

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LOS GATOS JOINT UNION HIGH SCHOOL)
DISTRICT,)
)
Employer,) Case No. SF-UM-230
) (SF-R-488)
and)
) PERB Decision No. 355
LOS GATOS JOINT UNION HIGH SCHOOL)
DISTRICT TEACHERS ASSOCIATION, CTA/NEA,) November 14, 1983
)
Employee Organization.)
)
)

Appearances: Paul M. Loya, Attorney (Atkinson, Andelson, Loya, Ruud and Romo) for Los Gatos Joint Union High School District; Ramon E. Romero, Attorney for Los Gatos Joint Union High School District Teachers Association, CTA/NEA.

Before Tovar, Jaeger, and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed to the attached proposed decision by both the employee organization, Los Gatos Joint Union High School District Teachers Association, CTA/NEA (Association) and the employer, the Los Gatos Joint Union High School District (District). In his proposed decision, the Administrative Law Judge (ALJ) granted the Association's petition filed pursuant to former PERB rule 32261(a)(1)¹ to modify the existing certificated unit to

¹At the time that this case arose, PERB rule 33261(a)(1) provided:

- (a) A recognized or certified employee organization may file with the regional

include driver training instructors and to exclude the position of driver training coordinator from the unit as supervisory within the meaning of section 3540.1(m) of the Educational Employment Relations Act (Act).²

We have reviewed the ALJ's proposed decision in light of the parties' exceptions, and the entire record in this

office a petition for unit modification pursuant to Government Code section 3541.3(e):

(1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit. . . .

In his proposed decision, the ALJ inadvertently cited to PERB rule 32781(a)(1), which was enacted after the unit modification petition was filed in this case. This miscitation was a harmless error and does not affect the outcome of the case.

²Section 3540.1(m) provides:

As used in this Chapter:

(m) "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.

matter, and finding it free from prejudicial error, adopt it as the decision of the Board itself.

In its exceptions, the District asserts an argument made for the first time in its post-hearing brief that the Association violated subsection 3543.6(b) when Driver Training Coordinator "Lefty" Lefkowitz signed the Association's proof of support petition to include the driver training instructors in the certificated unit. The hearing officer refused to rule on this contention, asserting that he had no jurisdiction to adjudicate an unfair practice charge in the course of a unit modification hearing. The District argues that the hearing officer did have jurisdiction to hear this allegation and that the Board should find that the unit modification was improper because of Mr. Lefkowitz's "supervisory interference" in the free choice of driver training instructors.

While the hearing officer is correct that a party may not file an unfair practice charge by way of a post-hearing brief, there is no question that an employer may raise by way of affirmative defense to a unit modification request, the argument that the proof of support was inadequate or somehow tainted by fraud or illegality. However, in this case, the District's argument that the Association's proof of support was rendered ineffective by "supervisory interference" is groundless. In the first place, Lefkowitz was not a "supervisor" within the meaning of the Act when he signed the

proof of support petition; rather, he was simply a rank-and-file member of the unit. Therefore, at the time of this allegedly unlawful conduct his actions could not have constituted "supervisory" interference. At most, Lefkowitz, as a rank-and-file member of the unit improperly signed a proof of support and his signature could not be included in the determination of whether a sufficient number of employees supported the unit modification. There is no allegation, however, that the proof of support was inadequate without Lefkowitz's signature. Nor is there any substance to the District's argument that by signing the proof of support, Lefkowitz, a union member, unlawfully interfered with the "free choice" of bargaining unit members. There is absolutely no evidence in the record that other employees even knew that Lefkowitz had signed the petition, let alone felt that their free choice was affected by his conduct.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, it is hereby ORDERED that:

1. The petition for unit modification by the Los Gatos Joint Union High School District Teachers Association, CTA/NEA shall be granted, thereby adding driver training instructors to the established unit represented by the Association.

2. The position of driver training coordinator is a supervisory position within the meaning of Government Code section 3540.1(m) and is therefore excluded from the established certificated unit.

Members Tovar and Burt joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



LOS GATOS JOINT UNION HIGH SCHOOL)
DISTRICT,)
Employer,)
and)
LOS GATOS JOINT UNION HIGH SCHOOL)
DISTRICT TEACHERS ASSOCIATION/CTA/NEA,)
Exclusive Representative.)

Representation Case
Case No. SF-UM-230
SF-R-488

PROPOSED DECISION
(3/9/83)

Appearances: Paul M. Loya, Attorney (Atkinson, Andelson, Ruud and Romo) for Los Gatos Joint Union High School District; Diane Ross, Attorney for Los Gatos Joint Union High School District Teachers Association/CTA/NEA.

Before Joseph C. Basso, Hearing Officer.

PROCEDURAL HISTORY

On January 20, 1982, the Los Gatos Joint Union High School District Teachers Association/CTA/NEA (hereafter Association) filed a unit modification petition with the Public Employment Relations Board (hereafter PERB or Board). The petition sought the addition of driver trainer instructors to a unit of certificated employees represented by the Association.¹

¹On June 14, 1976, the District recognized the Association as the exclusive representative of a certificated unit of regular daytime certificated staff, excluding the superintendent, district directors, principals, assistant principals, community education teachers, and substitutes.

The Association clarified its unit modification petition at the hearing indicating that the petition did not seek to include the driver training coordinator in the unit.

On February 9, 1982, the Los Gatos Joint Union High school District (hereafter District) responded to the Association's petition stating that: (1) driver training instructors should not be included in the established certificated unit because they allegedly do not share a community of interest with the other certificated employees; (2) driver training instructors are "casual" employees; and (3) the petition should be dismissed because of "supervisory interference."²

The District further contends that if the driver training instructors are included in the established certificated unit, the driver training coordinator should be excluded because of his alleged supervisory duties.

The issues to be decided in this case are:

1. Whether driver training instructors should be added to the established certificated unit;
2. Assuming that driver training instructors should be added to the unit, the status of the driver training coordinator.

²The District contends that because the driver training coordinator is allegedly a supervisor his signature on the proof of support for the Association's petition violated Government Code section 3543.6(b).

DISCUSSION

I. Driver Training Instructors Shall be Included in the Established Certificated Unit

PERB Regulation 32781(a)(1)³ provides that a recognized or certified employee organization may file with the regional office a petition for change in unit determination:

- (1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit . . .

Government Code section 3545(a) and (b) sets forth the standards for determination of an appropriate unit:

- (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

- (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.

³See California Administrative Code, title 8, Division I, Chapter 6, Article 5, PERB Regulations, September 1982.

A. Community of Interest

Section 3545 establishes a rebuttable presumption that all classroom teachers should be contained in a single unit, absent a showing of a lack of community of interest between the groups. In Peralta Community College District (11/17/78) PERB Decision No. 77, the Board held that:

Reading subsection 3543(b) together with its companion subsection (a) gives rise to the presumption that all teachers are to be placed in a single unit save where the criteria of [subsection (a)] cannot be met. In this way, the legislative preference, as the Board perceives it, for the largest possible viable unit of teachers can be satisfied. Thus, we would place the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it. (Id., at p. 10.)

In El Monte Union High School District (10/20/80) PERB Decision No. 142, the PERB concluded that driver training teachers should be included in the established certificated unit. The Board found that driver training teachers had a community of interest with their regular teacher counterparts, for they were all credentialed, performed their service in a state mandated program, worked directly with students and were recruited by the principals.

Board cases outside the driver training area are relevant in the instant case. In Dixie Elementary School District (8/11/81) PERB Decision No. 171, the PERB directed that all substitute teachers be included in the established certificated

unit. The PERB found that substitute teachers had a community of interest with their regular teacher counterparts because they all performed identical functions; including carrying out lesson plans; administering tests; evaluating students and participation in parent and children conferences; worked closely together; shared work locations and shared common responsibilities.

Through behind-the-wheel training, as well as simulator instruction,⁴ driver training instructors in the instant case teach the fundamentals of automobile operation. Driver training instructors work exclusively after the regular workday of classroom teachers, on Saturdays, during summer and other vacation periods.

Like regular teachers, the driver training instructors work directly with students; generally have teaching credentials, supplemented by 12 college units in driver training; prepare lesson plans; administer and grade tests; assign homework; keep records for each student; confer with parents when necessary; correct student errors and evaluate student performance.

There are differences between driver training instructors and regular teachers. Driver training instructors are paid on an hourly basis while regular teachers are paid under a yearly

⁴Simulators are mock-up automobiles that have a steering wheel, gas pedal, brake, and speedometer. There are 16 students assigned to a simulator. No more than four students are assigned to an automobile.

contract. Driver training instructors do not receive fringe benefits and tenure, whereas regular teachers receive fringe benefits and tenure. Driver training instructors do not have reemployment rights and are not assigned extra duty assignments, while regular teachers have reemployment rights and are assigned extra duty assignments. The driver training instructors have different dismissal and evaluation procedures than regular teachers.

But analyzed in light of the Board precedents discussed above, these differences do not counteract the basic similarities between the driver training instructors and the regular teachers. Indeed, the Board has noted that little weight should be given to differences in fringe benefits and payment procedures, for those matters are within the District's sole control as to its unorganized work force. (Redwood City Unified School District (10/12/79) PERB Decision No. 107.) Differences in reemployment rights and tenure are plainly insufficient to rebut the basic similarities between the certificated employees here involved. Dixie, supra, reinforces this conclusion, because it dictated that substitutes who might have worked as few as one or two days per year be included in a comprehensive unit with regular teachers.

B. Established Practices

As noted in Government Code section 3545(a) above, in addition to community of interest the PERB must also look to

established practices when making a determination of unit appropriateness. Established practices that are relevant include efficiency of operations and negotiating history.

Negotiation of a supplementary agreement covering the petitioned for employees "imposes no greater burden on the parties than would the negotiation of a separate agreement."

(Oakland Unified School District (9/20/79) PERB Decision No. 102.) Future negotiations covering all employees in the modified unit do not present any more potential for disruption than bifurcated negotiations covering two separate units. (El Monte, supra, Also see Rio Hondo Community College District (1/25/79) PERB Decision No. 87, and Redwood City Unified School District (10/23/79) PERB Decision No. 107 in which PERB included summer school teachers in a comprehensive unit with regular teachers.) PERB held in Livermore Valley Joint Unified School District (6/22/81) PERB Decision No. 165, that the efficiency of operations criteria is a factor militating against fragmentation of units, for the greater number of units for the District to negotiate with, the greater must be its use of resources for administering and negotiating contracts.

In the instant case, District past practices, including negotiating history, support a comprehensive unit. In previous years, the Association informally represented driver training instructors in separate, informal discussions with the

District;⁵ the District ultimately signed an agreement with the Association covering driver training instructor salaries. A comprehensive unit would improve efficiency of operations by enabling employment conditions of driver training instructors and regular teachers to be determined in one series of negotiations rather than two. Livermore, supra.⁶ Thus, considering community of interest criteria and established practices, it is concluded that the driver training instructors should be included in the established certificated unit.

II. Driver Training Coordinator

Neither the Association nor the District disputes that the position of driver training coordinator is a supervisory position within the meaning of Government Code section 3540.1(m).⁷ The driver training instructors report directly

⁵Only one district representative had negotiated with the Association concerning employment conditions for the current unit.

⁶The District provided no other convincing evidence showing that stable labor relations or efficiency of operations would be impaired by creating a comprehensive unit. Further, it should be noted that no party has petitioned for a separate unit of driver training instructors, nor for a separate unit comprised of all casual employees of the District. Thus the issue of creation of a second unit is not before the Board in this case. Additionally, the Board is not required by the EERA to find "the most appropriate" unit, but rather, "an appropriate unit." (Compton Unified School District (10/26/79) PERB Decision No. 109.) As discussed herein, the established certificated unit, with the addition of the driver training instructors, is an appropriate unit.

⁷Section 3540.1(m) provides:

"Supervisory employee" means any employee regardless of job description, having

to the driver training coordinator. The driver training coordinator spends four-fifths of his workday in the regular classroom teaching driver education. One-fifth of his workday is spent coordinating the driver training program for the District. The District employs approximately 12 driver training instructors in their driver training program.

The driver training coordinator assigns work on a regular basis to the driver training instructors. He oversees standing assignments which must be completed by a specific time and date.

He has recommended that an employee be suspended from his driver training assignment. He has effectively recommended that a driver training instructor be dismissed. The driver training coordinator has the authority to effectively recommend the hiring, suspension, dismissal and disciplining of employees.

Since the driver training coordinator possesses several of the supervisory indicia enumerated in section 3540.1(m), it is found that the position of driver training coordinator is a supervisory position within the meaning of EERA.

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.

The District has alleged "that the driver training coordinator who signed the proof of support petition for the Association's unit modification petition violated Government Code section 3543.6(b) because of his alleged supervisory status." This hearing officer cannot act on the District allegation regarding the alleged "supervisory interference" by the driver training coordinator. The proper forum for raising an alleged violation of Government Code section 3543.6(b) because of supervisory interference" is found in PERB rule 32600 (California Administrative Code, title 8, section 32600, Unfair Practice Proceedings). However, in light of the undisputed supervisory nature of the driver training coordinator it is excluded from the established certificated unit.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, it is the proposed order that:

1. The petition for unit modification by the Los Gatos Joint Union High School District Teachers Association/CTA/NEA shall be granted, thereby adding driver training instructors to the established unit represented by the Association.

2. The position of driver training coordinator is a supervisory position within the meaning of Government Code section 3540.1(m) and is therefore excluded from the established certificated unit.

Pursuant to California Administrative Code, title 8, part III section 32305, this Proposed Decision and Order shall become final on March 29, 1983, unless a party files a timely statement of exception. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on March 29, 1983, or sent by telegraph or certified United States mail postmarked not later than the last day set for filing 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 California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: March 9, 1983

Joseph C. Basso
Hearing Officer