

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BERKELEY UNIFIED SCHOOL DISTRICT,)
)
Employer,) Case No. SF-UC-32
)
and) PERB Decision No. 101
)
BERKELEY FEDERATION OF TEACHERS,)
LOCAL 1078, CFT/AFT,) August 28, 1979
)
Employee Organization.)
)

Appearances: Garry G. Mathiason and Harlan Van Wye, Attorneys (Littler, Mendelson, Fastiff and Tichy) for Berkeley Unified School District; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Berkeley Federation of Teachers, Local 1078, CFT/AFT.

Before Gluck, Chairperson; and Gonzales, Member*

DECISION

The present case arises in the context of a joint unit clarification petition filed by the Berkeley Unified School District (hereafter District) and the Berkeley Federation of Teachers, Local 1078, CFT/AFT (hereafter Federation) to determine the management or supervisory status of various employees within the District.¹ The positions in question

¹On June 27, 1977, pursuant to Government Code section 3541.3(e), the District and Federation filed a joint petition with the Public Employment Relations Board (hereafter PERB or Board) for a change in unit determination. Previously, on March 9, 1977, pursuant to a directed election, the Federation

*Board Member Moore did not participate in this decision.

are: 1) woman studies director/Title IX coordinator, 2) department chairperson, 3) teacher director, 4) head counselor, 5) grade coordinator, 6) junior high school dean, and 7) head teacher.

The hearing officer's proposed decision found none of the positions in question to be management and all but the woman studies director/Title IX coordinator and junior high school dean to be supervisory. Exceptions to the proposed decision were taken by both parties. The District contends that each of the above categories of employees fall within the statutory definitions of "management employee" (section 3540.1(g))²

was certified as the exclusive representative for a unit including:

All certified employees, all probationary or permanent certificated employees and hourly employees working eighteen (18) hours or more per week on a regular basis and not otherwise excluded; and substitute certificated personnel serving forty-four (44) consecutive days as a substitute teacher in the District; and excluding: all management, supervisory and confidential employees.

²Gov. Code section 3540.1(g) reads as follows:

'Management employee' means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

and "supervisory employee" (section 3540.1(m)),³ and should, therefore, be excluded from the certificated unit pursuant to section 3545(b)(1).⁴ The Federation, on the other hand, is of the view that these positions are neither management nor supervisory, and should, therefore, be included in the certificated negotiating unit.

The Board concludes that the woman studies director/ Title IX coordinator is a management position, and that the remaining positions are all supervisory.

DISCUSSION

Management Status of Employees

A "management employee" is defined in Government Code section 3540.1(g) as "any employee having significant responsibilities for formulating district policies or administering district programs." Although the statute is written in the

³Gov. Code section 3540.1(m) is quoted in full at page 10 of text, infra.

⁴Gov. Code section 3545(b)(1) reads as follows:

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

disjunctive the Board has previously concluded that a management employee must possess significant responsibilities for both formulating district policies and administering district programs.⁵ The "formulating of district policies" requires that an employee possess discretionary authority to develop or modify institutional goals and priorities.⁶ The "administering of district programs" requires authority to implement district programs through the exercise of independent judgement.⁷

Applying this standard the Board finds only the woman studies director/Title IX coordinator to be a management employee.

Woman Studies Director/Title IX Coordinator

The women studies director/Title IX coordinator is appointed by the District administration. She fulfills two roles for the District: one, as director of the woman studies program, and another as Title IX coordinator. She devotes approximately 50 percent of her time to each function, and has no teaching responsibility in connection with either. The essence of the incumbent's bifurcated position is that of

⁵Lompoc Unified School District (March 17, 1977) EERB Decision No. 13, at 20-21.

⁶Hartnell Community College District (January 2, 1979) EERB Decision No. 81, at 13.

⁷Id., at 13.

insuring a sexually unbiased environment within the District. She is required to work more hours than regular teachers and is compensated at a rate above that of certificated employees. For purposes of organization, we analyze the incumbent's dual responsibility separately.

A. Woman Studies Program Director

As director of the woman studies program, the incumbent is responsible for developing and implementing an appropriate woman studies program at all levels throughout the District. She works closely with teachers and administrators at the various school sites, providing them with instructional materials and assisting them in preparation of activities relating to women studies. The director of women studies maintains a women studies resource center. She is continually looking for materials to bring into the District, and is frequently called upon to assess the sex fair quality of textbooks which the school district hopes to adopt. The director is also responsible for preparing and conducting inservice training programs designed to "heighten awareness of sex fair curriculum and practices in the District."

The women studies director carries out her responsibilities with the assistance of a part-time classified and a part-time certificated employee. The director has authority to direct the work of both employees during that portion of their time delegated to women studies. In addition, she has authority to

discipline, evaluate, and adjust the working grievances of the classified secretary.

The Board finds the incumbent's responsibilities as woman studies director do not raise the position to the status of a "management employee." Admittedly, the woman studies director has considerable discretion in running the women studies resource center, in making budgetary allocations, and in determining courses to be taught and material to be used in the women studies program. Such responsibilities, however, do not amount to the "formulation of institutional goals or priorities." The responsibilities involved in maintaining a women studies program are limited in scope and more akin to the implementation of district policy than the actual formulation of such policy. As the Board stated in Hartnell, "Management status is not conferred upon employees because they possess some limited authority to determine within established limits, curriculum, course content or budgetary allocations."⁸

B. Title IX Coordinator

As a condition to receiving approximately six million dollars of federal funds, the District is required to prepare and submit to the Department of Health, Education and Welfare

⁸Id., at 13.

various reports indicating their compliance with Title IX.⁹ The Title IX coordinator is the individual designated by the District to be responsible for gathering information requested by HEW and insuring the District's compliance with Title IX generally.

As Title IX coordinator, the incumbent has authority to investigate various practices and policies of the District and to implement changes where sex bias is found to exist. Her authority to investigate is not limited to routine matters, but may include such things as personnel policies, evaluation procedures, the letting of contracts, and the use of sexually biased material. The Title IX coordinator has authority to investigate such matters in great depth. Moreover, when she finds a District policy or practice to be sexually discriminatory, the Title IX coordinator may bring it to the attention of the appropriate administrator and direct that the practice be changed.

The extent of the coordinator's authority to investigate and institute changes is illustrated by testimony of the director of instructional services, a District witness:

⁹Title IX of the Education Amendments of 1972, P.L. 92-318 (1972), as amended by P.L. 93-568 (1974) and P.L. 94-482 (1976) prohibits sex discrimination in federally assisted education programs.

Question: In her review of the personnel policies of the District, is her authority limited to superficial matters of forms, such as changing names of job titles, or does she have authority to go into matters of more substance?

Answer: She has authority to go into matters in great depth. For example, she had to review the entire set of Board policies contained in two large volumes. And her task then was to analyze and to assess to be certain that the District would not be guilty of any discriminatory practices.

Question: And where she found a practice that could possibly be discriminatory, did she have the authority to direct the change of that practice?

Answer: Yes.

The coordinator's power to seek out discriminatory practices and effectively change those practices is, therefore, clearly supported by the record.

In connection with her investigatory and reporting responsibilities, the Title IX coordinator develops surveys designed to identify discriminatory policies and practices within the District. A survey was conducted in the area of elementary physical education, for example, and as a result of the survey, and at the instigation of the Title IX coordinator, changes were effectuated in the way junior high school girls were required to dress for physical education.

The Title IX coordinator is also responsible for resolving grievances relating to sex discrimination. Any person (parent or District personnel) with a grievance related to sex discrimination may take it directly to the Title IX coordinator. In

one instance, a parent complained about a sexist statement in one of the Districts' textbooks. The statement was brought to the attention of the appropriate administrators and classroom teachers, and now when the page containing the sexist statement comes up, teachers will bring it to the attention of the students and deal with it in the classroom.

Another primary responsibility of the Title IX coordinator is to interpret Title IX policy for the District. When there are Title IX matters to be considered, the coordinator participates in meetings of the superintendent's administrative cabinet. The coordinator also serves as a resource person for the Board of Education, and may, on occasion, serve as the District's spokesperson on Title IX matters.

To assist her in carrying out her responsibilities as both woman studies director and Title IX coordinator, the incumbent is granted discretionary control over a \$5,000 budget. The \$5,000 covers the cost of things such as questionnaires, surveys, reproducing materials, and bringing consultants to speak to groups of teachers. It also covers the cost of developing and printing brochures related to Title IX, which the incumbent is required to produce as part of her Title IX responsibilities.

Upon the foregoing conclusions of fact relating to the incumbent's role as Title IX coordinator, the Board finds the woman studies director/Title IX coordinator to be a management

employee. The Title IX coordinator, as noted above, has authority to use independent judgement in identifying sexually discriminatory practices and policies within the District. This authority to identify discriminatory practices is districtwide, and not limited to routine matters. There is also evidence that once a discriminatory practice has been identified the Title IX coordinator has authority to direct a change in that practice. Since the record demonstrates significant responsibilities for formulating and administering District policy with respect to the equal treatment of the sexes, the woman studies director/Title IX coordinator is found to be a management employee.

The Board finds it unnecessary to consider the supervisory status of the woman studies director/Title IX coordinator since, as noted above, the incumbent is excluded from the certificated unit as a "management employee."

Supervisory Status of Employees

The supervisory status of an employee is governed by section 3540.1(m) which reads as follows:

"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 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.

It is well established that an employee need not possess all of the enumerated functions to be a supervisor.¹⁰

Rather the performance of any one of the enumerated actions or the effective power to recommend such action, exercising independent judgment, is sufficient to make one a supervisor within the meaning of the Act.¹¹

Applying this standard, the Board finds each of the remaining classifications in question to be supervisory.

Department Chairpersons

The department chairpersons are found to be supervisory employees based upon their authority to assign classes, resolve grievances, discipline department members, and complete formal evaluation of department teachers. The facts are as follows:

Berkeley High School is divided into approximately fifteen departments. These departments range in size from 4 to 23 teachers, and each is headed by a department chairperson. Department chairpersons are selected by the principal of the school from a list of candidates nominated by the department. Each of the department chairpersons are released from some of

¹⁰Sweetwater Union High School District (November 23, 1976) EERB Decision No. 4, at 12.

¹¹San Diego Unified School District (February 18, 1977) EERB Decision No. 8, at 9.

their teaching duties to perform administrative duties outlined below. They are each employed for a longer work year, and each receives more compensation than that received by other teachers.

Department chairpersons are the instructional leaders of their respective departments. The chairperson presides at department staff meetings. They relay information from the administration to the department and from the department back to the administration. In conjunction with other members of their department, the chairpersons prepare and submit to the administration a schedule of classes to be taught and a list matching teachers with classroom space. They submit orders for supplies and recommend textbooks to be used within the department.

Department chairpersons oversee the department with respect to such things as punctuality, keeping classroom doors locked, and proper utilization of conference hours. They have authority to informally discipline department members for breaches of department rules or procedures, and, if necessary, may issue written reprimands or seek formal disciplinary action. The chairpersons interview candidates seeking positions within the department. They coordinate interdisciplinary programs with other department heads. They complete written performance evaluations of teachers within their department and are frequently called upon to resolve grievances of students and staff.

The hearing officer found this position to be supervisory based solely on the authority of the department chairperson to effectively recommend disciplinary action. The department chairpersons' authority to discipline department members is clearly supported by the record. When a teacher breaches a department rule or procedure, the chairpersons have authority to meet with the teacher and request a correction of the behavior. The department chairperson can also issue a written reprimand and have it placed in the teacher's personnel file or request formal disciplinary action for serious breaches.

The incumbents' role in assigning classes, evaluating department members, and resolving grievances is also indicative of the chairpersons' supervisory status.

Mr. Parker, principal of Berkeley High School, testified as a District witness that the department chairpersons are responsible for the assignment of classes and classrooms to department members. This fact was verified by several witnesses for the Federation. One Federation witness testified, for example, that as department chairperson he would prepare a tentative schedule of classes to be taught and make himself available to department members who wished to discuss the courses they would like to teach or the times they would like to teach it. The ultimate authority for assigning classes, therefore, appears to rest with the department chairperson.

The incumbents' role in evaluating department members is also indicative of their supervisory status. District policy requires that teachers be evaluated at least once every two years. The responsibility for carrying out these evaluations falls on the department chairpersons, who receive some assistance from grade coordinators. In evaluating classroom teachers, the chairpersons must make at least two classroom observations, each lasting at least twenty minutes. The chairpersons carry out the evaluation utilizing standard evaluation forms provided by the District. The chairpersons complete and sign the evaluation forms and forward them to the principal for review. The principal reviews the forms, but does not sign them. He then forwards the evaluation forms to the personnel director for retention. The chairpersons are the final signatory on all teacher evaluation forms which they complete.

In recent years, there has been very little personnel turnover in the Berkeley Unified School District. As a result, the District has had little opportunity to utilize teacher evaluations in its tenure or retention system. The infrequent utilization of teacher evaluations, however, does not preclude a finding of supervisory status. It is the authority to perform or effectively recommend the functions enumerated in section 3540.1(m), and not the frequency of their exercise,

which determines the supervisory status of employees.¹² In this case, a District witness testified that the chairpersons' evaluations are given great weight, almost controlling weight, in determining whether a teacher will be granted tenure or discharged. The Board finds the department chairpersons' evaluation function, therefore, to be indicative of their supervisory status.

Mr. Parker testified on direct examination that department chairpersons have authority to informally adjust grievances at the first level of the District's grievance procedure. This authority was confirmed by Federation witness and department chairperson, Mr. Choulette, who admitted to resolving differences between two or more teachers on several occasions. Another Federation witness, Ms. Harrington, stated that she just assumed that the grievance function was part of her job as the head of a department. Evidence further indicates that the chairpersons are frequently called upon to resolve grievances related to such things as the assignment of classes or classrooms, and the availability of films or film projectors. Ample evidence exists, therefore, to support the department chairpersons' supervisory authority to resolve grievances.

¹²See, NLRB v. Pilot Freight Carriers, Inc. (4th Cir. 1977) 558 F.2d. 205, Cert denied (1977) 434 U.S. 101.

With respect to the hiring and transferring of employees, the District claims that department chairpersons have the power to veto any decision made by the principal. The chairpersons, however, were never informed that they possessed such power, and since the District has hired only one teacher in the last three years the chairpersons' authority in this respect remains largely unclear. Evidence was presented of an instance in which the chairperson of the science department vetoed a candidate who was hired by the District in a different department and later transferred into the science department against the wishes of the chairperson. In view of the above, the Board finds the chairpersons' responsibilities with respect to the hiring and transfer of employees do not fall within the purview of section 3540.1(m), and are, in themselves, insufficient to confer supervisory status.

In sum, the supervisory status of department chairpersons is affirmed based upon their authority to assign classes, resolve grievances, discipline department members, and effectively recommend tenure through the completion of formal evaluations.

Teacher Director

There are three teacher director positions in the Berkeley Unified School District. One of the directors is in charge of a set of alternate schools (K-9) known as "Odyssey/Kilimanjaro." This teacher director is found to be supervisory

based upon his role in hiring staff for his school. The other two teacher directors are employed in the District's high school, and are found to be supervisory for reasons mentioned in our discussion on department chairpersons.

The teacher director at Odyssey/Kilimanjaro was described as performing functions very similar to those of a principal or department chairperson. He presides at staff meetings, administers the school's budget, evaluates staff, resolves grievances, and has an important role in staffing his schools. The director has ultimate responsibility for the development of the curriculum and is responsible for implementing the total program at the two sites.

The teacher director at Odyssey/Kilimanjaro, like most of the District's administrative staff, was appointed by the Superintendent. The appointment is for an indefinite period and there is no rotation of this position among the school staff. The director attends all meetings of the District's principals and supervisors. The incumbent teaches only one or two periods per day and devotes the rest of the time to administrative matters. He is employed for an eight-hour day as opposed to a six and one-half hour day for the rest of the teachers, and also receives twelve percent more pay than do the other teachers.

The hearing officer found the teacher director at Odyssey/Kilimanjaro to be a supervisory employee based upon the

director's authority to effectively recommend the hiring of certificated staff. The teacher director has the same role in staffing his school as does a regular school principal. The teacher director interviews all applicants for positions within the school and makes recommendations to the director of certificated personnel. Although the ultimate authority in hiring resides in the latter, the teacher director was described as having "a very strong voice in selection of staff." Based upon the foregoing, the teacher director at Odyssey/Kilimanjaro is found to be a "supervisory employee" within the meaning of section 3540.1(m).

Very little evidence was presented regarding the two teacher director positions at Berkeley High School. Witnesses for both the District and Federation agree, however, that they have substantially the same job functions as department chairpersons. Accordingly, the teacher directors at Berkeley High School are found to be supervisory for reasons mentioned in the discussion on department chairpersons.

Head Counselor

The position of head counselor is also very similar to that of the department chairperson. The only major difference between the two is that the former is in charge of counselors rather than teachers. Like the chairperson, the head counselor is appointed by the principal from a list of two counselors submitted by the counseling staff. The appointment is for a

two-year period. The head counselor works more hours than does a regular counselor and receives greater pay. There is release time for the performance of administrative duties. The head counselor assigns students to his counselors. He evaluates the counselors, adjusts their grievances, and has the authority to discipline them or issue reprimands when necessary.

As with the department chairperson, the hearing officer found this position to be supervisory on the sole basis of the head counselor's authority to discipline staff and issue written reprimands. The head counselor's authority in this regard is similar to that of the department chairperson. The supervisory status of the head counselor is therefore affirmed.

Grade Coordinator

The grade coordinators are found to be supervisory based upon their authority direct the work of counselors in pupil attendance and disciplinary matters, and their broad supervisory authority over a large number of classified employees.

Grade coordinators are full-time administrators with no teaching responsibilities. They are selected by the assistant superintendent in charge of instruction for an indefinite period of time. The grade coordinators work from 400 to 600 hours per year more than classroom teachers and are compensated at a rate above the regular teacher.

One of the responsibilities of the grade coordinators is to facilitate the entry of each new class into Berkeley High

School. They are also responsible for overseeing the attendance and discipline of an assigned group of students. In addition, they assist in the supervision of the school area, and see to it that teachers comply with District and state procedures requiring notification of parents whenever students are having scholastic or attendance problems. As an incidental function, they help the department chairpersons evaluate the teachers and serve as a temporary principal in the absence of the regular principal and vice principal.

The grade coordinator has the authority to direct counselors in pupil attendance and disciplinary matters. The coordinator also has broad supervisory powers over certain classified employees such as grade center clerks, attendance clerks and student supervisors. There is evidence that grade coordinators have the authority to effectively recommend the hiring, firing, lay off, promotion, and transfer of these classified employees, and also to adjust their grievances.

The hearing officer found the grade coordinators to be supervisory based upon their authority to direct counselors in pupil attendance and disciplinary matters and to place written reprimands in counselors' personnel files. This finding is supported by the record and is affirmed.

The grade coordinator's broad supervisory authority over classified employees is also indicative of supervisory status. Government Code section 3540.1(m) does not distinguish between

the supervision of unit and non-unit employees, and the Board will not read such a distinction into the provision. The authority of the grade coordinator to supervise certain classified employees is clear and uncontradicted in the record. The supervisory status of the grade coordinator is affirmed.

Junior High School Dean

The junior high school deans are found to be supervisory based upon unrebutted evidence in the record that the dean supervises the counseling staff and has authority to resolve the working grievances of certificated faculty.

The only evidence presented with respect to the dean positions was the testimony of the director of instructional services, a District witness, who attested to the job functions outlined below. The Federation did not cross-examine this witness nor did it present any evidence in opposition to her testimony.

The basic function of the junior high school deans is to assist the principal in the supervision of both students and staff. The deans do written performance evaluations of certificated staff. They oversee the work of the counseling staff. They serve as a liaison between parents, students, teachers and counselors; and carry out individual projects as assigned by the principal. In addition, they resolve grievances and replace the principal when he or she is absent. The dean

positions are considered by the District to be the junior high school equivalent of the grade coordinator positions.

The junior high school deans are appointed by the administration, not their peers. They are required to have an administrative credential. They attend administrative staff meetings, and like other supervisory employees, they are required to work more hours and receive greater pay than the regular faculty.

The hearing officer found this position not to be supervisory. The record, however, indicates otherwise. Unrebutted testimony was presented that the deans supervised counseling staff, and that as first line supervisors they had authority to adjust the grievances of members of the certificated faculty. In the absence of contrary evidence, such evidence is found to be sufficient to qualify the junior high school deans as supervisory employees.

Head Teacher

Finally, the head teachers are found to be supervisory based upon their authority to direct the work of their staff, resolve their grievances, complete formal written evaluations, and effectively recommend the dismissal of teachers.

The Berkeley Unified School District operates seven centers for preschool children. The children's centers are for working parents of low income. The centers are attended by at least 50 children and are staffed by between 13 and 20 classified and

certificated employees. Each center is directed by one head teacher.

Head teachers are responsible for the day to day operation of their respective centers. They are responsible for maintaining a safe physical environment. They have authority to assign classes and classroom space. They set up the center's schedule. They have authority to formally discipline or counsel persons on their staff. They resolve grievances. They complete written evaluations of all members of the center's staff. They have discretionary control over the centers' budgets, and have a strong influence over staffing the centers.

Head teachers are appointed by the District. They have no fixed daily hours. They receive extra compensation for their additional duties and are required to work a slightly longer work year than other teachers. Head teachers are required to have only two and one-half hours of contact time per day with the students. The remainder of the day is spent discharging the special functions of head teacher.

The head teachers were found to be supervisory employees by the hearing officer on the basis of their authority to assign work, require correction of improperly performed work, and to effectively recommend the dismissal of teachers. This conclusion is supported by the testimony of District and Federation witnesses alike.

Evidence was presented of an instance in which a head teacher effectively recommended the dismissal of a teacher at her school. The dismissal occurred after an unsatisfactory evaluation and several conferences between the head teacher and the discharged employee.

Regarding the head teacher's authority to assign work, the following exchange took place on direct examination of a Federation witness who occupied the position of head teacher.

Q. . . . Do you direct the work of any of the employees of the children's center? . . . Do you give them work assignments?

A. Yes.

Q. What type of assignments would you give them?

A. Well, it's a fairly large area to cover and because there are such young children, you have to be sure that the grounds are covered safely and you have to be sure that there is adequate supervision at all times. That's something I think only one person with in concert with other people can look at. There has to be a plan so that the grounds are covered safely and the children are adequately looked after at all times.

The supervisory status of the head teacher is affirmed.

ORDER

The Public Employment Relations Board ORDERS that:

1. The woman studies director/Title IX coordinator is a management employee within the meaning of Government Code section 3540.1(g), and is, therefore, excluded from the certificated unit.

2. The department chairpersons, teacher directors, head counselor, grade coordinators, junior high school deans, and head teachers are supervisory employees within the meaning of 3540.1(m) and excluded from the certificated unit.

~~By: Raymond J. Gonzales, Member~~

~~Harry Gluck, Chairperson~~

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



BERKELEY UNIFIED SCHOOL DISTRICT,))	
Employer,))	
and))	REPRESENTATION
BERKELEY FEDERATION OF TEACHERS,))	Case No. SF-UC-32
LOCAL 1078, CFT/AFT,))	<u>PROPOSED DECISION</u>
Employee Organization.))	7/19/78

Appearances: Garry G. Mathiason and Harlan Van Wye, Attorneys (Littler, Mendelson, Fastiff and Tichy) for Berkeley Unified School District; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Berkeley Federation of Teachers, Local 1078, CFT/AFT.

Before Michael J. Tonsing, Hearing Officer.

PROCEDURAL HISTORY

The Berkeley Unified School district (hereafter District) has a student enrollment of approximately 12,138 at 22 school sites in the City of Berkeley.¹

On June 27, 1977, pursuant to Government Code section 3541.3(c), a joint petition for change in unit determination was filed with the Public Employment Relations Board (hereafter PERB)

¹Official notice is taken of these facts from the 1978 California Public School Directory (Cal. State Department of Education).

by the District and the Berkeley Federation of Teachers, Local 1078, CFT/AFT (hereafter Federation). Previously, on March 9, 1977 pursuant to a directed election, the Federation was certified as the exclusive representative for a unit including:

All certificated employees, all probationary or permanent certificated employees and hourly employees working eighteen (18) hours or more per week on a regular basis and not otherwise excluded; and substitute certificated personnel serving forty-four (44) consecutive days as a substitute teacher in the District; and excluding: All management, supervisory and confidential employees.

A hearing was held on August 16, 17 and 23, 1977. Subsequently, on April 10, 1978, more than seven months after the close of the hearing, the Federation moved to reopen the record to receive into evidence the minutes of the Board of Education meeting on February 3, 1978, showing a proposed reduction or discontinuance of services for the 1978-1979 school year, including certain of the job categories at issue herein. Because of the questionable relevancy and speculative nature of a possible future reduction or discontinuance of these positions, the motion to reopen is denied and the proffered exhibit is rejected. There is no showing of their relevance to any matters presently at issue. Rather, the minutes indicate possible future changes.

ISSUE

Are the positions of women's studies director/title IX coordinator, department chairperson, head teacher, dean, teacher-director, grade coordinator, and head counselor management or supervisory within the meaning of Government Code section 3540.1(g) or (m), respectively, and therefore excluded from the

unit or should they be in the certificated teachers' negotiating unit?

DISCUSSION

The District contends that all of the positions in question fall within the statutory definition of management employee (sec. 3540.1(g))² or supervisory employee (sec. 3540.1(m)).³ Thus, these positions should be excluded from the certificated unit as required by section 3545(b)(1).⁴ The Federation claims

²Section 3540.1(g) reads as follows:

'Management employee' means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

³Section 3540.1(m) reads as follows:

'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.

⁴Section 3545(b)(1) reads as follows:

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

that none of these positions are management or supervisory, but rather the incumbents merely possess additional administrative responsibilities as a result of their professional expertise and motivation, and are appropriately part of the certificated negotiating unit.

Although the District raises the question of management status for each of the job positions in dispute, there is very little evidence that any of the positions, other than the women's studies/title IX coordinator position, involve functions that could be considered management.

For the reasons which follow, it is found that the positions of women's studies/title IX coordinator and dean are neither supervisory nor management within the meaning of the Educational Employment Relations Act (hereafter EERA) and thus are included within the unit. Further, it is found that the positions of department chairperson, head teacher, teacher-director, grade coordinator, and head counselor are supervisory within the meaning of section 3540.1(m) and thus are excluded from the negotiating unit.

Women's Studies/Title IX Coordinator

The women's studies/title IX coordinator is found not to be a management employee as defined in section 3540.1(g) which provides that "'[m]anagement employee' means any employee in a position having significant responsibilities for formulating district policies or administering district programs"

The women's studies/title IX coordinator is appointed by the District for an indefinite period and receives greater compensation than other certificated employees. She has a role in developing curriculum for inclusion in the regular instructional program of the District. This curriculum is designed to create a non-discriminatory environment. There was no evidence that this role in developing curriculum rises to the level of independently formulating District educational policy. Rather, the women's studies/title IX coordinator merely recommends changes in curriculum to the superintendent's office for consideration.

The women's studies/title IX coordinator's role in curriculum is analogous to that of the project engineers in Flintkote Co. (1975) 217 NLRB 497 [89 LRRM 1295] where it was found that "management decision makers, must, as a practical matter, rely heavily on the discretion and technical expertise of the project engineers." In Flintkote, the NLRB concluded that project engineers were not management "notwithstanding the fact that their work may cause changes in company direction" in that "[t]heir discretions and decisions are predicated solely on a technical base, and culminate in technical reports or recommendations to superiors who, in turn, determine, establish, and carry out management direction, i.e., 'policy,' by approving or disapproving the recommendations presented."⁵

The women's studies/title IX coordinator is the person in the

⁵Flintkote Co., *ibid.*, quoting General Dynamics Corporation, (1974) 213 NLRB 851 [87 LRRM 1705].

District who completes the self-evaluation process required by the federal Department of Health, Education and Welfare (HEW) and who reports to HEW concerning the District's Title IX compliance. She also conducts surveys monitoring District operations regarding personnel policies, hiring procedures and evaluation procedures to ensure that they are not sexually biased.

Specific changes in District programs have resulted from these surveys. For example, changes were forthcoming in the manner of dress in girls' physical education in the junior high schools and changes were made relative to certain objectionable language used in course descriptions in the high school. Although the changes resulted from surveys by the women's studies/title IX coordinator, she had no authority to require or independently implement a change. The evidence is that if, for example, an affected department chairperson does not voluntarily accept recommended changes, the women's studies/title IX coordinator cannot require the change. Rather, she can only recommend to the chairperson's supervisor or to other District administrators that the change be implemented.

Turning now to the issue of the women's studies/title IX coordinator's supervisory status, the women's studies/title IX coordinator is the individual who processes sex discrimination grievances. During the one year period since appointment of the women's studies/title IX coordinator, there was testimony that there were three such grievances. Details of only one of the grievances was presented by the District's director of instructional services, which grievance concerned a complaint by a

parent that a textbook contained a sexist statement. There is no evidence that the women's studies/title IX coordinator has authority to adjust these grievances or that these grievances relate to employer-employee relations. Rather, in the case of the textbook, it was testified that the coordinator merely brought the alleged sexist statement to the attention of the school administration and classroom teachers. (This testimony itself was uncorroborated hearsay and thus inadmissible. Cal. Admin. Code title 8, sec. 35026.) Thus, there is no evidence that the "grievances" dealt with are of a type commonly considered to be a normal part of employer/employee relations or that the women's studies/title IX coordinator has authority to adjust these grievances.

The women's studies/title IX coordinator administers a budget of \$5,000. This money is utilized for purchasing supplies routinely needed. There is only a limited exercise of discretion in this area. Any purchase of over \$300 must be approved by the District administration.

The present women's studies/title IX coordinator has two part-time employees who work with her, one is certificated and one is a secretary, a classified employee. Regarding the certificated employee the record is not clear as to whether the women's studies/title IX coordinator supervises this employee. The director of instructional services stated at one point that the women's studies/title IX coordinator does not have the authority to direct the work of the certificated employee. However, later, she responded to the contrary. In light of this limited and

equivocal testimony, the District has not met its burden of proof that the women's studies/title IX coordinator supervises the certificated employee. With respect to the secretary, a non-unit classified employee, the mere fact that the women's studies/title IX coordinator has a secretary does not make her a supervisor. Washington Unified School District (6/27/78) PERB Decision No. 56; Adelphi University (1972) 195 NLRB 639, 643-4 [79 LRRM 1545.]

The evidence shows that the women's studies/title IX coordinator monitors district programs and policies and makes some recommendations regarding them, but this also does not, by itself, result in supervisory or management status. It is found that the women's studies/title IX coordinator is not a management or supervisory employee.

Department Chairpersons

Berkeley High School is administratively divided into approximately 15 departments. These departments vary in size from four to twenty-three teachers. Each department has one chairperson who is appointed by the principal for a term of two years. The principal's selection is made from two candidates nominated by the department's members. If the principal is not satisfied with either nominee, he can return the names to the department and ask for two additional names. The evidence indicates that this first rejection is rare but has occurred on occasion.

Department chairpersons receive release time from their teaching responsibilities in order to carry out their duties as chairpersons. The amount of release time varies with the size of

the departments, from 60 percent in the larger departments to 20 percent in the smaller. Also, they are required to work five extra days per year and receive approximately \$1,800 in additional compensation.

Because department chairpersons have the authority to reprimand department members concerning certain aspects of their work performance, they are found to be supervisory.

The department chairperson is responsible for informally disciplining, and reprimanding, if necessary, department members concerning such matters as proper utilization of conference periods, getting to school on time and keeping the doors to their rooms locked. The school principal becomes involved only in cases where the department chairperson has trouble resolving the problem with a particular teacher. Sarah Harrington, a department chairperson called as a Federation witness, testified on direct examination that teachers have requested her, as department chairperson, to work out problems between them and ". . . if something is going wrong to reprimand."

Department chairpersons have issued written reprimands to teachers. These are sent to the principal who, except on one occasion, placed the reprimands in the teachers' personnel files. Therefore, it is found that the chairpersons have the authority to effectively recommend disciplinary action.

Unlike chairpersons' authority to effectively reprimand department members, the following duties discussed do not indicate supervisory status.

The District utilizes a four step grievance procedure; the

initial step is informal resolution and the final step is an appeal to the Board of Education. The grievance procedure defines grievance as "a claim based upon the interpretation, meaning, or application of any of the provisions of these policies, other rules or policies of the district, or of applicable statutes." (There is a separate contract grievance procedure which is not involved here.) The evidence indicates that chairpersons informally resolve some grievances at the first step of the procedure.

The principal of Berkeley High School testified that between 50 and 100 grievances were taken through Step I. Because Step I grievances are not reduced to writing, he was unaware of the exact number. However, the principal testified that these grievances related to such subjects as: room assignment, disproportionate use of a movie projector, or ordered films not received regularly. He added that they are ". . . not grievances as you might think of them in terms of a professional organization grieving." This was the only specific evidence presented concerning the nature of the kinds of grievances adjusted by the department chairpersons.

Thus, there is no evidence that department chairpersons adjust grievances concerning employment relations matters as opposed to the more mundane "housekeeping" types of complaints to which the principal testified.

Department chairpersons are responsible for completing written performance evaluations of the teachers in their departments. District policy requires a minimum of one evaluation every two years. In order to evaluate the teacher, the

chairperson makes a minimum of two classroom observations. Each observation lasts at least 20 minutes. The chairperson completes and signs the evaluation form and forwards it to the principal for review. There is no evidence that the principal makes any independent evaluation. The principal then forwards the evaluation form to the District offices.

The District uses the performance evaluations of probationary employees in determining whether to grant permanent tenured status. While the decision to grant tenure rests with the school principal, he or she is guided by the chairperson's performance evaluations. Unfortunately, the evidence as to whether the principal ever approves tenure if the evaluations are unsatisfactory is not clear. The District claims that it does not grant tenure to teachers receiving unsatisfactory evaluations. But Judy Bodenhausen, the Federation president, testified that on at least one occasion a teacher with unsatisfactory evaluations was granted tenure. The issue is further clouded by the fact that no teachers recently have been denied tenure. Thus, evidence seeking to establish the supervisory status of the chairpersons through the performance evaluation criterion is inconclusive.

The evidence does not show that the department chairpersons make effective recommendations regarding hiring or transfers within the District. Job applicants are referred to the school principal by the District personnel office. They are interviewed by the principal who then refers them to the department chairperson for an interview. The chairperson and the principal then meet to determine which candidate should be recommended to

the superintendent. The District contends that a chairperson can veto any candidate he or she thinks is unfit for a position in the department. The evidence in this area was limited, in that the District has hired only one teacher in the past three years. However, there was one specific instance when the chairperson of the science department vetoed a candidate who then was hired by the District, but not in the science department. Later, the teacher was transferred into the science department against the express wishes of the chairperson. Likewise, the history department chairperson testified that she has had no control over transfers into her department.

Although the District's procedures indicate that the chairpersons may have had authority over the areas of assigning work, assigning classrooms and establishing budget priorities, it is concluded on the basis of the testimony adduced at the hearing that, whatever the case historically, they are not currently exercising this authority independently. The evidence clearly demonstrates that in these areas the decisions made by the department chairpersons are done on a collegial basis only after lengthy consultation with fellow department members. In the only specific instance cited of a teacher being forced to teach a course against her wishes, it was the vice principal and not the chairperson who made the assignment.

Further, although it is contended that chairpersons monitor attendance at department meetings, the chairpersons who testified stated that they did not perform this function.

In Sweetwater Union High School District (11/23/76) EERB

Decision No. 4, the EERB considered the meaning of Government Code section 3540.1(m). It was determined that because this section is written in the disjunctive an employee need not possess all of the enumerated functions to be found a supervisor within the meaning of the EERA, rather "the performance of any one of the enumerated actions or the effective power to recommend such action is sufficient to make one a supervisor within the meaning of the Act."

Thus, in the present case, despite the inconclusive testimony regarding other indicia of supervisory status, inasmuch as department chairpersons have the authority to effectively reprimand department members, it is found that they are supervisory employees within the meaning of the EERA.

Children's Center - Head Teacher

The District operates seven children's centers for preschool age children. The centers open at 7:30 a.m. and remain open until 6:00 p.m. The centers are attended by at least 50 children and are staffed by between 13 and 20 classified and certificated employees. Because the centers are open long hours, they require two shifts of employees. However, each center has only one site administrator, the head teacher.

Head teachers are appointed by the District. They have no fixed daily hours, receive extra compensation for their additional duties and are required to work a slightly longer work year than other teachers. Head teachers are required to have only two and one-half hours of contact time per day with the students. The remainder of the day is spent discharging the special functions of head teacher.

The head teacher schedules the work assignments of the personnel at the center and has authority to require an employee to correct or improve his or her work performance.

The head teacher is responsible for completing performance evaluations for employees in the children's center. On at least one occasion, a head teacher has effectively recommended the discharge of a teacher at her school. It was the result, in part, of an unsatisfactory evaluation and several conferences between the head teacher and the employee involved.

With respect to transfer of teachers into their centers, head teachers make requests to the director of prekindergarten and elementary instruction for specific personnel from a pool of teachers who have requested transfers into the children's center. However, sometimes their requests are honored and other times they are not. The evidence demonstrates that head teachers' requests do not rise to the level of effectively recommending transfers.

Although the director of prekindergarten and elementary education asserted that the head teachers adjust grievances, no specific testimony was elicited, e.g., how many or what issues were involved in these grievances.

In the absence of more specific evidence it is not found that the head teacher has the authority to adjust grievances.

However, because the head teachers make effective recommendations regarding dismissal of teachers, and also have authority to assign work and to require correction of improperly performed work, this position is found to be supervisory and thus excluded from the certificated negotiating unit.

Deans

There are three dean positions in the District's junior high schools. Although each of the deans has a slightly different job title, their duties are similar. Unlike department chairpersons, deans are directly appointed by the District administration for an indefinite period. They are required to possess an administrative credential. While teachers work a six and one-half hour day, deans work a straight eight-hour day. Deans also receive a 13 percent pay differential over and above the amount paid to teachers. Further, deans have no teaching responsibilities.

The District director of instructional services testified that deans have the first-line authority to adjust grievances brought by teachers and counselors pursuant to the District's grievance procedure. This function was previously performed by the junior high school department chairpersons who now are in the negotiating unit.

Unlike department chairpersons, there was no evidence presented by the District as to the kinds of grievances adjusted by deans. Thus, since the District has the burden of proof to show that deans have supervisory status exempting them from the negotiating unit, for purposes of this decision it must be presumed that deans adjust the same sort of "housekeeping grievances" as department chairpersons and do not adjust grievances involving employment relations matters.

Although the evidence indicates that the deans are required

to complete performance evaluations beginning in the 1977-1978 school year (in a manner previously set forth with respect to department chairpersons at page 11), because junior high school department chairpersons who previously did the evaluations now are in the negotiating unit, there is no evidence that these evaluations will be used as effective recommendations as to matters set forth in section 3540.1(m).

There was testimony that the dean serves as acting principal in the absence of both the principal and vice principal, but there was no evidence that this occurs with any frequency. Occasional substitution for a superior does not make an employee supervisory. (See San Rafael City Schools (10/3/77) EERB Decision No. 32 at p.8.)

Therefore, it is found that deans are not supervisory employees but rather are in the certificated negotiating unit.

Teacher-Directors

The District has three teacher-directors, two at Berkeley High School and one at off-site schools known as "Odyssey/Kilimanjaro." The Odyssey/Kilimanjaro schools are alternative schools designed, respectively, for students from kindergarten to grade six and from grade seven through nine. The other two teacher-director positions are at Berkeley High School, one denominated "College Prep" and the other "Model School A." The authority possessed by the teacher-director at Odyssey/Kilimanjaro differs from that of the teacher-directors at College Prep and Model School A and will be treated separately.

Odyssey/Kilimanjaro. The teacher-director at

Odyssey/Kilimanjaro performs functions very similar to those performed by both school principals and department chairpersons.

The teacher-director is appointed by the superintendent and serves for an indefinite period. There is no rotation of this position among the staff at Odyssey/Kilimanjaro.

The teacher-director works an eight-hour day compared to the other teachers' six and one-half hour day, receiving additional compensation for the duties of teacher-director amounting to approximately 12 percent of a teacher's salary.

The teacher-director has a reduced teaching load and teaches only one or two periods per day. The remainder of the day is release time used to perform administrative functions.

The teacher-director also completes performance evaluations for teachers at Odyssey/Kilimanjaro (in a manner similar to that previously discussed with respect to department chairpersons at page 11). However, there is no evidence that these evaluations are utilized as effective recommendations for the matters set forth in section 3540.1(m). The completion of performance evaluations is not one of the enumerated indicia of supervisory status; hence, performing evaluations does not by itself make one a supervisory employee within the meaning of the EERA.

The teacher-director at Odyssey/Kilimanjaro has significant authority to hire new teachers. While other teachers may participate in the interview process, it is the teacher-director who makes the recommendation to the certificated personnel director. In this capacity the teacher-director performs the same function as school principals in staffing their schools. This

effective power to recommend the hiring of certificated personnel is sufficient to give the teacher-director at Odyssey/Kilimanjaro supervisory status.

Berkeley High School. Very little evidence was introduced regarding the two teacher-directors at Berkeley High School. However, witnesses for both the District and Federation characterized these teacher-directors as having substantially the same job functions as a department chairperson in that they direct teachers in combined programs including subjects such as history, English, reading and science. Hence, the job title represents a distinction without a functional difference. Thus, based upon the evidence presented that the high school department chairpersons have the authority to reprimand department members, and are thus supervisory, it likewise is found that the teacher-directors of "College Prep" and "Model School A" are supervisors within the meaning of section 3540.1(m).

Grade Coordinators

Grade coordinators are selected by the assistant superintendent in charge of instruction and serve for an indefinite period. The District expects them to work from 400 to 600 hours more per year than classroom teachers. They are compensated at a rate above that of teachers.

Grade coordinators have no teaching responsibilities. Their job function is entirely administrative. They are responsible for attendance and discipline of an assigned group of students, along with a team of three or four counselors. They have the authority to direct the counselors in pupil attendance and disciplinary

matters and to place written reprimands in counselors' personnel files. They assist in the supervision of the school area and are also responsible to see that teachers comply with District and state procedures requiring notification of parents whenever students are having scholastic or attendance problems.

Pursuant to the District's grievance procedure, the grade coordinators are responsible for adjusting grievances at Step I. Their role is to resolve disciplinary disputes between parents or students on the one hand, and teachers on the other. If the grievance proceeds to the higher, formal levels, the grade coordinator usually is the person against whom the teacher files the grievance.

Although the grade coordinators have limited responsibility for some performance evaluations, the evidence is that their role is advisory only.

Grade coordinators also supervise classified employees such as: grade center clerks, attendance clerks and student supervisors. The grade coordinators have the authority to effectively recommend the hiring, firing, lay off, promotion, transfer and adjust the grievances of these classified employees. However, there is no evidence that grade coordinators spend a substantial amount of time in supervising these non-unit employees, thus such supervision is not a factor in finding grade coordinators to be supervisory. Washington Unified School District, supra at 2; Westinghouse Electric Corp. (1967) 163 NLRB 723, 726-27 [64 LRRM 1440.]

Because grade coordinators direct counselors in pupil

attendance and disciplinary matters, and have the authority to place written reprimands in counselors' personnel files, they are found to be supervisory employees within the meaning of section 3540.1(m).

Head Counselor

The head counselor is appointed by the high school principal from a list of two counselors submitted by the counselling staff. The appointment is for two years and is not rotational. The head counselor receives approximately 6 percent more pay than other counselors and 17 percent more than classroom teachers. Head counselors are expected to work approximately 400 hours more than other counselors. Also, head counselors receive release time to perform their additional job functions. Generally, counselors are assigned 300 students; however, the head counselor is assigned only 75 students.

The principal of Berkeley High School testified that the duties of the head counselor are very similar to those of department chairpersons. He coordinates counseling services at the high school, evaluates the counselling staff, has the authority to adjust the number of students assigned to each counselor, approves counselors' attendance at conferences, and has the authority to adjust grievances at the first level.

The head counselor has authority to place written reprimands in counselors' personnel files. As with department chairpersons, this makes the position supervisory under section 3540.1(m).

The other duties of the head counselor are found not to be supervisory in nature. Although the head counselor nominally

assigns work to other counselors, this is done in a routine, nondiscretionary fashion. On a rotational basis, counselors are assigned to a group of students upon their entering the high school and usually remain assigned to those students until they are graduated.

The head counselor adjusts counselors' grievances at Step I in the same manner as do department chairpersons for teachers in their department (see pages 9-10 supra). As with department chairpersons, there is no evidence that the head counselor adjusts grievances regarding employment relations matters.

The head counselor is responsible for evaluating the other counselors. However, there is no conclusive evidence as to how these evaluations are utilized.

The budget for conferences is only \$200-\$300 and there was no evidence that the head counselor exercised any great degree of discretion in approving counselors' conference attendance.

Based on the authority to effectively reprimand, head counselors are found to be supervisory within the meaning of section 3540.1(m).

PROPOSED DECISION

Based on the foregoing findings of fact, conclusion of law and the entire record in this matter, it is the proposed decision that:

The positions of women's studies/title IX coordinator and dean is neither management nor supervisory within the meaning of Government Code section 3540.1(g) or (m), respectively, and are therefore included in the certificated negotiating unit.

The positions of department chairperson, head teacher, teacher-director, grade coordinator, and head counselor are supervisory within the meaning of Government Code section 3540.1(m) and thus are excluded from the certificated negotiating unit.

The parties have twenty (20) calendar days following the date of service of this Proposed Decision in which to file exceptions in accordance with section 32300 of the Board's rules and regulations.

If no party files timely exceptions, this Proposed Decision will become final on August 11, 1978 and a Notice of Decision will issue from the Board.

Dated: July 19, 1978

MICHAEL J. TONSING
Hearing Officer