

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MODESTO CITY SCHOOLS,)	
)	
Employer,)	Case No. S-UM-159
)	S-UM-160
and)	S-UM-161
)	
MODESTO TEACHERS ASSOCIATION,)	PERB Decision No. 384
CTA/NEA,)	
)	May 15, 1984
Employee Organization.)	

Appearances; Ken Burt, Attorney and Executive Director for Modesto Teachers Association, CTA/NEA; Louis T. Lozano, Attorney (Breon, Galgani, Godino and O'Donnell) for Modesto City Schools.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto City Schools (District) to that portion of the hearing officer's proposed decision, attached hereto, finding that the existing certificated unit should be modified to include the positions of Counselor-Assistant and Psychologist-Intern.¹

¹In its original unit modification petition, the Modesto Teachers Association (Association) requested that the position of Preformal/Permit Teacher be included in the certificated unit. In his proposed decision, the hearing officer concluded that this position should be included in the certificated unit. The District filed no exceptions to this determination.

PERB rule 32300 (c), codified at title 8 of the California Administrative Code, provides that "an exception not

With respect to the position of Counselor Assistant, we have reviewed the hearing officer's findings of fact and

specifically urged shall be waived." Since no exceptions were filed to the determination that Preformal/Permit Teachers should be included in the certificated unit, that portion of the hearing officer's determination is affirmed.

The Association also requested that the positions of Program Specialist/Infant-Toddler and Children's Center Head Teacher should be included in the unit. In his proposed decision, the hearing officer found that the Program Specialist position should be excluded from the unit as supervisory and that the Head Teacher position should be placed in the unit. Both the District and the Association originally excepted to the hearing officer's findings with respect to these positions, but thereafter reached a settlement agreement. This agreement provided, inter alia, that the Association would withdraw its exceptions to the hearing officer's proposed decision with regard to the position of Program Specialist/Infant-Toddler, and would withdraw altogether its unit modification request with respect to the position of Children's Center Head Teacher.

Since the Association no longer excepts to the hearing officer's finding that the position of Program Specialist should be excluded from the certificated unit as supervisory, we affirm that portion of the proposed decision.

With regard to the Association's request that it be permitted to withdraw its unit modification petition concerning the position of Children's Center Head Teacher, PERB rule 33430 expressly permits withdrawal so long as a final Board decision has not issued on the matter. That rule provides, in relevant part:

Any petition requesting action to resolve a representation dispute may be withdrawn by the petitioner in writing at any time prior to a final decision by the Board pursuant to a voluntary agreement among the parties.

Since, at the time the parties' request was made, the Board had not issued a final decision in this case, the unit modification petition could be withdrawn as to the position of Children's Center Head Teacher. Accordingly, that portion of the hearing officer's proposed decision concerning the position of Children's Center Head Teacher is vacated.

conclusions of law and, finding them free from prejudicial error, adopt them as the determination of the Board itself. For the reasons which follow, we also affirm the hearing officer's determination that the position of Psychologist-Intern is appropriately placed in the certificated unit.

FACTS

The Psychologist-Intern, Ms. Rogers, carries a full caseload similar to that of other regular Psychologists. She works full-time, performs the same duties as other Psychologists, attends Psychologist staff meetings, and is introduced to parents and staff as a regular School Psychologist. She receives the same fringe benefits as other certificated employees, but is paid 50 percent of a Psychologist's wage. She is a member of the Modesto Teachers Association, and as a result of negotiations between the Association and the District received a salary increase. While interns have no guarantee of continued employment, the District has hired former interns as regular Psychologists when openings were available.

Ms. Rogers is a student in an internship program at California State University at Stanislaus (University). The position of Psychologist-Intern is provided by an agreement between the District and the University. Ms. Rogers is in the internship program in order to satisfy the state requirement

that one must perform an internship in order to obtain a credential as a School Psychologist. As a condition of employment, Psychologist-Interns must possess a Pupil Personnel Services credential, which certifies the intern has completed a particular course of study and is ready to "go out into the field." Ms. Rogers has the credential. She has no association with the University other than attending monthly internship meetings. She is not enrolled at the University and attends no classes.

The Psychologist-Intern has an intern supervisor at the University with whom she meets monthly and has two "mentor-Psychologists" within the school district who review and sign the reports she files. These mentors also evaluate the intern's work, but most of the Psychologist-Intern's case work is handled independently of either the supervisor or the mentors, and there is no showing that they direct her work or require her to get their approval before initiating activities.

DISCUSSION

Subsection 3540.1(j) of the Educational Employment Relations Act (EERA or Act)² defines a public school employee as "any person employed by any public school employer." PERB has decided only one case under EERA in which the status of

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

interns as employees or students was at issue. New Haven Unified School District (3/22/77) EERB Decision No. 14.3 In New Haven, supra, the Board held that where an intern's employment is incidental to his/her educational concerns he/she will not be considered an employee. Conversely, when the intern's educational goals are secondary to his/her employment, he/she will be an employee for the purposes of the Act. Under the facts of New Haven, supra, the Board held that the Stanford interns were not employees under EERA.

We find it appropriate to apply the test articulated in New Haven, supra, to the facts in this case.⁴ The District argues, however, that we should adopt the National Labor Relations Board's (NLRB) test for determining whether interns are employees under the National Labor Relations Act (NLRA) and follow a long line of NLRB decisions which have excluded medical interns from bargaining units. See St. Claire's Hospital and Health Center (1977) 229 NLRB 1000 [95 LRRM 1180];

³Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

⁴In holding that the Psychologist-Intern was an employee under EERA, the hearing officer relied in part on the test set forth in Regents of the University of California (Physicians National Housestaff Association) (2/14/83) PERB Decision No. 283-H for determining employee status under the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq. He argued that, while EERA contains no statutory section comparable to HEERA subsection 3562(f), the Housestaff test could be applied to cases arising under EERA by analogy. Since we find this case to be governed by the test articulated in New Haven, supra, we need not base our finding on any analogy to the HEERA standard.

Cedars-Sinai Medical Center (1976) 223 NLRB 251 [91 LRRM 1398];
Buffalo General Hospital (1976) 224 NLRB 17 [97 LRRM 1197];
Clark County Mental Health Center (1976) 225 NLRB 780 [92 LRRM
1545].

Under the NLRA, a student is not an "employee" when his/her employment interest is "predominantly academic rather than economic in nature." St. Claire's Hospital & Health Center, supra, 229 NLRB at 1002. Contrary to the District's assertion, we find that the test for determining whether interns are employees under the NLRA does not diverge from the test adopted by this agency. Both administrative bodies have found particular students not to be employees when their employment interests are predominantly academic rather than economic in nature. Since the NLRB's test is essentially indistinguishable from that articulated by this Board in New Haven, the federal cases cited by the District merely reflect the application of that test to a different factual record than that before us in this case.⁵ We conclude, therefore, that since the determination of whether the Psychologist-Intern in this case is an employee under EERA must be based on the record before

⁵Applying similar tests, several other states have rejected the NLRB's conclusion that interns are not "employees" within the meaning of their respective statutes. See, e.g., House Officer's Association v. University of Nebraska Medical Center (1977) 198 Neb. 697, 225 N.W.2d [82 LRRM 2909]; Regents of the University of Michigan v. Michigan Employment Relations Commission (1973) 389 Mich. 96, 204 N.W.2d 218 [88 LRRM 2909]; City of Cambridge, Cambridge House Officer's Association (1976) 2 M.L.C. 1450.

us, the NLRB's factual conclusions in other instances are of minimal persuasive value.

Next, the District contends that the facts of this case are indistinguishable from those of New Haven, supra, and therefore we cannot find that the Psychologist-Intern is an employee under EERA. It further argues that since the Psychologist-Intern serves in the internship program as a condition of qualifying for a regular School Psychologist, her employment is secondary to her educational goals and she should not be found to be an employee under the Act.

In New Haven, supra, the District had an arrangement with Stanford University to obtain teaching interns. The interns were hired for up to a full year, teaching two or three periods a day (out of a normal five period day) and performing the duties of a regular teacher. The interns were monitored more closely than regular teachers, had no continued expectation of employment, and had only temporary interim credentials. While they did not achieve tenure while serving as interns, their service as interns counted toward achieving tenure. They continued to attend classes at Stanford during the internship. Based on these factual circumstances, the Board concluded that the interns' educational concerns predominated over their employment interests.

We find that the record does not support the District's contentions. Unlike the student/interns in New Haven, the

Psychologist-Intern here works a full 40-hour week, is minimally supervised, and attends no classes. Indeed, she is not even enrolled at the University. She performs essentially the same duties as other School Psychologists, attends Psychologist staff meetings, and is introduced to parents as a School Psychologist, with no reference to her intern status. Overall, in our view, the Psychologist-Intern is more like a regular School Psychologist than the interns in New Haven were like regular teachers. The mere fact that Ms. Rogers' participation in the internship program is required for her to qualify as a regular School Psychologist is not, in and of itself, determinative of whether her employment is secondary to her educational concerns. It is only one factor to be considered along with the rest of the record. Weighing all the evidence, we find that Ms. Rogers' educational concerns are secondary to her employment interests.

The hearing officer, having determined that the Psychologist-Intern was an employee within the meaning of the Act, placed that position in the certificated unit without separately applying the community of interest standard set forth in subsection 3545(a).⁶ Apparently, the hearing officer concluded that the analysis required to determine

⁶Subsection 3545 (a) provides:

In each case where the appropriateness of the unit is an issue, the board shall decide

whether the Psychologist-Intern was an "employee" within the meaning of the Act was sufficient to satisfy the community of interest criteria of subsection 3545(a). At no time has the District argued that, if the Psychologist-Intern were found to be an employee, it would not be appropriate to place her in the certificated unit or that she would be more appropriately placed in another unit. Therefore, while we can foresee circumstances where the analysis of employee status would not, in and of itself, be sufficient to satisfy the distinct community of interest standard, the factual record in this case amply supports the hearing officer's conclusion that the Psychologist-Intern indeed is appropriately placed in the certificated unit.

ORDER

Based upon the foregoing and the entire record in this case, the Public Employment Relations Board ORDERS that:

1. The petition to add Preformal/Permit Teachers, Counselor-Assistants, and Psychologist-Interns to the certificated unit is GRANTED.

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.

2. The Program Specialist/Infant-Toddler is a supervisory employee and is, therefore, EXCLUDED from the unit.

Member Burt joined in this Decision.

Member Morgenstern's Concurrence and Dissent begins on page 11.

MORGENSTERN, Member, concurring in part and dissenting in part: While I am in agreement with the majority's opinion regarding the Psychologist-Intern, I am unable to join in their summary affirmance of the hearing officer's conclusion as to the Counselor-Assistant to the principal. My dispute with the majority rests primarily on the undisputed fact that the two individuals who occupy the Counselor-Assistant position substitute for the absent principal at least 50 and as much as 70 percent of the time.

In contrast to those situations where an employee's substitution for his/her superior is sporadic and irregular (NLRB v. Stewart Oil Co. (5th Cir. 1953) 207 F.2d 8 [32 LRRM 2651]; Nevada County Publishing Co. (1980) 251 NLRB 1030 [105 LRRM 1359]; Canonsburg General Hospital Association (1979) 244 NLRB 899 [102 LRRM 1143]; The Boston Store (1975) 221 NLRB 1126 [91 LRRM 1076]; Complete Auto Transit, Inc. (1974) 214 NLRB 425 [87 LRRM 1352]), the National Labor Relations Board (NLRB) and the courts have found indicia of supervisory status when the employee's job includes substitution for the recurring and substantial absences of superiors. NLRB v. Scoler's, Inc. (2nd Cir. 1972) 466 F.2d 1289 [81 LRRM 2299]; Best Products Co., Inc. (1981) 259 NLRB 95 [108 LRRM 1285]; Ajax Tool Works, Inc. (1981) 257 NLRB 825 [108 LRRM 1013]; Bucyrus Foodland North & South (1980) 247 NLRB 284 [103 LRRM 1219]; Kut Rate Kid & Shop Kwik (1979) 246 NLRB 106 [102 LRRM 1633]; Osco Drug, Inc.

(1978) 237 NLRB 231 [99 LRRM 1150]. This same distinction has been utilized in other public sector jurisdictions specifically as to assistant principals. Ridgewood Board of Education (N.J. 1979) 5 NJPER para. 10183; Garrison Union Free School District (N.Y. 1979) 12 PERB para. 3050. Borrowing from the rationale expressed by the NLRB in Ajax, supra, failure to recognize the supervisory status of these two employees means that all bargaining unit employees at the two continuation high schools are without supervision of any kind during the substantial and repeated periods when the principal is absent.

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MODESTO CITY SCHOOLS,)	
)	Representation
Employer,)	Case No. S-UM-159
)	S-UM-160
and)	S-UM-161
)	
MODESTO TEACHERS ASSOCIATION, CTA/NEA,)	
)	Proposed Decision
Exclusive Representative.)	(4/26/83)
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Appearances; Kenneth W. Burt II, Attorney and Executive Director for Modesto Teachers Association, CTA/NEA; Louis T. Lozano, Attorney (Breon, Galgani, Godino and O'Donnell) for Modesto City Schools.

Before Terrell J. Lindsey, Hearing Officer.

PROCEDURAL HISTORY

The Modesto Teachers Association, CTA/NEA (MTA) is the exclusive representative for a comprehensive unit¹ of certificated employees in the Modesto City and High School District (District).

In three unit modification petitions consolidated for hearing in this case, MTA has moved to add to the certificated unit three classifications of employees: (1) preformal or permit teachers, (2) the counselor-assistant to the principal

¹The District has an enrollment of approximately 19,000 to 20,000 students. The existing certificated unit contains around 950 employees. This comprehensive certificated unit encompasses a large grouping of certificated classifications. For an exhaustive listing of these classifications refer to PERB case file S-R-365.

at the continuation high schools, (3) the psychologist-intern.

The District opposes the petitions, arguing that:

(1) preformal/permit teachers have no community of interest with certificated employees or, in the alternative that a separate unit of preformal teachers would be appropriate;

(2) that the counselor-assistant to the principal is either a management or supervisory classification² (3) the psychologist-intern does not share a community of interest with other certificated employees.

ISSUES

A. Should permit or preformal teachers be placed in the certificated unit?

B. Are child care center head teachers and the counselor-assistant to the principal at the continuation high schools management or supervisory employees?

C. Should the psychologist-intern be placed in the certificated unit?

²The District did not raise the supervisory issue in its response to the addition of these classifications. However, the District did present evidence on the record and raised in its post-hearing arguments supervisory issues. Accordingly, the issue will be addressed in this case.

It is clear from the record that, absent supervisory or managerial status, these classifications do have a community of interest with other certificated employees. No party argued that the counselor-assistant to the principal lacks a community of interest with other certificated employees, absent a finding that the position is managerial or supervisory. Similarly, no party argued that child care center head teachers lacked a community of interest with other preformal teachers, absent a finding of managerial or supervisory status.

DISCUSSION

PERB regulation 32781(a)(1) allows a recognized or certified employee organization to file with the regional office a unit modification petition:

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

Government Code section 3545(a) and (b),³ in pertinent part, sets forth the general criteria for determining appropriate units:

(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.

I. PERMIT TEACHERS

A. Community of Interest

The Board has held that section 3545 establishes a

³All section references will be to the Government Code unless otherwise noted.

rebuttable presumption that all classroom teachers should be placed in a single unit unless community of interest factors dictate otherwise.

In Peralta Community College District (11/17/78) PERB

Decision No. 77 the Board interpreted section 3545 as follows:

Reading subsection 3545(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.

Consistent with the Peralta presumption, the Board has included some permit teachers in comprehensive units with regular teachers. In Gilroy Unified School District (7/20/79) PERB Decision No. 98, the Board included permit teachers in a comprehensive unit of teachers, holding that permit teachers' interests were not so dissimilar from those of other teachers so as to preclude joining them in the same unit, and that efficiency of operations criteria (discussed below) further mandated creation of a single consolidated unit.⁴

⁴The employer relies, inter alia, on two other PERB decisions in arguing that permit teachers do not share a community of interest with the regular certificated staff. Oakland Unified School District (3/28/77) EERB Decision No. 15; Redondo Beach City Unified School District (1/17/80) PERB Decision No. 114. (PERB previously was called the Educational

Clearly the Board since Peralta has expressed a preference for certificated units which contain all of a school district's certificated employees absent community of interest factors which dictate otherwise. Part-time teachers share units with regular teachers. Hartnell Community College District (11/2/79) PERB Decision No. 81. In Dixie Unified School District (8/11/81) PERB Decision No. 171, the Board placed substitute and regular teachers in the same unit. Driver education teachers were included in an overall certificated unit by the Board in El Monte Union High School District (10/20/80) PERB Decision No. 142. Summer school and adult education teachers have also been united with other certificated staff by the Board in Redwood City Unified School District (10/23/79) PERB Decision No. 107 and Glendale Community College District (1/30/79) PERB Decision No. 88 respectively. In the aforementioned cases those employees were certificated, prepared lesson plans, shared work locations, and

Employment Relations Board, or EERB.) These cases, however, are not controlling. First, while Board determined, in Oakland USD, that the separate unit of children's center teachers is an "appropriate" unit, it relied in substantial part on the theory that children's center teachers were not "classroom teachers" under the EERA. This theory was specifically overruled in Peralta, supra, which characterized the Board's previous definition of "classroom teacher" as "parochial." Peralta USD, supra, at p. 9. Second, as discussed infra, the Board's decision in Redondo Beach, supra, rested on elements that are distinguishable from the instant case. Third, in Redondo the exclusive representative of the unit from which permit teachers were severed did not oppose a separate permit teacher unit.

many worked similar hours. Not all shared the same salary schedules, fringe benefits or evaluation procedures with other teachers in all cases. However, the Board resolved these unit disputes despite those differences among certificated employees.

In all of these cases, teachers who were not year round, regular teachers were included in overall certificated units with regular teachers, principally because they all shared the same job function and many common characteristics - including teacher certificates, an obligation to prepare lesson plans, shared work locations, and similar hours. The fact that not all teachers in a given district shared the same salary schedules, fringe benefits or evaluation procedure with other teachers did not affect the Board's determination to include them in light of the mandates of EERA section 3545(a).

In the instant case the District employs 34 teachers in its preformal programs. These programs provide child development services⁵ to pre-kindergarten children to prepare them for matriculation through the formal educational programs of the District. The District's preformal programs are Head Start, preschool, child care, school age parenting/infant development and pregnant minors program. All of these programs are located at various District elementary schools except for the school age parenting/infant development and pregnant minors program

⁵Education Code section 8201 et seq.

which is located at Downey High School. All these programs are funded from a variety of federal, state and local funding sources.

Under Education Code section 8360 the teachers in these programs are required to hold teaching permits issued by the Commission for Teacher Preparation and Licensing. Education Code section 83666 specifies that permit teachers are certificated employees.

Like the teachers in the unit, all preformal teachers work in a classroom setting. Preformal teachers are required to work the same number of hours (approximately 6 to 7 hours) and days (180) as teachers in grades kindergarten through sixth (K-6). All K-6 teachers are within the existing unit.

Preformal teachers, like K-6 teachers, prepare lesson plans as a part of their instructional duties. They also periodically assess the progress of each child against program standards to achieve specific goals. Like K-6 teachers, preformal teachers hold parent-teacher conferences as a part of their required duties.

⁶Section 8366 states in pertinent part:

Each person employed by a public or private agency as defined in section 8213 in a position requiring a child development permit for the supervision and instruction of children . . . or in the supervision of the child development program, shall be deemed to be employed in a position requiring certification qualifications.

The school principal evaluates preformal as well as K-6 teachers. He/she uses the same evaluation procedure for both. Like K-6, the principal visits preformal programs and is responsible for the program's efforts.

Head Start and preschool program classroom activities are similar to those done in kindergarten. Education Code section 37042, for instance, authorizes school employers to combine preschool and kindergarten classes. Preschool and Head Start teachers have substituted for kindergarten teachers in the District.

Children in the preformal programs use the same playground, materials, and restrooms as the other children at the school. All teachers at the school are encouraged to have their children interact with other children at the school site regardless of grade level.

Children in the preschool and Head Start programs and kindergarten are at times interchanged. For instance, a child whose abilities are advanced beyond the preformal context may be placed in a kindergarten class temporarily. On occasion kindergarten children are put in a preformal class for the opposite reason.

Handicapped children and those with other unique educational needs are part of the student population in the preformal programs. The District assigns special education teachers to work with preformal teachers. Using a team

teaching approach, they provide instruction to a child utilizing their different abilities to achieve a developmental goal for the student. Special education teachers are part of the existing unit.

Preformal teachers are considered to be part of the certificated staff at the schools where they work. They attend faculty meetings, participate in open house and are involved in various social activities sponsored by the school for all certificated staff. Preformal teachers have mailboxes like the other teachers and use the same faculty rooms and other conveniences provided for teachers.

Teacher aides are provided to preformal teachers to assist in the classroom. The preformal teacher evaluates her aide in concert with the school principal. K-6 teachers also have aides and use the same evaluation procedure as do preformal teachers.

In Gilroy the Board acknowledged differing community of interest factors between permit teachers and other classroom teachers, but included these employees in the same unit. In the instant case no less a commonality exists. Here, as in Gilroy, permit teachers interact with other teachers who are in the unit, attend faculty meetings and provide instruction similar to that offered by elementary teachers. But here, the case for a community of interest is even stronger than Gilroy, for permit teachers and elementary teachers in this case have

common supervision, similar work hours and school year, facilities and all assisted in the classroom of teacher aides.⁷

There are, of course, differences between preformal and regular teachers. Under the Education Code, K-12 teachers have more protection in layoff proceedings than preformal teachers. Preformal teachers are paid from a different salary schedule than other certificated employees. Preformal programs are funded in an entirely different way than other programs in which certificated employees work. The funding for the program is a combination of federal, state and parent fee monies used solely to run preformal programs. Enrollment in these various preformal programs is contingent on the child's parent not exceeding certain income levels. No such restrictions exist in the K-12 program.

These differences, however, are not persuasive. The existing certificated unit is composed of classifications with various terms and conditions of employment. Employees in the existing certificated unit have different student staff ratios,

⁷The facts in the instant case are thus clearly distinguishable from those in Redondo Beach, supra. In Redondo, permit teachers performed different work functions than regular teachers, worked different hours, and otherwise had "little contact" with regular teachers, "even on an informal basis." (Redondo, supra, at pp. 6-8.) In the instant case, as noted above, the work functions and hours of permit teachers are similar to those of regular teachers, there is considerable contact between the two groups, and there are other substantial similarities between them.

salary schedules, qualifications, funding sources, work sites and duty assignments. The preformal teachers seem to share most of the similarities found among the employees in the certificated unit and the differences as well.

Also in support of its argument against placing preformal teachers in the unit, the District says preformal programs are not part of the regular District educational program. The District cites the California State Constitution at Article IX sections 5 and 6 and a celebrated court case⁸ to reinforce this point.

It is true that the District is not legally required to offer preformal programs. However, the unit status of a programs' employees does not turn on such distinctions. The programs purpose is a factor in unit determination matters, though not controlling. It is a guide toward establishing the work of the employee which actually determines unit questions.

A weighing and balancing of the facts in this case supports the view that preformal teachers share a community of interest with other certificated employees.

B. Established Practices

In Livermore Valley Joint Unified School District (6/22/81) PERB Decision No. 165 the Board held that the efficiency of operations criterion argues against the proliferation of

⁸Serrano v. Priest, 18 C.3rd 728, 755-756; Cal.Rptr. 345.

units. An excessive number of units places an inordinate strain on the resources of a district which must bargain with each unit. In Gilroy, supra, the Board determined that a unit of 6 employees in a district with units of 262 classified and 314 certificated employees "would unduly fragment units and impair the efficiency of the District's operations."

As earlier stated, the District herein would support a separate unit for its 34 preformal teachers. Presently the District has the responsibility to bargain with two units covering 860 classified and 950 certificated employees. In light of Board precedent, a third unit of only 34 employees might well impair this District's operations. In any event, the District's argument that a consolidated unit including the 34 permit teachers would hinder the efficiency of its operations is unsupported by the record.

C. Conclusion

In this case the District's efforts to overcome the Peralta presumption do not succeed. Placing preformal teachers in the existing certificated unit is appropriate given the community of interest and efficiency of operation mandate. Therefore, the petition to add preformal teachers to the unit is granted.

II. Child Care Center Head Teachers and Program Specialist, Infant-Toddler

The District argues that three child care center head teachers and one program specialist, infant-toddler employed in

the District's child care centers are either managers or supervisors.

Section 3541.1(g) defines a management employee as ". . . any employee in a position having significant responsibilities for formulating district policies or administering district programs." When interpreting this statutory instruction the Board created a test that an employee must have "significant responsibilities for formulating and administering" District policies and programs. . . . (Emphasis added.) Lompoc Unified School District (3/17/77) EERB Decision No. 13, Hartnell Community College District (1/2/79) EERB Decision No. 81, Oakland Unified School District (11/25/81) PERB No. 182.

Section 3540.1(m) of the Act defines a supervisory employee as:

. . . 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.

In Sweetwater Unified School District (11/13/76) EERB Decision No. 4, the Board interpreted section 3540.1(n) to be written in the disjunctive. Therefore, to be a supervisor an

employee need only perform, or effectively recommend one of the enumerated actions.

While the authority to "assign" work may be an indicator of supervisory status, a sporadic assignment of work which amounts to nothing more than the "routine application of established policy or practice" does not require the use of independent judgment, and therefore is insufficient, standing alone, to support a finding of supervisory status. Cantua Elementary School District (3/18/83) PERB Decision No. 295.

A. Head Teacher

1. Managerial Issue

Child care center head teachers have an administrative role, and do not have as much contact with students as do child care center teachers. Head teacher administrative duties include determining the eligibility of families and children for the program, assisting the coordinator of preformal programs in developing program plans and goals, maintaining program records and implementing policies received from the school principal or the program coordinator.

Head teachers follow prearranged guidelines in certifying entrants. Their input to the coordinator of preformal programs is shared with three other head teachers. Above head teachers in the administrative hierarchy are at least the school principal, the program coordinator and the director of educational services. Head teachers were not shown to interact

at any of these levels where true managerial responsibility may arguably lie. For these reasons it must be concluded that head teachers are not managerial employees.

2. Supervisory Issue

The District has three children's centers, each has a head teacher. The head teachers at these centers are Suzanne Nelson, Judith Spencer and Ella Temple. One children's center has three teachers, one has two and another has one teacher on the staff. The centers also have aides, volunteers, parents and students in their operations. Because the teachers and the rest of the staff report to the head teachers, head teachers are alleged to be supervisors.

Head teachers are supervised by the principal of the elementary school where the center is located. They also report to Mrs. Rita Roberts, supervisor of Curriculum Support Services, Preformal and K-6. The children's centers, and other preformal programs have this dual supervision. Mrs. Roberts oversees the program areas of the centers. For instance, if either the nutritional or budgetary components of a program are not in compliance with program guidelines, Mrs. Roberts has the authority to correct the problem. Mrs. Roberts does not have daily contact with the centers. However, in non-program areas, such as personnel administration, the principal is ultimately responsible for what goes on at his/her school site. The

principal and Mrs. Roberts jointly supervise the children's centers.

Head teachers oversee the daily operation of the children's centers. However, the extent of their "supervisory" responsibility is dictated, in substantial part, by the role that the school principal has at the school site.

The record does not show that the children's centers program operation require constant direction. Neither are there opportunities, typically, for a head teacher to exercise any supervisory authority.

One area that head teachers may arguably have supervisory authority is in assigning and directing the work of teachers. Upon entering the center a child is assessed for need, and goals are established for that child's development. The head teacher makes that assessment and assigns the teacher who implements the plan. However, this process is well established almost routine in its existence and, therefore, provides little, if any, discretion to head teachers. As a result, one head teacher spends most of her time in a kindergarten class while another works mostly as a children's center teacher herself. Additionally, it is the principal who receives and reviews the lesson plans of the teachers.

Head teachers have little involvement in promoting, rewarding, discharging or otherwise affecting the employment conditions of teachers through the evaluation process. The

school principal evaluates head teachers and teachers. The principal may ask a head teacher's opinion about a teacher's performance but usually after the principal has written the evaluation. Conversely, no facts are present in the record to show what weight a principal gives to a head teacher's comments when such comments are sought.

The school principal usually intervenes whenever a personnel matter occurs. For instance, it is alleged that head teachers reprimand teachers. Head teachers may informally reprimand a teacher but quickly defer to the school principal in situations which may lead to formal discipline.

Vacation schedules typically are worked out informally between the teachers. Therefore head teachers are faced with a fait accompli with any potential conflict and, therefore, a decision by the head teacher is eliminated.

Regular teachers work around 194 days in the school year. Head teachers typically work 230 days in the year. They also are paid 10 percent over what regular teachers receive which well may be compensation for the administrative responsibilities head teachers have in addition to any student contact time.

Head teachers do not make effective recommendations with regard to hiring teachers. They screen applicants for interviewing. However, a panel with the principal, head teacher, regular teacher, parent or aide participates in the

interview. The principal makes the ultimate recommendation about hiring. Further, the head teachers' role in hiring is no more substantial than that of the other non-supervisory panel members.

3. Conclusion

Head teachers do not possess supervisory authority as prescribed by section 3540.1(m) of the Act. Head teachers have an administrative role in the children's centers and generally less student contact than do teachers. Yet, relative to the role played by the school principal at the school site, head teachers have no real supervisory authority in the interest of the public school employer.

B. Program Specialist, Infant-Toddler

1. Managerial Issue

Ms. Phyllis York is employed in this position which in some respects is like the head teacher in the children's centers. An obvious difference is that the children in Ms. York's program are from six weeks to two years old. Ms. York is also under the joint supervision of Ms. Roberts and the school principal as are head teachers.

Her involvement in formulating or administering District programs is not sufficient enough to establish managerial status. Ms. York's responsibilities are outlined in prearranged policies. She said that when it is necessary to deviate from these policies she must gain approval from either

Ms. Roberts or the school principal. Like head teachers, Ms. York does interact with her superiors. The purpose, though, is to further her ability to implement District policy. For these reasons the conclusion is that the program specialist, infant-toddler is not a managerial employee.

2. Supervisory Issue

The District alleges, in the alternative, that Ms. York is a supervisory employee. The record supports this allegation. Ms. York has effectively recommended the hiring of two teachers in her program: she initiated the request for a teacher, had the position advertised, secured the principal's approval of the request, and screened and selected candidates. She then selected an interview panel among her staff and interviewed the candidates. Ms. York made recommendations to the school principal, which he followed.

Ms. York also has the authority to assign and direct the work of teachers, in that she meets with the teachers weekly, discusses what activities will occur during the week, structures the work week, and gives out work assignments. Unlike head teachers, it is Ms. York who receives her teachers' lesson plans. She determines at the outset what a teacher will be doing from day to day. She will also vary teacher responsibilities during the school year based upon student-staff ratios and the abilities of the children enrolled in the program.

Ms. York is alleged to have the authority to reprimand teachers. However, the record is devoid of facts to support this contention. During her tenure as the program specialist, infant-toddler, no teacher has needed to be disciplined in any form.

3. Conclusion

On the basis of the record it is concluded that Ms. York does exercise independent judgment in the assignment of work and has effectively recommended the hiring of two teachers. Therefore she is a supervisor within the meaning of the Act.

III. Psychologist-Intern

In New Haven Unified School District (3/22/77) EERB Decision No. 14 the Board considered the question whether "interns" should be placed in a unit of regular certificated personnel.⁹ The interns in New Haven worked under an internship agreement¹⁰ which enabled interns to have on-the-job training and experience that were necessary to qualify them as credentialed teachers. While functioning "as . . . regular teacher[s]," New Haven interns were closely monitored, had no continued expectation of employment, and had

⁹The definition of "employee" in the EERA does not specifically indicate the circumstances under which "students" may be considered "employees." Government Code section 3540.1(j).

¹⁰The internship agreement was in accordance with Education Code provisions authorizing school districts to enter into internship agreements with state colleges and universities.

temporary interim credentials. While interns did not achieve tenure while serving as an intern, their service as interns counted towards achieving tenure.

Under these facts, the Board held:

While the interns have duties similar to those of the regular teachers, we note that their employment is merely incidental to their education. The Education Code provisions regarding the supervision of interns highlight the educational nature of their work experience. Their continued employment necessarily depends upon satisfactory progress toward their regular teaching credential and they have no expectancy of employment in the district after completion of the credential. Because interns are primarily students, we find they do not share a community of interest with the regular teachers and therefore exclude them from the stipulated unit. (New Haven, supra, at p. 10.)

In the instant case, unlike New Haven, the intern, Mrs. Rogers, is primarily an employee who shares a community of interest with her fellow employees. Unlike the interns in New Haven, Rogers (here the intern) carries a full caseload similar to that of regular school psychologists, works full-time, receives the same fringe benefits as other certificated employees (although she is only paid 50 percent of a psychologist's wage), attends psychologist staff meetings, and basically performs the work of a full-time psychologist for the District. Further, the intern here involved received a salary increase as a result of a negotiated agreement affecting psychologists. In addition, Mrs. Rogers works a full day, 8:00

to 5:00, 195 days per year as do the regular psychologists. Similarly, she receives fringe benefits and attends psychologist staff meetings. Mrs. Rogers is a member of the Modesto Teachers Association. And, while interns have no guarantee of continued employment (internships, by their terms, last for only one year) the District has hired former interns as regular psychologists when openings were available.

It is true that, as a condition of her internship, the intern has an intern supervisor with whom she meets monthly. In addition she has two mentors-psychologists within the school district who review the reports she files and signs off on them. These mentors also evaluate the intern's work. However, the functions performed by the intern supervisor and the mentors do not rise to the level of supervision given the teacher intern in New Haven. Most of the psychologist intern's case work is handled independently of either the supervisor or the mentors; there is no showing that they direct her work or require her to get their approval before initiating any activities.

Thus, with the exception that she is paid less and that her reports are reviewed by others (not an uncommon experience for a new employee either), the psychology intern performs essentially the same functions as the regular psychologist. In light of the foregoing, the intern's employment is certainly

not "secondary" to her educational concerns, and she shares a clear community of interest with other unit employees.

The instant case is analogous to Physicians National Housestaff Association v. Regents (2/14/83) PERB Decision No. 283-H (Housestaff), in which the Board found that the housestaff of the University of California medical center were "employees" under the Higher Education Employer-Employee Relations Act (HEERA, Government Code section 3560 et seq.). In Housestaff, the Board found that the amount of time hospital housestaff spent on direct clinical care, the nature of their work, the lack of direct supervision and the emphasis on providing services to clients as opposed to education of the housestaff required a conclusion that the housestaff's educational objectives were secondary to their job of providing services.

This conclusion, the Board held, was amply supported by policy considerations. Inclusion of housestaff as employees would provide them an opportunity to participate fully in the determination of their working conditions, the proper facilities for treatment of patients, and diagnostic testing and evaluation. This opportunity, the Board held, provides housestaff with a mechanism for resolving disputes which will have "a salutary effect on the nature of the relationship between housestaff, the hospitals, and the University." (Board decision, at pp. 16-18.)

In the instant case, as in Housestaff, the educational objectives of the psychologist intern are secondary to her job of providing counselling services for the District. Further, as with UC housestaff, the purposes of the Act will be served by providing interns with a mechanism for participating fully in determinations about their working conditions. Thus, Housestaff counsels in favor of including the intern in the unit herein.¹¹

¹¹It might be argued that Housestaff is inapplicable to the instant dispute because the HEERA, unlike the EERA, specifically indicates that, under prescribed circumstances, students will be considered "employees" under the HEERA. HEERA section 3562(f) states:

"Employee" . . . means any employee of the Regents of the University of California . . . The Board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter. (Emphasis added.)

The treatment, in HEERA, of "students" does not mean that the test articulated in Housestaff is simply inapplicable under the EERA, much less that students never can be held to be "employees" under the EERA. HEERA specifically allows PERB to determine that students are also employees when their education is subordinate to their employment activities. But the EERA does not prohibit a determination that students are employees; rather, the power to determine whether students are employees is implicit in the power granted PERB. (See EERA section 3543.1.) It is likely that the HEERA includes specific language concerning students because the Legislature was aware that students frequently were employed to work in institutions of higher learning: student employees are far less common in

Relying heavily on NLRB precedent, the District argues that the intern should not be included in the unit because of the educational aspect of her work. The NLRB has consistently refused to confer "employee" status on interns whose work was closely related to, or required for, their course of study. Cedars-Sinai Medical Center 91 LRRM 1398. Housestaff, however, indicates that significant California public sector labor relations policies require conferring "employee" status on interns whose employment is not subordinate to their educational objectives. (See discussion supra.) While Housestaff, by its terms, addressed student employees under the HEERA, there is no significant distinction between appropriate labor policies in the higher education setting and those governing other California public schools. The Housestaff policies thus are equally applicable under the EERA. The District's reliance on NLRB precedent is accordingly misplaced.

Conclusion

The record establishes that the intern psychologist shares a community of interest with regular psychologists who are in the certificated unit. Accordingly, the petition to add the intern psychologist to the unit is granted.

elementary and high schools. However, the purposes of both acts can be best effectuated by a finding that students are also employees in cases in which the educational aspect of their employment is clearly secondary to the services they provide. New Haven and Housestaff both articulate this essential test.

IV. Counselor-Assistant to the Principal

The District contends that the counselor-assistants to the principal at each of its two continuation high schools are either management or supervisory employees. The MTA maintains that the positions are neither management nor supervisory and therefore should be included within the certificated unit.

1. Managerial Issue

As discussed earlier, the Board has interpreted section 3541.1(g) to mean that an employee must possess significant responsibilities for formulating and administering District policies and programs to be considered management. With regard to the counselor-assistant to the principal the record reveals no facts to support a contention that the position is managerial.

Mr. William Hampel and Mr. Jack Henry occupy the positions at issue at Frontier and Pioneer High Schools respectively. Mr. Eugene Mould is principal for both high schools. Mr. Hampel and Mr. Henry assist Mr. Mould in the administration and supervision of their respective high schools. There is no evidence that either employee is involved in any activities leading toward establishing District policy or programs in their employment role. Most certainly no evidence was offered to show that either gentlemen is vested by the District with significant responsibility to formulate and administer polices and programs.

2. Supervisory Issue

Neither does the record support the view that as counselor-assistants to the principal, both Mr. Henry and Mr. Hampel have supervisory authority. The Board has decided that an employee need only have the authority to exercise one of the statutorily enumerated job duties¹² to be a supervisor. The only areas in which Mr. Henry and Mr. Hampel appear to exercise supervisory authority are in assigning work to and directing teachers in the performance of their jobs. The assistant principals are alleged to perform these duties by granting time off to teachers and monitoring them in the classroom or doing special projects.

It was established that, as principal of two high schools, Mr. Mould is absent from the schools at least half of the normal workday. Mr. Hampel said that at Frontier High School Mr. Mould is absent from 60 to 70 percent of the workday. During Mr. Mould's absence Mr. Hampel and Mr. Henry are responsible for what goes on at their particular school. Despite Mr. Mould's prolonged absences, Mould said he can be reached by either assistant principal should the need arise.

The counselor-assistant to the principal is an administrative position. The classification is paid from the management salary schedule. Assistant principals/counselors

¹²Section 3540.1(m) et seq.

are paid at a significantly higher rate than teachers. Both incumbents must possess an administrative services credential. As counselors they work with students on graduation progress, attitudes, citizenship and behavior. Neither has any classroom duty. Along with counseling, each has a host of administrative duties, which Hampel and Henry consider their primary tasks.

Mr. Mould testified that Mr. Hampel and Mr. Henry have the authority to approve a request from a teacher for time off in his absence. Mr. Mould said that his rule is if a teacher wants one hour off as a matter of personal necessity then generally the time off is granted. Thus the assistant principal's action of granting an hour off is routine. But beyond one hour the assistant principal may decide whether the reason justifies additional time off. Mr. Henry said that if a teacher wanted only two hours off he expects justification from the teacher before granting the absence. However, personal necessity leave generally for one day, which typically involve medical appointments, are routinely granted. Henry pointed out that actually he never has had to use any discretion when granting time off. Therefore, at best, the exercise of such authority is a sporadic occurrence and of little value to determine an employee supervisory. Adelphi University (1972) 195 NLRB 639, 79 LRRM 1545.

If Mr. Henry should grant the time off, he might select another teacher who was off duty, bring in a substitute or

cover himself. Covering the absent teacher's class himself or arranging for another teacher to cover the class seems a routine reaction. This well may be the case where no more than 18 teachers are available and therefore alternatives would inherently be limited. However, as Mr. Mould indicated opportunities for the assistant principal to grant time off don't often occur. Mr. Mould also pointed out that when a teacher calls in absent the call is to the school secretary not the assistant principal. The school secretary will arrange for a substitute teacher. From all the facts presented the assistant principal's role in granting time off seems perfunctory, a matter of common school practice and not enough to establish supervisory authority, Cantua, supra.

Mr. Hampel said that he spends around 70 percent of his time overseeing the school's operation. He said that it is his responsibility to deal with problems as he observes them. He has, for instance, noticed that a teacher was having difficulty maintaining discipline in the classroom. Hampel said that he brought the teacher to his office and counseled the teacher about her performance. Mr. Hampel says that in his judgment if any teacher is not performing adequately it is his job to keep the principal informed. The record does not support the conclusion that any of Hampel's observations of a teacher's performance somehow affect that teacher's employment. For instance, no facts were offered to show how Mould used the

information supplied by Hampel. Whether Hampel's observations have meaning in teacher evaluations are not in themselves persuasive, as discussed infra.

An incident allegedly establishing Henry's authority to assign work involves the principal telling Henry to have the teachers do a book inventory. It is not evident from the record how Henry's involvement was required to insure the inventory was done or that Henry provided any direction to teachers doing the work. Further, the principal's use of Henry to assign work compels the view that only the principal holds the authority to assign work since it was the principal who ordered the book inventory, not Henry.

With regard to teacher evaluations the evidence does not support the view that either Hampel or Henry play a meaningful role in that process. Mr. Mould indicated that he discusses the evaluations with both but it is not clear what reliance Mould places on these discussions. Also, the power to evaluate itself is not an indication of supervisory authority unless tied to a result somehow affecting an employee's employment condition.

The role that Mr. Henry and Mr. Hampel have in granting time off to teachers and monitoring them in their job performance does not compel the view that either assigns work to or directs teachers in the interest of the school employer.

One needs look to the school principal to find true supervisory authority at both schools in this case.

3. Conclusion

The counselor-assistants to the principal at the continuation high schools are not management or supervisory employees. The petition to add this classification to the certificated unit is granted.

PROPOSED ORDER

Based upon the foregoing and the entire record in this case, it is the proposed decision that:

1. The petition to add permit/preformal teachers and the children's center head teachers to the certificated unit is granted. The program specialist, infant-toddler is a supervisory employee and is, therefore, excluded from the unit.

2. The petition to add the intern psychologist to the certificated unit is granted.

3. The counselor-assistants to the principal are neither management nor supervisory. The petition to add this classification to the certificated unit is granted.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 16, 1983, unless a party files a timely statement of exceptions. 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 Board itself at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on May 16, 1983, in order to be timely filed. When exceptions are sent by telegraph or certified United States mail postmarked not later than the last day set for filing, said document shall also be considered 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, section 32300 and 32305.

Dated: April 26, 1983

Terrell J. Lindsey
Hearing Officer