

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ANTIOCH UNIFIED SCHOOL DISTRICT,)
)
Employer,) Case No. SF-UM-306
)
and) PERB Decision No. 415
)
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION) October 12, 1984
AND ITS ANTIOCH CHAPTER #85,)
)
Employee Organization.)
_____)

Appearances; Michael Aidan, Field Representative for California School Employees Association and its Antioch Chapter #85; Janae H. Novotny, Attorney (Atkinson, Andelson, Loya, Ruud & Romo) for Antioch Unified School District.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: California School Employees Association and its Antioch Chapter #85 (CSEA) appeals the attached administrative determination by an agent of the Public Employment Relations Board (PERB or Board). Finding that the positions of Food Service Cook Managers I, II and III are supervisory within the meaning of subsection 3540.1(m) of the Educational Employment Relations Act (EERA or Act),¹ the

¹EERA is codified at Government Code section 3540 et seq.

Subsection 3540.1(m) provides:

"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to

Board agent granted the Antioch Unified School District's (District) petition for unit modification and ordered the positions deleted from the operations/support services unit represented by CSEA.

The Board has reviewed the administrative determination in light of CSEA's appeal and the entire record in this case. Finding the Board agent's findings of fact and conclusions of law free from prejudicial error, we adopt them as the findings of the Board itself. In addition, for the reasons discussed herein, we reject two grounds for appeal asserted by CSEA which were not considered by the Board agent in her administrative determination.

DISCUSSION

CSEA first argues that the District's unit modification petition is invalid because it was originally filed pursuant to a rule which "no longer exists," and because it was not filed "on forms provided by the Board."

The District's unit modification petition was initially filed on September 13, 1982, pursuant to then-existing

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.

regulation 33261(b)(1).² Because PERB was then in the process of revising its regulations, on November 2, 1982, the petition was put in abeyance at the District's request "until PERB's proposed unit modification rules go into effect." PERB's revised regulations became effective February 14, 1983 and, on March 22, 1983, the District requested that its petition be reactivated "pursuant to the new PERB rules."³

²PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

At the time of the District's original filing, regulation 33261(b)(1) authorized an employer to file a petition for change in unit determination:

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

³Specifically, previous rule 33261(b) was renumbered as rule 32781(b); subsection (1) was retained without change, and a new subsection (5) was added which provides an additional basis for filing a petition for change in unit determination:

To delete classification(s) or position(s)
. . . which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory or confidential, provided that:

(A) The petition is filed jointly by the employer and the recognized or certified employee organization, or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding

Contrary to CSEA's contentions, the mere renumbering of a rule does not affect either the "existence" of the rule or the validity of actions commenced thereunder. Neither would we find it necessary to require a formal amendment of a petition to reflect a technical change in rule number. More to the point, however, here the District clearly intended to change the basis for its petition and to proceed under the more liberal provisions of the rule as amended. This intention was expressly indicated in the letters of November 2, 1982 and March 22, 1983, both of which were properly served on CSEA. Moreover, the facts to which both parties stipulated and the briefs filed by both parties address the issue of supervisory status, relevant to a determination under rule 32781(b)(5), rather than the question of changes in circumstances, relevant under rule 32781(b) (1) .

Thus, CSEA clearly knew and understood that the District's petition would be decided under rule 32781(b)(5). In these circumstances, no purpose would be served by requiring a formal amendment of the petition, and we decline to impose such requirement here.

Similarly, the fact that the petition was not filed "on forms provided by the Board," as required under rule 32781(e), does not render the petition invalid.

CSEA next argues that the District's unit modification petition should be dismissed because it is allegedly motivated, not by a genuine belief that the managers are supervisors, but

as a union-busting tactic for the purpose of limiting the impact of concerted activities.

In Los Gatos Joint Union High School District (11/14/83) PERB Decision No. 355, the district opposed a unit modification request filed by an exclusive representative, arguing, inter alia, that the association had unlawfully permitted a supervisor to sign the association's proof of support petition. The Board stated that, in opposing a unit modification request, an employer may raise the argument that the proof of support was inadequate or somehow "tainted by fraud or illegality." Los Gatos, supra, p. 3. The Board there found no evidence that the proof of support was so tainted.

Applying that principle to the instant case, we find that CSEA could prevail if it successfully argued that the District had fraudulently misrepresented the duties performed by the Food Service Cook Managers, illegally changed their duties so as to give the appearance of supervisory status, or engaged in some other fraudulent or illegal conduct. While motivation might well be an important factor in determining whether the District acted fraudulently or illegally, no argument or allegation of such conduct is advanced here.

The District is accused not of having acted illegally in seeking to modify the unit, only of improper motivation. But the District's motives can have no bearing on our factual determination of whether the employees are supervisory within the meaning of the Act. Any claim which CSEA may have

regarding District conduct which allegedly interferes with its statutory rights or with the rights of employees which it represents is properly brought as an unfair practice charge.

ORDER

Based on the foregoing, the unit modification petition filed by the Antioch Unified School District is GRANTED.

Food Service Cook Managers I, II and III shall be excluded from the operations/support services unit.

An amended unit certification will be issued in accordance therewith.

Members Tovar and Jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| -and-) | |
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| ASSOCIATION AND ITS ANTIOCH) | |
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|) | |
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PROCEDURAL HISTORY

On September 13, 1982, the Antioch Unified School District (District) filed with the Public Employment Relations Board (PERB or Board) a unit modification petition to delete eight positions as supervisory from the operations/support services unit represented by the California School Employees Association and its Antioch Chapter #85 (Association).¹ On November 1, 1983, the District requested that its petition be put in abeyance pending issuance of new proposed PERB Regulations. The request was granted,² and the petition was held in

¹The Association was certified as the exclusive representative of the operations/support services unit on February 3, 1978.

²The Association was informed by letter of the request for abeyance and did not file any objections.

abeyance until March 23, 1983 when it was reactivated pursuant to the District's request.

On March 31, 1983 an informal settlement conference was held wherein a settlement agreement was reached regarding five of the eight positions, leaving only the positions of Food Service Cook Managers I, II and III in dispute.

An investigation was held regarding these positions on September 21, 1983, and February 28, 1984. During the investigation, the parties submitted joint exhibits and entered into stipulations of fact, and responses to specific questions were elicited from representative employees in the disputed classifications.

The issue to be decided herein is whether or not the positions of Food Service Cook Managers I, II, and III are supervisory within the meaning of section 3540.1(m) of the Educational Employment Relations Act (EERA)³ and should therefore be deleted from the operations/support services unit.

DISCUSSION

Section 3540.1(m) states:

"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

³The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise noted.

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 merely of a routine or clerical nature, but requires the use of independent judgment.

Section 3540.1(m) is written in the disjunctive; therefore, an employee need perform or effectively recommend only one of the enumerated functions or duties to be a supervisor.

Sweetwater Union High School District (11/23/76) EERB Decision No. 4, at p. 12.⁴

There are nine Food Service Cook Managers in the District: six Food Service Cook Managers I, each of whom maintains an elementary school kitchen; one Food Service Cook Manager II, who maintains an elementary school kitchen which prepares its own meals as well as meals for another elementary school; and three Food Service Cook Managers III, two of whom maintain the two junior high school kitchens and one who maintains the high school kitchen. All Food Service Cook Managers report directly to the Director of Food Services.

The number of food service employees in each kitchen varies. The Food Service Cook Managers I oversee the work of three employees: one food service assistant I, one food service assistant III and one cashier. The Food Service Cook Manager II oversees the work of eight employees: four food service

⁴Prior to January 1, 1978, the PERB was known as the Educational Employment Relations Board (EERB).

assistants I, two food service assistants III, and two cashiers. The Food Service Cook Managers III oversee the work of seven to eight employees: three to four food service assistants I, three food service assistants II and one food service assistant III.

The Food Service Cook Managers all work either a seven or seven and one-half hour day, while the cashiers and food service assistants work in hourly slots of varying lengths, i.e., food service assistants III work 6 to 7 1/2 hour shifts, food service assistants II work 5 1/2 hour shifts, and food service assistants I work 2 to 3 1/2 hour shifts. Food Service Cook Managers are paid at a higher range on the salary schedule than other food service employees.

Food Service Cook Managers assign food service employees food preparation, serving, and cleanup tasks according to the number of hours they work, their abilities, and the needs of the kitchen. If the assistants or the cashiers complete their duties early, or if the workload is heavy, the Manager will direct them to help out with other tasks as needed. The Food Service Cook Managers train new substitutes and food service assistants transferred into their kitchens. If time allows, they try to cross-train the employees.

The Food Service Cook Managers spend the majority of their time preparing, serving and ordering food. Some Food Service Cook Managers have offices with a desk and a telephone. They

attend monthly meetings with the Director of Food Service to discuss their operations. The Director occasionally visits the kitchens, both formally (for the purpose of inspection) and informally (to make deliveries).⁵

Food Service Cook Managers participate in the promotion of food service assistants by serving on an interview panel composed of three Food Service Cook Managers and the Director of Food Service. The interviews are limited to the top three applicants on an eligibility list established pursuant to Personnel Commission rules. Seniority is an important factor in the selection of a candidate.⁶ Final selection is made by consensus of the panel. The Director of Food Service has never overruled the panel's choice of a candidate.

⁵At the time of the second day of investigation (February 28, 1984), the Food Service Cook Manager II and one Food Service Cook Manager I stated that the Director had not visited their kitchens at all this year. The Food Service Cook Managers III and two Food Service Cook Managers II stated that the Director had visited their kitchens from 2-6 times to date.

⁶Article 15.3.4 of the current collective bargaining agreement between the Association and the District states, regarding promotion:

If two or more applicants are equally qualified, the employee with the greatest hire date seniority shall be offered the position. If the list is insufficient (less than three applicants), then additional names shall be taken from the open list pursuant to the Personnel Commission Rules. If two or more applicants are equally qualified, the employee with the greatest hire-date seniority shall be offered the position.

To the best recollection of both parties, every Food Service Assistant I currently employed by the District was initially a substitute employee. When a vacancy for this position occurs, it is first posted to allow for transfers within the District. If there are no applications for transfer, the Director of Food Service screens those substitutes in the top three ranks on the open eligibility list for their availability. She then asks the Food Service Cook Manager of the kitchen with the vacant position to choose from those substitutes available in the top three ranks. If the Food Service Cook Manager is unfamiliar with the available candidates, she may try them out in her kitchen prior to making a decision. Based on her knowledge and/or on-site observation of the candidates, the Manager decides which individual to hire. These decisions have never been overruled by the Director.

When a food service employee is absent, the employee reports her absence to the district office, and a secretary routinely calls a substitute. The Food Service Cook Manager may ask that a particular substitute not be assigned to her kitchen if she feels that the substitute's performance has previously been unsatisfactory. If the absentee is a food service assistant, the other food service assistants move up (by seniority) to fill her slot, leaving the lowest position to

be filled by the substitute.⁷ If the Food Service Cook Manager has prior knowledge of an absence, or if she knows that her workload will be light that day, she may decide to ask another food service assistant to cover the absence rather than employ a substitute. When the position for which the employee is filling, in is paid at a higher range on the salary schedule, the employee will receive the higher rate of pay. The Food Service Cook Managers have the authority to assign extra hours to food service employees, although this is done on a voluntary basis by seniority.

Food Service Cook Managers evaluate the permanent employees in their kitchens at least once a year. They fill out a standard evaluation form and discuss it with the employee. They both sign the form and send it to the Director of Food Service, who reviews the form, signs it and returns a copy to the employee. The Director of Food Services has never changed an evaluation. No employee has ever been terminated pursuant to these evaluations.

The Food Service Cook Managers also evaluate probationary employees. They have always recommended permanent status For

⁷An exception to this occurs in the Food Service Cook Manager's II kitchen, where the seniority rule is apparently not followed. The Manager II assigns the most qualified food service assistant to fill the absentee's position and assigns the other assistants to the remaining slots according to their ability.

probationary employees, and the Director of Food Service has never overturned these recommendations.

The Food Service Cook Managers possess several responsibilities which warrant a finding of supervisory status.⁸ They use independent judgement when called upon to choose a candidate from those eligible to fill vacant food service assistant I slots. Their recommendations are always followed, and, thus, achieve a dimension of "effectively recommending" hiring under Board precedent. Sacramento City Unified School District (10/19/77) EERB Decision No. 30A, at p. 7-8; and Campbell Union High School District (8/17/78) PERB Decision No. 66, at p. 9-10.

The Food Service Cook Managers also exercise supervisory authority by assigning work to employees in their kitchens. They determine which duties will be performed by the employees within each classification, direct the employees to other tasks when their regular assignments are completed, and change assignments when necessary to cover absences. This assignment and direction of work engaged in by the Managers occurs on an ongoing basis and involves the use of independent judgement, not merely the adherence to established District policy. Cantua Elementary School District (3/18/83) PERB Decision No.

⁸Neither party argued that there is any distinction in the duties performed by the Food Service Cook Managers I, II and III, nor that any of the Food Service Cook Managers I, II and III is more or less a supervisor than any other.

295; and California State University (10/20/83) PERB Decision No. 351-H. The Managers train new employees and rotate assignments when possible to make sure that all employees can perform all tasks. They determine if substitute employees are needed and if extra hours are required. Sacramento City USD, supra. In addition, they are the only authority on-site and neither substantial review nor prior approval is required for them to carry out day-to-day operations of their kitchens. California State University, supra.

Furthermore, the Food Service Cook Manager's role in evaluating employees is also indicative of their supervisory status. The agreement between the parties requires that all regular classified employees be evaluated by their immediate supervisor twice during their probationary period and once a year after achieving permanent status. Recommendations that probationary employees be granted permanent status pursuant to these evaluations are given great weight, as evidenced by the fact that the Director of Food Service has never changed an evaluation. Therefore, the evaluation function is found to be indicative of supervisory status. Berkeley Unified School District (8/28/79) PERB Decision No. 101.

No evidence was introduced to support the District's contention that the Food Service Cook Managers possess the authority to transfer, layoff or discharge employees working under them. Nor does their participation on a promotional

interview panel achieve a dimension of "hiring" or "effectively recommending" hiring under Board precedent. Foothill-DeAnza Community College District (3/1/77) EERB Decision No. 10; Unit Determination for the State of California (12/31/80) PERB Decision No. 110c.

CONCLUSION

In sum, the supervisory status of the Food Service Cook Managers is affirmed based on their authority to hire employees, assign and direct work, and effectively recommend permanent status through completion of formal evaluations. Therefore, the unit modification petition filed by the District is granted, and the Food Service Cook Managers I, II and III are deleted from the operations/support services unit.

An appeal of this decision pursuant to PERB Regulations 32350 through 32380 may be made within 10 calendar days following the date of service of this decision by filing an original and 5 copies of a statement of the facts upon which the appeal is based with the Board itself at 1031 18th Street, Suite 200, Sacramento, California 95814. Copies of any appeal must be concurrently served upon all parties and the San Francisco Regional Office. Proof of service pursuant to Regulation 32140 is required.

Dated: April 5, 1984

Jer Jerilyn Gelt, Board Agent