

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ATASCADERO UNIFIED SCHOOL DISTRICT,)
)
Employer,) Case Nos. LA-UM-146
) LA-R-369
and)
) PERB Decision No. 191
CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION AND ITS ATASCADERO) December 30, 1981
CHAPTER #124,)
)
Employee Organization.)
_____)

Appearances: E. Luis Saenz, Attorney for the California School Employees Association and its Atascadero Chapter #124.

Before Jaeger, Moore and Tovar, Members.

DECISION

The California School Employees Association (hereafter CSEA) excepts to the attached hearing officer's proposed decision. The hearing officer granted the Atascadero Unified School District's (hereafter District) petition for unit modification and excluded the positions of head custodians I and II, and cook/kitchen managers from the existing classified unit, finding that changes in circumstances rendered the classifications supervisory and thus inappropriate to the established unit.

CSEA excepts to the following hearing officer's findings:

The District has met its burden of proving the required change in circumstances (of the positions in question.)

The collective bargaining agreement between the parties does not bar the employer from filing such a petition.

The District has not waived its right to rely upon the claimed changes because it could have raised the issue earlier but didn't.

After considering the entire record and the parties' briefs, the Public Employment Relations Board (hereafter PERB or Board) finds no prejudicial error and adopts the hearing officer's findings of fact. The Board affirms her conclusions of law in accordance with the following discussion.

DISCUSSION

The District filed its petition for unit modifications pursuant to PERB regulation 33261(b)(1)¹ to exclude head custodians I and II and cook/kitchen managers from the unit as supervisory. Section 33261(b) provides:

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination pursuant to Government Code section 3541.3(e):

¹PERB rules are codified at California Administrative Code, title 8, section 31000 et seq.

(1) To delete classifications no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit.

.

The parties entered into a stipulation that the employee classifications in question are supervisory. The hearing officer found that there were sufficient facts on the record to support the parties' stipulation, as required by Centinela Valley Union High School District (8/7/78) PERB Decision No. 62. We agree with her finding. We also agree with her assessment that the District has proven a change in circumstances since the unit was recognized in 1976. The record indicates that, after the unit was recognized on May 21, 1976, both the head custodians and the cook/kitchen managers were given significantly more supervisory responsibilities. Both head custodians and cook/kitchen managers began to evaluate subordinate employees. Head custodians took over this function from the school principals. Cook/kitchen managers took over the function from a food service manager. These evaluations were the only ones that the subordinate custodians and food service workers received. Both head custodians and cook/kitchen managers effectively hire employees. Their decisions are not overturned by management. Head custodians effectively recommend dismissal of employees. There was no evidence of any food service worker being terminated since 1976; however, the District testified that

cook/kitchen managers would also have the authority to recommend dismissal of food service workers. There was no evidence introduced to contradict this statement.

Analysis

Since the Board has not previously considered a case in which a party has filed a petition pursuant to PERB Regulation 33261.(b) (1), the hearing officer turned to the Educational Employment Relations Act (hereafter EERA)² and to a reading of PERB regulations for guidance.

CSEA argues that the District should be estopped from proceeding with the petition for unit modification because it had two opportunities to bring up the issue: during the negotiations for the collective agreement in 1977 and again in 1980.³ The hearing officer correctly found that neither section 33260 nor 33261 preclude the employer from filing a petition because the changes took place years ago or because a collective agreement between the parties includes the positions in question in an established unit. Unlike other sections of

²EERA is codified at Government Code section 3540 et seq. All code references are to the Government Code unless otherwise specified.

³Arguably not in 1980 because the parties had agreed to roll over all the provisions of the previous collective agreement except for wages.

the unit modification regulations,⁴ where the time period for the filing of a petition is clearly restricted, PERB regulation 33261(b) (1) has no time limitations.

The hearing officer was correct in asserting that the District had met its burden of proving that the positions were no longer appropriate to the established unit by virtue of changes in circumstances.

In addition to the fact that there are changed circumstances, we would exclude the employee classifications in question because it is clearly inappropriate to include supervisory classifications within the established unit. Subsection 3545 (b) of EERA provides:

(b) In all cases:

.....

(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

Thus, the statute prohibits units such as the one at issue in this case, and therefore we find the District's petition is appropriate.

⁴See regulation 33261(a) (5) to consolidate two or more established units and 33261(c) to transfer classifications from one unit to another.

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA



Atascadero Unified School District,)
Employer,) Case No. LA-UM-146
-and-) LA-R-369
California School Employees) PROPOSED DECISION
Association and its)
Atascadero Chapter #124,) (7/22/81)
Employee Organization.)

Appearances: Mr. Carl Lange III, Director of Labor Relations (Schools Legal Service) for Atascadero Unified School District; Mr. E. Luis Saenz, Attorney for the California School Employees Association and its Atascadero Chapter #124.

Before Patricia Hernandez, Hearing Officer.

PROCEDURAL HISTORY

On September 10, 1980, the Atascadero Unified School District (hereafter District) filed a unit modification petition pursuant to PERB Regulation 33261(b)(1).¹ The petition requested the deletion of head custodians I and II and

133261. Petition.

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination pursuant to Government Code section 3541.3(e);

(1) To delete classifications no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit; . . . (Emphasis added.)

cook/kitchen managers² from the existing classified unit on the basis that changes in circumstances made the classifications no longer appropriate to the established unit. The petition stated the employees in question, "direct subordinate employees, evaluate subordinate employees and effectively recommend the granting of permanent status, discipline and discharge of subordinate employees."

On September 30, 1980 the California School Employees Association and its Atascadero Chapter #124 (hereafter CSEA) filed a responding statement in which it opposed the petition.

On October 23, 1980 an informal conference was held at which no resolution was reached. The case was set for formal hearing to be convened on December 4, 1980. On that date, however, no hearing was held because the parties entered into a joint stipulation that the disputed classifications were supervisory³ employees as defined in the Educational

²The petition incorrectly showed the positions as head custodians and kitchen managers. Both parties agree the correct titles are head custodians I and II and cook/kitchen managers.

³"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.

Employment Relations Act⁴ (hereafter EERA or Act).

A hearing was rescheduled and held on March 4, 1981. At the hearing and in its brief, CSEA maintained the positions should remain in the unit because there have been no changes which justify excluding them, i.e., any alleged changes are only minor ones. This is argued despite the joint stipulation. In the alternative, they contend that if changes are found to have occurred, the District should be prohibited from filing at this time because the alleged changes took place several years ago.

Lastly, CSEA argues the District is precluded from filing a petition because of the existence of a collective bargaining agreement which includes the positions.

The District representative indicated he was employed by the District in July or August 1980. Thereafter he became aware of the situation and advised the District to file the instant unit modification petition.

Simultaneous post-hearing briefs were filed by the parties on or before April 30, 1981.

⁴Government Code section 3540 et seq. All future references are to the Government Code unless otherwise indicated.

ISSUES

(1) Whether the Atascadero Unified School District satisfied PERB Regulation 33261(b) (1) by demonstrating a change in circumstances which would make head custodians I and II and cook/kitchen managers no longer appropriate to the established unit, and if so,

(2) Whether the District should be prohibited from filing at this time because the changes took place several years ago.

(3) Whether the District is precluded from filing a petition because of the existence of a collective bargaining agreement which includes the positions.

FINDINGS OF FACT

The Atascadero Unified School District has a total K-12 enrollment of 3,831 students. There are 10 educational facilities including 6 elementary, 1 junior high, 1 senior high, 1 adult and 1 continuation school.⁵ There are approximately 100 classified employees.

At the hearing the parties stipulated that CSEA is an employee organization within the meaning of section 3540.1(d) and the District is an employer within the meaning of section 3540.1(k). They also stipulated that CSEA was voluntarily recognized as the exclusive representative of the classified employees of the

⁵California Public School Directory, 1980, p. 458.

District on May 21, 1976, and that the classifications in question were included in the unit at the time of recognition.⁶ They re-affirmed their stipulation that cook/kitchen managers and head custodians I and II are supervisory employees within the meaning of the Act. This stipulation is accepted because it is adequately supported by the facts as noted hereafter. (Centinela Valley Union High School District (8/7/78) PERB Decision No. 62.)

The parties further stipulated to and entered into evidence, the collective bargaining agreement between the parties for the period July 1, 1977 until June 30, 1979. This agreement included the disputed classes. The parties stipulated that at the expiration of said contract they agreed to extend the

⁶The District voluntarily recognized CSEA as the exclusive representative for the following unit:

Shall INCLUDE but not be limited to the following major groupings of jobs: Food Services, Clerical and Secretarial, Operations and Maintenance to include custodial/maintenance/grounds, Instructional Aides (paraprofessional), and Transportation.

The unit EXCLUDES noon duty supervisors (by whatever name) when the job description does not authorize or require the performance of duties other than playground supervision of students for the purpose of providing certificated personnel with a duty-free lunch period, AND those positions which can lawfully be declared management, confidential, and supervisory.

contract for the period July 1, 1979 to and including June 30, 1980, with negotiations to be conducted solely on the issue of wages. The current collective bargaining agreement dated September 1, 1980 to June 30, 1983 was also entered into evidence. This agreement includes the positions in question.

Head Custodians I and II

The classifications of head custodian I and II are distinguishable from each other in that a head custodian I is assigned responsibility for supervising the smaller schools and a smaller staff while the head custodian II supervises the operation at a larger school or two medium-sized schools.⁷

The record reveals that in mid-1976, there were three head custodians II located at the larger or mid-sized schools. Mr. Brazzi was at Lewis Avenue supervising approximately two employees; Mr. James Williams was at the Jr. High School supervising approximately two or three employees; and another individual was at the High School. The name or the number of employees this person supervised failed to be demonstrated on the record.

⁷See "Head Custodian-Series Specification" for distinguishing characteristics between head custodians I and II. At the hearing the parties inadvertently confused the two.

Also in mid-1976 the District employed Mr. Tony Diaz, head custodian I, who was responsible for the three small schools of the District (Santa Margarita, Creston and Carissa Plains). So in mid-1976 the District employed three head custodians II and one head custodian I for a total of four head custodians.

Currently the District employs only three head custodians. It appears the position at Lewis Avenue was abolished sometime in 1976. Mr. Brazzi is now at the high school and is responsible for the oversight of custodians at that site as well as at Monterey Road and Oak Hills continuation school. He supervises five and one half employees. Mr. James Williams is still at the junior high; however, now he is also responsible for custodians at the District office for a total of five subordinate employees. The three small schools are currently overseen by Mr. David Carreiro who has under his supervision two custodians. Thus, the District currently employs two head custodians II and one head custodian I.

At the time CSEA was recognized in May 1976 head custodians with the exception of one, did not evaluate subordinate employees. The exception was Mr. Brazzi, head custodian II, who was given evaluation duties in 1967 or 1968 and has continued to the present. The District indicated, and it is found, that this was an exception. Mr. Brazzi has been employed with the District for over 25 years.

All other head custodians I and II began evaluating employees in mid-1976 or early 1977. Prior to this, school principals evaluated all custodial personnel.

It was the uncontroverted testimony of of Mr. Theron McCarty, assistant superintendent for instruction and personnel, that custodians have been dismissed for incompetency, based upon the recommendations of head custodians I and II. He testified that a custodian was dismissed within the last calendar year based on the recommendation of a head custodian.

Head custodians I and II participated on hiring panels prior to 1976 and have continued to the present. At present the hiring panel consists of the school principal, head custodian and the maintenance operation director. No evidence was presented on what weight, if any, was given to the recommendations of the head custodians prior to 1976. Both the District and CSEA agree that at present head custodians I and II effectively recommend the hiring of employees.

Cook/Kitchen Managers

The District currently employs three cook/kitchen managers. It appears that in the early 1970's cook/kitchen managers evaluated their subordinate employees. This practice was discontinued after a director of food services was hired some time in 1975 or early 1976. At that time a central kitchen

prepared and prepacked all meals then transported them to the various school sites. This operation was disbanded some time between February and September of 1977 in favor of a hot lunch program at each site.

In February 1977 concurrent with the reorganization the District abolished the position of director of food services and replaced it with the position of administrative assistant/business. Mr. Paul Monn filled that position in February 1977 and has continued to the present. In this capacity Mr. Monn's responsibilities include overseeing transportation, purchasing and food services. When he took over in 1977 he recommended that cook/kitchen managers be given evaluation duties.

Mrs. Mary Anderson, cook/kitchen manager since February 1976, testified that she started evaluating subordinates in February 1977 when Mr. Monn took over.

There has not been a dismissal of a food service worker in the past several years. The same procedure is followed when a cook/kitchen manager recommends dismissal as when a head custodian does.

Cook/kitchen managers sit on hiring panels which consist of the cook/kitchen manager who will supervise the new employee and Mr. Monn. The assistant superintendent for instruction and personnel acts on the recommendation of the panel to issue offers of employment. His function is ministerial in nature.

Cook/kitchen managers began to participate in hiring panels on or about February 1977. Cook/kitchen managers effectively recommend the hiring of subordinate employees.

CONCLUSIONS

As previously indicated, CSEA contends the positions should remain in the unit based on several arguments. They indicate there have been no changes which justify excluding the positions, i.e., any alleged changes are only minor ones. In the alternative, they argue the District should be prohibited from filing a petition at this time because the changes took place several years ago. They maintain the employer has in effect acquiesced to the continued inclusion of the disputed classifications in the bargaining unit. It is also argued that the current collective bargaining agreement precludes the employer from filing a petition.

Lastly, CSEA feels that PERB should not disturb a bargaining unit which has been in place since May 1976 and which has been reaffirmed by the parties through collective bargaining agreements.

Unfortunately there is no Board precedent to look to for guidance on unit modifications of this nature. I turn therefore first to the Act itself and then to the regulations.

Section 3541.3(e) of the EERA provides the Board shall have the power and duty:

To establish by regulation appropriate procedures for review of proposals to change unit determinations.

In fulfilling its duty the Board promulgated PERB regulations 33260 et seq. These regulations read, in pertinent part, as follows:

33260. Policy. It is the policy of the Board to provide a single mechanism which shall be utilized for the modification of all established units. This system is designed to ensure that all parties to a modification are afforded notice and opportunity to express their views with regard to any proposed modification, and to provide assistance in the resolution of questions raised by the parties to a dispute regarding the modification of a unit. (Emphasis added.)

* * * * *

No unit modification may be made by any procedure other than that contained in this Article. (Emphasis added.)

33261. Petition.

* * * * *

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination pursuant to Government Code section 3541.3(e);

(1) To delete classifications no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit; . . . (Emphasis added.)

Sections 33260 and 33261 neither prohibit nor preclude the employer from filing a petition because changes took place years ago or because a collective bargaining agreement includes the positions. Unlike other sections of the unit modification

regulations⁹ where the filing of a petition is clearly restricted to a "window" period, PERB regulation 33261(b)(1) has no such restrictions.

The National Labor Relations Board (hereafter NLRB or Board) has different unit clarification regulations than does the PERB. They are brief and essentially non-definitive. They give no time frames in which to file. Yet the NLRB has on occasion denied petitions as untimely when filed during the term of a contract.

In Logan Memorial Hospital (1977) 231 NLRB 119 [96 LRRM 1063], the NLRB found that the employer knowingly executed an agreement and immediately thereafter petitioned the Board to exclude classifications covered by the agreement. Both parties were aware during negotiations of the uncertainty surrounding the unit placement of the disputed supervisory status of certain positions. The NLRB reasoned that to permit the petition at the time filed would tend to undermine the bargaining relationship of the parties. Since the employer knew of the dispute, he should have filed before contract-end.

⁹See regulation 33261(a)(5) to consolidate two or more established units and 33261(c) to transfer classifications from one unit to another.

Yet the NLRB in numerous earlier cases clarified units during the term of a contract. See Pacific Coast Shipbuilders Association (1966), 157 NLRB 384, 386 [61 LRRM 1362], where the Board indicated there was no limitation upon the right of a party to request clarification of a unit. See also Westinghouse Air Brake Company, Union Switch and Signal Division (1959) 129 NLRB 859 860 [44 LRRM 1008], where the NLRB proceeded to clarify a unit one month after the collective bargaining agreement was executed.

Thus through case law the NLRB has defined its brief unit clarification regulations; first, to process petitions filed during the term of a contract, and more recently, to deny them as untimely based on the facts of the case.

The PERB has rather extensive unit modification regulations spelling out precise time-frames in many instances. For filing the instant petition there are no specified time-frames. The employer is obliged only to demonstrate changes in circumstances which make the positions no longer appropriate to the unit. The Board itself may in the future either by case law or by revised regulations choose to place restrictions on such filings. At this time, however, there are no restrictions.

In this case, there is no evidence that CSEA was misled or harmed during recent negotiations. Moreover, there is no evidence that processing the petition at this time would be disruptive of the collective bargaining relationship between the

parties. It is found therefore that the collective bargaining agreement does not preclude the employer from filing the instant petition.

The Atascadero Unified School District, as stated earlier, has the obligation of demonstrating that the positions are no longer appropriate to the established unit by virtue of changes in circumstances. For the reasons noted below it is concluded that the District has demonstrated changes which make the positions no longer appropriate to the unit. Head custodians I and II and cook/kitchen managers have experienced substantial changes in job duties. Most significantly, the assignment of evaluation duties and, secondarily, the responsibility of sitting on hiring panels.

Although one head custodian was evaluating employees in 1976, it is unclear what weight, if any, his recommendations were given at the time. Head custodians I and II as a class were not given evaluation duties until after CSEA was recognized. The weight given these evaluations is apparent and undisputed as reflected in the joint stipulation by the parties as well as in the facts of this case. Head custodians I and II are clearly supervisory employees. The evaluation duties given them constitute a change in circumstances. Other changes have occurred with respect to the number of sites and employees the head custodians supervise. These changes are noteworthy, however, the critical change is the assignment of evaluation duties.

Like the head custodians, cook/kitchen managers began evaluating subordinates after CSEA was voluntarily recognized. They were given the duty in connection with the reorganization of food services in February 1977. They also began to sit on hiring panels at about the same time. These two additional duties constitute a change in circumstances which make the positions no longer appropriate to the established unit.

These changes are not minor ones as CSEA argues. They are, in fact, the basis for the supervisorial status of the employees.

It is incumbent upon the Public Employment Relations Board to process and grant unit modification petitions which are found to be properly filed and in compliance with all provisions of the EERA and regulations.

It is concluded that the instant petition was so filed. It is the proposed decision, therefore, that the petition be granted. The District met its obligation to show changes in circumstances and in so doing brought to light the supervisorial nature of the positions. Positions which can lawfully be found to be management, confidential or supervisory do not belong in a unit of regular employees.

PROPOSED ORDER

It is the Proposed Order that the unit modification petition filed by the Atascadero Unified School District be granted.

Head custodians I and II and cook/kitchen managers shall be excluded from the unit.

An amended unit certification will be issued in accordance therewith.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 17, 1981 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 17, 1981 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

DATED: July 22, 1981

FOR THE REGIONAL DIRECTOR

By

Patricia Hernandez
Hearing Officer

0