relations. It is further assumed that this nucleus of individuals would be required to keep confidential those matters that if made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture.

The Board restated this analysis and supplemented it in Fremont Unified School District (12/16/76) EERB Decision No. 6 with the following observation:

"Employer-employee relations" includes, at the least, employer-employee negotiations and the processing of employee grievances.

In Fremont the Board concluded that "the employer's right to the undivided loyalty of a nucleus of staff designated as 'confidential' outweighs the inherent denial of representation rights of those employees designated as 'confidential.'"

In Richland Elementary School District (9/12/77) EERB Decision No. 26, the Board adopted a hearing officer's decision in which three secretaries to principals were excluded from the unit as being confidential. In that case the hearing officer relied heavily on the principals' membership on the District management team where they participated in discussions about negotiating proposals. The secretaries to the principals

on the management team typed notes and other documents relating to collective negotiations.

Finally, in San Rafael City High School District (10/3/77) EERB Decision No. 32, the Board excluded three secretaries as confidential. The secretary to the assistant superintendent was excluded because she was responsible for preparing financial projections used during negotiations. The secretary to the director of instruction was excluded because in the course of typing district position papers she has access to information about the district positions in negotiations. An intermediate clerk-typist was excluded because she kept notes of all negotiating sessions and typed and assembled proposals and counter-proposals for the district.

Relying on these decisions, on various hearing officer decisions and on decisions from several other states, the Districts in the present case argue that the five school secretaries are confidential employees. The Districts argue that principals have a significant role in grievance processing and, through membership on the management team, an important voice in negotiations. Because school secretaries work closely for principals, the Districts continue, they have typed and filed negotiations materials and have access to evaluations and other confidential information.

CSEA argues that the secretaries do not have access to negotiations material. While the school secretaries do have access to material from the management team, this same information goes to other management employees whose secretaries

the Districts are not seeking to exclude as confidential. For this reason, CSEA argues, the Districts' position is inconsistent.

Initially, it is important to note that it is a secretary's work assignment which is the crucial element in determining whether that secretary holds a "confidential" position. While PERB decisions carefully analyze the duties of the secretary's superior, the superior's work is important only insofar as it causes the secretary to handle confidential materials. It clearly is possible for any secretary to be placed within the negotiating unit, regardless of who the secretary works for, if that secretary does not have access to confidential materials. It is important, therefore, to analyze the nature of the materials which school secretaries receive.

In the present case, all secretaries to principals have access to employee evaluations, employee personnel records and student records. However, none of these materials relate to the negotiating process and all of them must be kept confidential for reasons apart from negotiations. Evaluations and personnel records must be kept private as a matter of good personnel practice and their disclosure might well subject a school district to legal liability for invasion of privacy. Student records must be kept confidential under state law.¹⁰

Moreover, neither employee records nor student records are "matters that if made public prematurely might jeopardize

¹⁰See Education Code sec. 49073 et seq.

the employer's ability to negotiate with employees from an equal posture." Under state law, school districts cannot prevent employees from seeing evaluations and most other matters in their personnel files.¹¹ There is little in personnel files which can be protected from premature disclosure should the employees involved desire to disclose it. As for student records, they simply do not contain information involved in the employer-employee relationship.

The most critical information possessed by any of the Districts' secretaries was the bottom line negotiating parameters for 1977 salary increases. Disclosure of this information would have had a definite adverse effect on the Districts' negotiating stance. However, the two secretaries who were told this information did not receive it "in the regular course" of their duties. One was told by a board of education member who was a social friend. In addition, that secretary and one other were told by a principal who just wanted to keep them abreast of what he was doing. The secretaries, therefore, did not have a need to know the information from either source and they got the information in a context outside their normal working requirements.

In their contention that school secretaries are confidential employees, the Districts rely on two other types of materials to which the secretaries have access -- grievance documents and minutes from management team meetings. The

¹¹See Education Code sec. 44031.

school principals are the first level of appeal in grievances for all certificated employees and some classified employees. So far as can be determined, the secretaries would have access to the grievant's original statement of the grievance and the principal's response. Because the grievants themselves receive both of those documents, it is hard to imagine how they are confidential.

The management team minutes present a harder problem. It is undisputed that the 20 members of the management team discuss negotiating strategy and review negotiating proposals of the Districts and employee organizations. The minutes reflect these discussions and therefore would provide a source of information about the plans of the Districts. Premature disclosure of this information would have an adverse effect on the Districts' negotiating posture. Without a doubt the management team minutes are confidential information and they are sent to every principal in the Districts. There was undisputed testimony that the school secretaries open envelopes containing management team minutes.

However, if opening envelopes and filing minutes is all that is required to make a secretary a confidential employee, a public school employer probably could exclude every secretary from the negotiating unit. All the employer would have to do is to send confidential negotiating materials in an open manner to the supervisors of the various secretaries. It is hard to imagine that the Legislature intended the exclusion of confidential employees to apply to persons with such a casual and

fleeting relationship to confidential materials. Persons who merely open and file minutes are not involved in the development of confidential material and they have no essential need to deal with it. Classifying them as confidential would allow massive abuse of the "small nucleus" concept advanced by the PERB in Sierra Sands Unified School District.

In the present case, the Districts could achieve their goal of keeping principals involved in negotiations by the simple expedient of placing the management team minutes in envelopes marked "confidential" and advising school secretaries not to open those envelopes. The principals could file the minutes in their own desk drawers just as Mr. Asher already has filed the strike plan in a place described by his secretary as "his personal . . . area for keeping things." This approach would achieve the Districts' purpose of involving the principals while keeping its strategies confidential. It also would allow all secretaries to remain in the negotiating unit except those who are clearly and regularly needed to handle confidential materials.

Only one principal, Mr. Bayless, was involved directly in negotiations. The evidence established that his secretary, Mrs. Terry, never typed any materials relating to negotiations and that she was away on summer vacation during the two months when he belonged to the certificated negotiating team. The only negotiating materials to which Mrs. Terry had access were

minutes of the negotiating sessions. The parties stipulated that the minutes were "an accurate reflection and summary" of what occurred at negotiating sessions. They were a written record of past events. It is hard to imagine, therefore, how their disclosure could adversely affect the Districts' negotiating position. Because they were an accurate reflection of what occurred at previous negotiating sessions their disclosure would have told the certificated employee organization precisely what it already knew, namely, what occurred in previous meetings. But even if the minutes were to contain negotiating strategies, that still would provide no justification for excluding Mrs. Terry. The minutes could be sent to Mr. Bayless in an envelope marked confidential and Mrs. Terry could be instructed not to open them.

Similarly with Mrs. Mullen, the secretary to Mr. Asher. Mrs. Mullen did type a series of statistical documents which Mr. Asher used in his attack on the class size ratio to which the Districts' negotiator had agreed. The information on the documents was drawn from the public records of the Districts. An examination of the documents shows them to be nothing more than lists of class sizes, calculated in various methods. There is no written narrative or comment relating to negotiations on the face of the documents. But even assuming that they are "confidential" in nature, Mr. Asher does not regularly develop such materials and does not therefore need a secretary to regularly type them. He is not on the negotiating team and so any need to type such

materials would be occasional. There is no reason why he could not use the services of any of the four confidential employees already excluded if he has an occasional future need for negotiations materials to be typed.

For these reasons, therefore, it is concluded that the five school secretaries do not have access "in the regular course" of their duties to confidential materials. Therefore, they should not be excluded from the negotiating unit.

PROPOSED DECISION

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is the proposed order that the five school secretaries are not confidential employees within the meaning of Government Code section 3540.1(b) and they are therefore included within the classified employees unit.

The parties have 20 calendar days following the date of service of this Proposed Decision in which to file exceptions in accordance with Title 8 California Administrative Code 32300. Pursuant to Title 8 California Administrative Code 32305, this Proposed Decision shall become final on July 7, 1978, unless a party files a timely statement of exceptions.

Dated: June 13, 1978

Ronald E. Blubaugh
Hearing Officer