

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



MODESTO CITY SCHOOL DISTRICT,

Employer,

and

MODESTO TEACHERS ASSOCIATION,  
CTA/NEA,

Exclusive Representative,

and

CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION AND ITS LOCAL  
CHAPTER 007,

Interested Party.

Case No. S-UM-465  
(R-750)

PERB Decision No. 884

June 3, 1991

Appearances: Kronick, Moskovitz, Tiedemann & Girard by Robert A, Galgani, Attorney, for the Modesto City School District; Ken Burt, Attorney, for Modesto Teachers Association, CTA/NEA; Michael Branham, Field Representative, for California School Employees Association and its Local Chapter 007.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto Teachers Association, CTA/NEA (MTA) to the attached proposed decision of a Board agent granting the Modesto City School District's (District) petition to modify the certificated bargaining unit. The District sought removal of the school board's newly adopted position classification of High School Auditoriums Manager (HSAM) from the non-administrator certificated employee bargaining unit and filed a petition

pursuant to PERB Regulation 32781(b)(I)<sup>1</sup>. Thereafter, the petition was amended by the District and joined in by the California School Employees Association and its Local Chapter 007 (CSEA), who sought placement of the classification into the non-administrative classified bargaining unit. The HSAM classification contains only one position.<sup>2</sup>

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<sup>1</sup>PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32781 provides, in pertinent part:

Petition. Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification:

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

<sup>2</sup>The Board in Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (Alum Rock) defined "position" as "a group of duties and responsibilities which are intended to be performed by one employee." A "classification" or "class" was defined as "any number of positions which are sufficiently similar in duties and responsibilities that the same job title, minimum qualifications, qualifying tests, and salary range are appropriate for all positions in the class." (Id., pp.5-6.) (Also see, Government Code section 45101(a).)

While we agree with the accuracy of these definitions, we note that the HSAM classification consists of only one position and that the parties occasionally use the terms classification and position interchangeably. Since, in this case, there is no significant factual distinction between what the terms are

The Board agent granted the District's petition finding that none of the duties of the HSAM require certification under Education Code section 44065<sup>3</sup> and therefore the classification "is part of the classified service under Education Code section 44104."<sup>4</sup>

MTA filed nine exceptions to the decision and requested oral argument. The request was granted and oral arguments were heard by the Board itself on April 30, 1991.

We have considered the oral arguments and have carefully reviewed the entire record, including the proposed decision, the transcripts, MTA's exceptions and the District's response thereto. Finding the Board agent's findings of fact and conclusions of law to be substantially free of error, we adopt them, consistent with the following discussion, as a decision of

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intended to describe, we also will occasionally refer to the HSAM classification as the HSAM position.

<sup>3</sup>Section 44065 provides, in pertinent part, that any person employed by a school district in a position in which 50 percent or more of his/her duties performed during the school year consist of directing, coordinating, supervising or administering any or all of the following functions shall hold a valid teaching or service credential:

- (3) School extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school.

<sup>4</sup>The Board agent cites in her conclusion Education Code section 44104. After reviewing the text of that section and the analysis contained in the body of the Board agent's decision referring to Education Code section 45104, it is clear the citation to 44104 is a typographical error. (See p. 16 for text of section 45104.)

the Board itself, but write separately to address MTA's exceptions.

#### FACTUAL SUMMARY

The following facts are summarized from the Board agent's proposed decision, with some additional information drawn from the record and added for clarification.

The dispute involves the duties of one individual, Paul Tischer (Tischer), hired by the District in 1965 as a teacher. With the exception of one semester in 1965, Tischer taught drama for the District until the 1984-85 school year. During this same period, he also assumed additional responsibilities related to the coordinating and maintenance of the District's auditorium and stage facilities. These additional duties generally included scheduling the use of the auditorium for school and community performances; hiring and supervising a crew to assist in productions; overseeing and assisting in the use and maintenance of all equipment, such as lighting, sound equipment, and scenery; and ensuring the safety of persons and property in the auditorium.

A job description entitled "Stage Technician" was developed and adopted by the District encompassing these duties in 1975. The job description was revised slightly in 1979 and renamed "High School Stage Technician" (HSST). Neither position is expressly identified in the certificated or classified collective bargaining agreements. However, appearing on the face of the HSST job description is the statement "Classified Unit Salary

Schedule" apparently indicating the classification's salary was fixed by the classified contract. On June 29, 1989, the District's board of education adopted a new job description entitled "High School Auditoriums Manager," which incorporated and expanded the duties and qualifications described in the prior job descriptions. It is this latter job description and respective position that is the subject of the unit modification petition. Neither the 1975, 1979, nor the current 1989<sup>5</sup> job description of HSAM require that the incumbent possess a teaching credential.

Although Tischer performed the duties of the HSST, the record indicates that he has always been paid according to the certificated salary schedule and that the HSST position was never filled as a separate and distinct position. Tischer did not teach any instructional courses for the District in 1984-85, 1985-86, 1987-88, and 1988-89.<sup>6</sup> His sole responsibilities consisted of the Stage Technician and HSST duties.

Prior to the 1989-90 school year, Tischer was responsible only for the auditorium at Modesto High School. His

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<sup>5</sup>At page 6 of the proposed decision, the Board agent identifies the HSAM job description as the "1988" job description. However, although the job description was first proposed by the personnel department in 1988, it was not adopted until June 26, 1989. Other references in the record also identify the document as a 1989 job description. Therefore, to remain consistent with the record we will refer to it as the 1989 job description, the date it was officially adopted by the District.

<sup>6</sup>In 1986-87, Tischer taught five English classes in addition to his stage technician duties since the District was understaffed by one instructor.

responsibilities expanded, in the fall of 1989, to include Downey High School. Tischer reports to the high school site administrators or their designees and to the supervisor of maintenance and operations.

The District filed the instant petition<sup>7</sup> alleging Tischer's responsibilities have shifted away from his teaching assignments and now focus entirely on the use and maintenance of the District's auditoriums for theatrical productions.

#### DISCUSSION

##### MTA's Exceptions

MTA asserts nine exceptions primarily arguing that the Board agent erred in her legal analysis and conclusions of law. The exceptions focus on four basic theories: (1) the Board agent erred in holding PERB has jurisdiction to consider the petition; (2) the Board agent erred by not concluding that the duty to bargain should be imposed as a condition precedent to granting the petition; (3) the Board agent erred by examining whether the position (and therefore duties) were "certificated" or "classified" under the Education Code, rather than examining the

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<sup>7</sup>In the original petition, the District sought only the removal of the HSAM position from the certificated bargaining unit due to its classified status. Subsequently, the District and CSEA jointly filed an amended petition requesting not only the deletion of the position from the certificated bargaining unit but that it also be added to the classified bargaining unit. Noting that PERB regulations do not allow for the transfer of classifications between bargaining units unless the petition is filed jointly by the exclusive representative of both bargaining units the Board agent concluded she could only act on the petition insofar as it sought to delete the HSAM position from the certificated unit.

issue as a transfer of bargaining unit work; and (4) the Board agent's decision results in poor public policy because it allows the employer to transfer bargaining unit work by simply "rebundling" a set of duties into position classifications established outside the bargaining unit.

Jurisdiction To Consider Petition

MTA contends PERB is without jurisdiction to act on the unit modification petition because the petition identifies a classified bargaining unit position that was not authorized or adopted by the District's board of education. MTA further argues the Board agent erred in concluding that the intent of a unit modification petition (i.e., identifying the position to be deleted from a bargaining unit) is to be determined by the content of the petition itself. According to MTA, the job description attached to the petition describing the HSAM classification is not the same position description adopted by the Modesto City School's board of education at its June 26, 1989 meeting. MTA contends that the board only authorized the creation of a classified management position which is an unrepresented position. MTA then notes that the instant petition is a joint petition in which the District and CSEA are requesting that the HSAM classification be deleted from the certificated bargaining unit and placed in the classified unit. Since all actions authorized by a school board are required to take place at public meetings, MTA asserts the District can only speak through actions properly adopted at a public meeting, as

reflected in the board minutes. MTA contends that such properly authorized actions are a jurisdictional requirement that PERB must observe before considering the merits of a unit modification petition.<sup>8</sup>

MTA's exception and supporting arguments are without merit. The gravamen of MTA's argument is that the District's representatives do not have authority to file the instant petition because it does not describe the position officially adopted by the board of education. MTA, however, has offered no legal authority to support its theory that the District's representatives have exceeded their authority in filing the instant petition. In contrast, we note that the California Court of Appeal (3rd Dist.) stated in McGrath v. Burkhard (1955) 131 Cal.App.2d 367 that:

"There is no necessity that all the rules, orders and regulations for the discipline, government and management of the school shall be made a matter of public record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote."  
(Id. at p. 373; emphasis added.)

Accordingly, we agree with the Board agent's conclusion that the petition was properly brought before PERB because the intent of a petition, when signed by an authorized representative of the filing party, is determined by the contents of the petition

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<sup>8</sup>The District responds by stating the board of education clearly indicated its intent to remove the position from the certificated unit by its assignment of a salary for the position from the classified management salary schedule.

itself. MTA's argument that PERB lacks jurisdiction to consider the petition is therefore rejected.

Similarly without merit are MTA's related arguments that the Board agent erred in acting on the amended (joint) petition because, by removing the HSAM position from the certificated bargaining unit, the incumbent, Tischer is left without representation. Although the argument is not clearly stated, MTA appears to contend that consideration of the petition is improper because the joint petition seeks to remove the classification from one unit and place it in another unit when the exclusive representatives of each bargaining unit have not consented to the transfer. However, since in the absence of such mutual agreement, PERB regulations only permit the Board agent to delete the classification from the certificated unit, Tischer has been denied his right to representation.

These arguments are without merit because removing the HSAM classification from the certificated unit does not mean Tischer has been denied a right to collective representation. He can remain in the certificated unit by taking a teaching position. All that has occurred by the Board agent's consideration of the joint petition is that the HSAM classification is unrepresented. Nevertheless, once the classification is removed from the certificated unit, CSEA can simply file a new petition to include it in the classified bargaining unit.

## Duty to Bargain and Unit Modification Petitions

MTA contends that the duty to bargain should be imposed as a condition precedent to granting a unit modification petition since the practical effect of granting the petition is to remove (transfer) work from the bargaining unit. MTA also contends that the Board agent erred in holding that allegations of an unlawful transfer of bargaining unit work are properly raised as an unfair practice charge and not in a unit modification proceeding. To restrict the transfer issue to unfair practice proceedings, MTA contends, places it in a "Catch 22" if the petition is granted and a "res judicata effect" is given to the modification.<sup>9</sup> MTA apparently believes it cannot file an unfair practice charge until the work has actually been transferred, which in this case will not occur until the petition is granted, and, by granting the petition, the issue of whether work has been improperly transferred out of the bargaining unit is automatically decided. These arguments, however, are without merit for a variety of reasons.

First, MTA misapplies the phrase "removal" and "transfer of bargaining unit work" to the facts of this case. As a general rule, charges that an employer has engaged in an unlawful transfer of bargaining unit work arise in the context of an

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<sup>9</sup>MTA does not clearly explain what is meant by the "Catch 22" effect or its statement that if the petition is granted it should not be given "any res judicata effect." Presumably, however, MTA is referring to an unfair practice proceeding brought after the petition is granted and based on the employer's alleged refusal to bargain the transfer of work.

unfair practice proceeding. In such cases, the employer, in response to a request, is accused of refusing to bargain the removal of duties from one bargaining unit and the assignment of those duties to another bargaining unit. What is at issue in this case, however, is the District's request to delete a position from a bargaining unit by retitling or creating a new classification. Such an action is expressly authorized by PERB Regulation 32781(b)(1) which provides, in part:

A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification:

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

Although the practical effect of modifying a unit under the above provision may be to transfer work out of the unit, it is not an unlawful transfer because it is done in accord with the process PERB requires the employer to observe. Recognition of this principle partially underlies the analysis in Regents of the University of California (California Nurses Association) (1989) PERB Decision No. 722-H (Nurses). In Nurses, the employer created an entirely new supervisory classification encompassing the alleged supervisory duties of nurses represented by the California Nurses Association (CNA). The university then excluded the nurses from the existing bargaining unit by reassigning them to the supervisory classification and refused

to bargain with CNA contending it was not the exclusive representative of the supervisor nurses. The university further argued that PERB regulations permit an employer to engage in a "technical refusal to bargain" as a means of securing PERB's review of the disputed unit modification (i.e., testing the "contours of the bargaining unit"). Responding to that argument, the Board stated in relevant part:

. . . PERB statutes and regulations, as well as decisional law under the NLRA, clearly support the . . . conclusion that in disputed cases the only method available to an employer seeking to convert bargaining unit positions to newly created supervisory positions is through the filing of a timely unit modification petition.  
(Id. at p. 9; emphasis added.)

Stating a similar rationale, the Board, in Mount San Antonio Community College District (1983) PERB Decision No. 334, rejected the dissent's theory that the district, by creating new job classifications, was legally permitted to remove supervisory work from the bargaining unit because:

. . . management could effectively circumvent the statutory unit modification procedure, [which placed the burden on the employer to prove the modification is appropriate by] shifting the burden to the union to prove that management had acted improperly.  
(Id. at p. 9, fn. 7; emphasis added.)

In other words, once new classifications were created, filing a unit modification petition was recognized by the majority as a means of addressing the removal of work from the bargaining unit.

Together, these decisions indicate the removal of work from a bargaining unit may lawfully occur as a collateral effect of a

unit modification when PERB's statutory and regulatory procedures are followed.

Also without merit is MTA's contention that the Board should not apply the doctrine of res judicata to the unit modification determination, since it places MTA in a "Catch 22." However, what MTA seeks through this argument amounts to "two bites at the apple." That is, if it is unsuccessful in opposing modification of the unit, MTA wants the opportunity to bargain over the transfer of work issue or file an unfair practice charge in the event the employer refuses to bargain. This approach is rejected.

More significantly, however, it is not at all clear that MTA is faced with a "Catch 22." MTA ignores the fact that, when the District authorized the creation of the HSAM position by adopting the job description at its June 26, 1989 meeting, MTA could have requested to bargain over the alleged transfer.<sup>10</sup> (See Regents of University of California (UC-AFT) (1990) PERB Decision No. 826-H.) Then, if the District refused to negotiate, MTA could have filed a charge with PERB alleging an unfair practice. Had MTA exercised this option, the unit modification petition might have been held in abeyance pending resolution of the unfair practice charge or consolidated with an unfair practice complaint and both issues resolved in a single hearing. Accordingly, MTA's

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<sup>10</sup>It is not clear from the record exactly when MTA first learned that the school board authorized the creation of the HSAM position. Nevertheless, it cannot be disputed that MTA had notice of its existence as of the date MTA was served with a copy of the petition.

"Catch 22" situation appears to be more a problem of timing on its part than a dilemma created by PERB's procedures.

Finally, MTA's contention that prior Board decisions have imposed a duty to bargain in reclassification settings is rejected. The decisions cited by MTA (Alum Rock, Lake Elsinore School District (1986) PERB Decision No. 563, and Muroc Unified School District (1978) PERB Decision No. 80) simply do not stand for the proposition for which they are cited.<sup>11</sup> While it is true the Board in Alum Rock, held that the employer has a duty to bargain over "those aspects of the creation or abolition of a classification which merely transfer[s] existing functions and duties from one classification to another" (Id. at p. 11), there is no violation unless the employer, in response to a request, refuses to bargain. (Calistoga Joint Unified School District (1989) PERB Decision No. 744, p. 10.) Furthermore, in each case in which the Board imposed a duty to bargain, the transfer of work issue was brought before the Board in an unfair practice proceeding. There is no evidence in the instant case that MTA made such a request or that the District refused to discuss the alleged transfer. Accordingly, the duty to bargain is not a condition precedent to a determination of a unit modification petition.

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<sup>11</sup>It is not clear from MTA's exceptions how the Board's decision in Lake Elsinore; supra; and Muroc., supra, apply to reclassification since neither case addressed the duty to bargain in the "reclassification setting."

Education Code Governs Initial Classification of Position

A key determination made by the Board agent is that the HSAM classification does not include duties for which a teaching certificate may be required under Education Code section 44065. Furthermore, since the position was not a certificated position, then, under Education Code section 45104, it must be designated as a classified position. Finally, the Board agent held that since the Educational Employment Relations Act (EERA) section 3545(b)(3)<sup>12</sup> prohibits classified and certificated employees from being included in the same bargaining unit, the HSAM classification must be removed from the certificated unit.

MTA contends the Board agent erred in resolving this case by tracking the Education Code because that process ignores significant labor law principles. According to MTA, EERA section 3545(a) requires unit determinations to be decided by examining "community of interests" and bargaining history. MTA contends the proper analysis should consider whether the duties belong in the unit, not the status of the employee assigned to perform them. MTA also argues that Education Code section 44065 is not the "touchstone" for determining which duties "belong" in the certificated bargaining unit. Relying, in part, on Hartzell v. Connell (1984) 35 Cal.3d 899, 909-911, MTA points out that many duties performed by certificated personnel are not listed in

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<sup>12</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

section 44065 and, nonetheless, have been held to be a necessary part of "education" in California.<sup>13</sup>

We do not find MTA's arguments persuasive. Education Code section 45104 provides, in pertinent part, that:

Every position not defined by this code as a position requiring certification qualifications . . . shall be a part of the classified service. Such positions may not be designated as certificated nor shall the assignment of a title to any such a position remove the position from the classified service, nor shall possession of a certification document be made a requirement for employment in any such position.  
(Emphasis added.)

Similarly, Education Code section 45103 provides:

The governing board of any school district shall employ persons for positions not requiring certification qualifications. The governing board shall . . . classify all such employees and positions. The employees and positions shall be known as the classified service.  
(Emphasis added.)

Additionally, Education Code section 44066 provides in part:

A governing board of any school district . . . shall not require an employee or applicant to possess any certification, license, or other credential unless the possession of such . . . is required by statute or is based upon a bona fide occupational qualification.  
(Emphasis added.)

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<sup>13</sup>MTA's reliance on Hartzell v. Connell, supra, is misplaced. The issue in Hartzell was whether school districts **could**, in light of the passage of Proposition 13, impose special fees on students who elected to participate in after school, voluntary, extracurricular activities. The court did not, however, address credentialing qualifications or the status of an employee required to "teach" extracurricular activities.

These sections clearly indicate that a school district must designate a position as "classified" unless the duties to be performed require certification, in which case the position must be designated as certificated. Thus, when the district creates a position it must, at least tentatively, designate it either classified or certificated (Healdsburg Union High School District, et al. (1984) PERB Decision No. 375, p. 46) and, is prohibited from requiring certification unless it is required by law or as an occupational qualification. (Education Code section 44066.) The District, in this case, designated the position as part of the classified service, but because the duties that made up the new classification had previously been performed by an employee who also possessed a teaching credential, the District petitioned for a unit modification in order to satisfy any obligation concerning the transfer of work from the certificated to the classified unit. Accordingly, we agree with the Board agent's analysis and hold it is necessary to first determine the status of the classification or position (and therefore the duties) under the Education Code. Bargaining history and community of interest criteria are then used to ascertain into which classified or certificated bargaining unit the position should be placed.

We also reject MTA's argument that Education Code section 44065 is not the "touchstone" for determining whether certain duties are certificated or classified. Although MTA attempts to draw a distinction under this section and EERA section 3545(a)

and (b)(3) between the treatment of "duties" verses "categories of employees;" we do not find the argument persuasive. Thus, when confronted with a position for which none of the duties require a credential, the appropriate analysis is to evaluate the position in light of Education Code sections 44065, 45103 and 45104.

Similarly without merit is MTA's contention that the Board agent misapplied the criteria set forth in Education Code section 44065. MTA contends that the duties and responsibilities of the HSAM are instructional in nature and therefore fall within the provisions of Education Code section 44065(a)(3) (i.e., "school extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school"). In support of its argument, MTA points out that the incumbent, Tischer, requested that the job description be revised to reflect his work with students and the possibility that students might receive high school graduation credit by working for him. MTA also objects to the Board agent's determination that the position is not governed by section 44065 because the duties performed by the HSAM are not "core components" of extracurricular activities.

There is no evidence in the record, however, to support MTA's argument that the HSAM duties include, or are an outgrowth of, instructional program activities. The fact that a district employee may have some supervisory or instructional responsibility over students of the district does not automatically require that the incumbent possess a teaching

credential. Several examples of non-certificated positions consisting of this kind of responsibility include instructional and noon-duty aides, bus drivers and, on occasion, cafeteria staff. (See Education Code sections 44065, 44066, 45103, 45104, 45342 et seq., 44814, 44815, and 39902.) Further, after reviewing the job descriptions and the testimony of witnesses for both parties, Tischer's proposal appears to be closer to that of an on-the-job training work site such as those utilized in work study and vocational education programs. Under either program, students enroll in special work related courses at their school. They also receive special instruction from a teacher-coordinator at the school in preparation for placement at a work site involving on-the-job training. While the teacher-coordinator must be credentialed under Education Code section 44065, the work site supervisor or employer is not. (See California Code of Regulations, title 5, section 10070 et. seq.) There is no evidence in the record to indicate that Tischer's suggestion<sup>14</sup> is anything more than a proposal that the HSAM act as an

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<sup>14</sup>The evidence indicates that Tischer's suggestion is merely an inquiry, and that the District did not incorporate his suggestion into the duties identified in the job description. In addition, none of the witnesses (Tischer and Assistant Superintendent of Personnel David Mello (Mello)) testified that the position would include instructional duties (i.e., provide instruction in the skills, knowledges, and attitudes required of a particular course of study along with the evaluation of specific performance levels.) Although Mello states that section 44065(a)(3) might arguably apply, his full testimony on the subject is that, "It really would depend on the activity". Moreover<sup>1</sup>; when asked on direct examination, "in your opinion, does Mr. Tischer's position require certification credentials?" Mello responded, "No."

employer/supervisor of students who enroll in a stagecraft course at their respective schools. In such a case, the HSAM would not be governed by the provisions of section 44065. Accordingly, MTA's arguments concerning the Board agent's misapplication of the criteria under Education Code section 44065 are rejected.

Public Policy Considerations

MTA contends the Board agent misreads the proper relationship between EERA section 3545(a) and (b)(3).<sup>15</sup> The proper analysis, MTA argues, is to first determine whether the duties are properly considered as falling within the certificated bargaining unit. This should be accomplished by utilizing the community of interest and bargaining history criteria identified in section 3545(a). Further, according to MTA, the Board agent's analysis results in "poor public policy" because it permits and encourages employers "to rebundle duties and responsibilities to move . . . employees based on this rebundling to a different

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<sup>15</sup>EERA section 3545(a) and (b)(3) provides:

(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:

(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

bargaining unit . . . ." Noting that classified employees generally receive a lower salary and benefits, MTA argues the interchange between bargaining units has a significant and negative impact upon individual employees' terms and conditions of employment and has the potential to disrupt employer-employee relations under EERA. MTA further contends that the Board agent erred in concluding that the level of rights and benefits afforded an employee as a result of unit placement is irrelevant to the inquiry here.<sup>16</sup>

These arguments are rejected as highly speculative and without any factual basis. There is no evidence that by determining the appropriate designation of a position under the Education Code as either certificated or classified, then applying the unit determination standards identified in EERA section 3545(a) and (b), that an employer will be encouraged to transfer work out of the bargaining unit by "rebundling" duties.

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<sup>16</sup>We agree with Board agent's conclusion that the level of benefits afforded Tischer as a certificated employee when compared to the benefits available to the HSAM, as a classified position, is irrelevant to whether a unit modification should be granted. MTA's insistence on considering these facts is, in reality, an attempt to bootstrap a "community of interest" argument into the analysis. That is, because Tischer currently receives a salary based on the certificated salary schedule and receives all the other benefits of a certificated employee, his interests are similar to the certificated unit. The argument is rejected. If PERB were to consider the community of interest argument, the proper focus should involve a comparison between the HSAM position, not the individual who has been doing the work, with the certificated unit. However, even if Tischer's rights were to be considered, the District correctly points out that his rights are protected under a number of the Education Code provisions authorizing transfers between certificated and classified positions, e.g., sections 44063, 44064 and 22504.

Nevertheless if that did occur, as previously discussed, the proper method for challenging the rebundling/transfer is to request to bargain about the alleged transfer or file an unfair practice charge at the time the District makes known its intention to create the position allegedly encompassing the bargaining unit work.

ORDER

For the reasons expressed above, we AFFIRM the Board agent's proposed decision and ORDER that the unit modification petition be GRANTED.

Chairperson Hesse and Member Shank joined in this Decision.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO CITY SCHOOLS DISTRICT,	)	
	)	
Employer,	)	Case No. S-UM-465
	)	(R-750)
and	)	
	)	PROPOSED DECISION
MODESTO TEACHERS ASSOCIATION/ CTA/NEA,	)	(6/14/90)
	)	
Exclusive Representative,	)	
	)	
and	)	
	)	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LOCAL CHAPTER 007,	)	
	)	
Interested Party.	)	

Appearances: Kronick, Moskovitz, Tiedemann & Girard by Robert A. Galgani, Attorney, for the Modesto City Schools District; Ken Burt, Executive Director, for the Modesto Teachers Association/CTA/NEA; Michael Branham, Field Representative, for the California School Employees Association and its Local Chapter 007.

Before Jerilyn A. Gelt, Hearing Officer.

PROCEDURAL HISTORY

On July 18, 1989, the Modesto City Schools District (District) filed a unit modification petition with the Public Employment Relations Board (PERB or Board) pursuant to PERB regulation 32781(b)(1)<sup>1</sup>. The petition sought to delete the

<sup>1</sup>PERB regulation 32781 provides, in pertinent part:

Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. . . .

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

position of High School Auditoriums Manager from the certificated bargaining unit represented by the Modesto Teachers Association/CTA/NEA (CTA) due to its classified status. The California School Employees Association and its Local Chapter 007 (CSEA) was named as an interested party on the petition.

On August 3, 1990, CSEA filed a letter with PERB stating its position: that the High School Auditoriums Manager should become part of the classified bargaining unit represented by CSEA.

CTA filed a response opposing the requested deletion on August 7, 1990. An informal settlement conference was held on September 1, 1990, but the parties were unable to reach agreement.

Subsequently, on September 25, 1990, an amended unit modification petition<sup>2</sup> was jointly filed by the District and CSEA

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(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification:

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

<sup>2</sup>CTA argues that the amended unit modification petition is not properly before PERB because it states a position other than that which was initially authorized by the governing board of the District, i.e., that the High School Auditoriums Manager should be a classified management position. However, when a unit modification petition is signed by an authorized representative of the filing party, such as, in this case, the Assistant Superintendent, the intent of the petition is determined by the content of the petition itself. Thus, CTA's argument is without merit.

to delete the position of High School Auditoriums Manager from the certificated bargaining unit and add it to the classified bargaining unit. Under PERB's unit modification regulations (32781 et seq.)/ however, an exclusive representative may not file a petition to add a position currently represented by another exclusive representative to its bargaining unit. The only exception to this is when a petition is jointly filed by the exclusive representatives of both units to transfer a position from one unit to another. Therefore, the request to add the position in dispute to the classified unit is not properly before the Board at this time, and this decision will only address the issue of whether the position should be deleted from the certificated unit.

A formal hearing was held on November 27, 1989, briefs were filed by the District and CTA, and the case was submitted for decision on March 29, 1990.

#### FACTS

Mr. Paul Tischer, the person currently performing the duties of High School Auditoriums Manager<sup>3</sup>, has been employed as a

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<sup>3</sup>On September 2, 1975, the District Board of Education approved a job description entitled "Stage Technician" developed by Mr. Tischer encompassing his stage production duties. On June 26, 1989, the Board approved a job description entitled "High School Auditoriums Manager," also developed in major part by Mr. Tischer, encompassing these duties. Although neither of these titles appear in the certificated bargaining unit description, it is undisputed that it is this position, filled by Mr. Tischer for the past 25 years, which is the subject of this unit modification petition. For the purposes of this decision, the titles of Stage Technician and High School Auditoriums Manager will be used interchangeably.

certificated employee by the District since 1965. In 1968, he founded a summer theater program called the Modesto Youth Theater, later known as the Modesto Performing Arts Association (MPAA). In 1969, this program became part of the District's summer school program where it continued until summer school was eliminated statewide in 1978 due to the passage of Proposition 13. After that time, although it was no longer offered for credit as part of the District curriculum, the program continued and Mr. Tischer's responsibilities remained the same. The program was funded by MPAA, which reimbursed the District for 60% of Mr. Tischer's salary.

Mr. Tischer has a B.A. degree in drama and speech, an M.A. degree in drama instruction and curriculum, and a general secondary teaching credential. Until the 1984-85 school year, Mr. Tischer's assignment for the District consisted of both teaching and stage technician duties. Except for a one-semester assignment as a woodshop teacher in 1965 and a one-year assignment as an English teacher in 1986-87, his teaching responsibilities have been in the drama program. His stage technician duties generally include scheduling the use of the auditorium for school and community performances; hiring and supervising a crew to assist in productions; overseeing and assisting in the use and maintenance of all equipment, such as lighting, sound equipment, and scenery; and ensuring the safety of persons and property in the auditorium. These duties remain

much the same today as they were when the program began, although the scope of Mr. Tischer's responsibility has grown.

In 1979, due to the expansion of his stage technician responsibilities, Mr. Tischer began teaching three classes instead of five. In 1984-85 and 1985-86, he did not teach any classes. In 1986-87, Mr. Tischer taught five English classes in addition to his stage technician duties because the District was short one instructor. He did not teach any classes in 1987-88 and 1988-89, and did not have a teaching assignment at the time of this hearing.

Prior to the 1989-90 school year, Mr. Tischer was responsible only for the auditorium at Modesto High School. In the fall of 1989, his responsibilities expanded to include Downey High School. At the time of the hearing, he had an office at Modesto High School and planned to have one at Downey High School. Mr. Tischer reports to the high school site administrators or their designees and to the supervisor of maintenance and operations.

Mr. Tischer has always been paid according to the certificated salary schedule. In 1986-87, when he worked as a full-time English teacher and stage technician, he was paid 140% of his salary as a certificated employee: 100% for his teaching duties and 40% for his stage technician duties. He is currently at the top of the salary schedule, and receives additional longevity compensation. He has taken one sabbatical leave and is

eligible for another under the CTA contract. He is a member of the State Teachers Retirement System.

Neither the 1975 job description of Stage Technician nor the 1988 job description of High School Auditoriums Manager require that the incumbent possess a teaching credential.

#### ISSUE

Whether the position of High School Auditoriums Manager should be deleted from the certificated bargaining unit represented by CTA.

#### DISCUSSION

As noted above, PERB regulation 32781(b)(1) requires a showing of changed circumstances for the filing of the instant petition. Although CTA claims that no such showing has been made, the record reflects that a significant change has occurred, i.e., the elimination of teaching duties from Mr. Tischer's job. From the time of his initial employment until 1979, Mr. Tischer consistently taught a full load of classes. In 1979, this load was reduced from five to three classes. He did not teach any classes in 1984-85, 1985-86, 1987-88 and from the fall of 1989 to the date of the hearing in this case.<sup>4</sup> Therefore, it is found that circumstances relating to the position of High School Auditoriums Manager have sufficiently changed to meet the requirements of PERB regulation 32781(b)(1).

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<sup>4</sup>The record also indicated that there was no plan to assign Mr. Tischer teaching duties in the spring of 1990.

The definitions for "classified" and "certificated" employees are found in the Education Code. Education Code section 44065 provides that any school district employee who works in a position in which 50 percent or more of his/her duties performed during the school year consist of directing, coordinating, supervising or administering any or all of the following functions shall hold a valid teaching or service credential:

- (1) The work of instructors and the instructional program for pupils.
- (2) Educational or vocational counseling, guidance and placement services.
- (3) School extracurricular activities related to, and an outgrowth of, the instructional and guidance program of the school.
- (4) Planning courses of study to be used in the public schools of the state.
- (5) The selection, collection, preparation, classification or demonstration of instructional materials of any course of study for use in the development of the instructional program in the schools of the state.
- (6) Research connected with the evaluation and efficiency of the instructional program.
- (7) The school health program.
- (8) Activities connected with the enforcement of the laws relating to compulsory education, coordination of child welfare activities involving the school and the home, and the school adjustment of pupils.
- (9) The school library services.

- (10) The preparation and distribution of instructional material.
- (11) The in-service training of teachers, principals, or other certificated personnel.
- (12) The interpretation and evaluation of the school instructional program.
- (13) The examination, selection, or assignment of teachers, principals, or other certificated personnel involved in the instructional program.

Section 45104 of the Education Code provides that positions not requiring certification qualifications and not specifically exempted from the classified service according to the provisions of Section 45103 or 45256 shall be part of the classified service.

In San Bernardino City Unified School District (1989) PERB Decision No. 723, the Board stated that, while it is not empowered to enforce the Education Code, it does have exclusive jurisdiction to enforce the statutes it administers, i.e., the Educational Employment Relations ACT (EERA).<sup>5</sup> Citing San Mateo City School District v. PERB (1983) 33 Cal.3d 850, the Board held that:

[w]here the EERA and the Education Code address the same or similar subjects, the Board properly seeks a resolution which harmonizes the legislative intent underlying the EERA with existing provisions of the Education Code. Inherent in this process is the need to interpret the Education Code

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<sup>5</sup>See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1.

(absent an antecedent court decision which provides the necessary interpretation).  
Id. at p.2.

Thus, the Board found that it is within PERB's jurisdiction to interpret the provisions of the Education Code in order to carry out its statutory duty to administer the EERA.<sup>6</sup>

EERA section 3545(b)(3) provides that classified and certificated employees shall not be included in the same negotiating unit. Thus, if the High School Auditoriums Manager is found to be a classified position, it must be removed from the certificated bargaining unit.

The District argues that since the High School Auditoriums Manager position has evolved into a non-teaching position and no longer encompasses any of the functions listed in Education Code Section 44065, it does not require certification. Therefore, it is a classified position and, under EERA, no longer appropriately in the certificated unit.

CTA argues that the position of the High School Auditoriums Manager should remain in the certificated unit since it falls under Education Code Section 44065(3): school extracurricular activities (i.e., stage productions) related to, and an outgrowth of, the instructional program of the school (e.g., drama and music programs).

The record reflects that Mr. Tischer's relationship to the instructional program of the school (i.e., the drama and music

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<sup>6</sup>See, e.g., Jefferson School District (1980) PERB Decision No. 133; Mammoth Unified School District (1983) PERB Decision No. 371.

programs), while important, has been peripheral for the past several years. Although complex, his duties are not core components of the "extracurricular" activities related to the "instructional" program. They are more in the nature of support services of such programs. The students who participate in District productions participate not under Mr. Tischer's direction, but under the direction of a teacher present. It is a teacher who directs the substantive aspects of the drama/music programs. Students receive no credit from Mr. Tischer. Although he may hire students as crew members on a production, he is not required to do so. Furthermore, Mr. Tischer spends a significant amount of his time in non-District, community-related productions, such as performances by the Oakland Ballet and MPAA theater productions. Thus, his relationship to extracurricular activities related to the instructional program of the school is peripheral, and does not reasonably fall within the meaning of Education Code Section 44065(3).

CTA asserts that there are many duties which teachers are required to perform for which certification is not required. This is undisputed; however, these duties are adjunct to their primary teaching duties for which certification is required. The duties of the High School Auditoriums Manager, however, no longer include teaching duties. A certificate is not required to

perform these non-instructional duties, nor is it required by the job description.<sup>7</sup>

In its brief, CTA correctly states that bargaining history and community of interest are factors to be used in determining the appropriateness of a bargaining unit or the unit placement of a position. However, these factors are not appropriate guidelines for determining the classified or certificated status of a position. Rather, once that status has been determined pursuant to the relevant Education Code provisions stated above, bargaining history and community of interest criteria are used in ascertaining the appropriate bargaining units for classified and certificated employees or in which of the district's established bargaining units a disputed position should be placed.

CTA alleges that the District filed the instant petition in an attempt to transfer bargaining unit work out of the certificated unit without negotiating and, in the process, negotiated directly with Mr. Tischer regarding the terms and conditions of his employment. Such actions have been found to be unfair practices by PERB.<sup>8</sup> Therefore, such allegations are

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<sup>7</sup>Although Mr. Tischer testified that he felt a B.A. degree in Theater was necessary to perform this job adequately, he did not state that a teaching credential was also necessary. Furthermore, the job description requires as a minimum requirement, "[g]raduation from high school or equivalent combination of education and experience in the specific area of assignment."

<sup>8</sup>See, e.g., Alum Rock Union Elementary School District (1983) PERB Decision No. 322; Lake Elsinore School District (1986) PERB Decision No. 563; Muroc Unified School District (1978) PERB Decision No. 80.

properly brought before PERB by the filing of an unfair practice charge, not in a unit modification proceeding.<sup>9</sup>

CTA argues that the deletion of this position from the certificated unit would result in a loss of rights and benefits guaranteed under the certificated contract by Mr. Tischer. The District counters this argument by citing Education Code sections 44063, 44064 and 22504<sup>10</sup>, which provide protection for employees

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<sup>9</sup>PERB records reflect that no charges were filed by CTA regarding these allegations.

<sup>10</sup>Education Code Section 44063 provides:

If an employee of a school district, including a district having the merit system as outlined in Article 6 (commencing with Section 45240) of Chapter 5, employed in a position requiring certification qualifications is assigned to a position in the classified service of the same district, the employee shall retain all sickness and injury, sabbatical leave, and other rights and benefits. All seniority and tenure rights accumulated by the employee at the time of assignment to the position in the classified service shall be secured to the employee during the period of time he or she occupies a position in the classified service. The employee's return to certificated service at any time shall be treated as if there had not been an interruption in his or her certificated service.

Education Code Section 44064 provides:

If an employee of a school district, including a district having the merit system as outlined in Article 6 (commencing with Section 45250) of Chapter 5, employed in a position in the classified service is assigned to a position in the same district requiring certification qualifications, the employee shall retain all sick leave, vacation, and other rights and benefits accumulated by the employee at the time he or she is assigned to a position requiring certification qualifications. All seniority and permanency rights shall be secured to the employee during the period of time he or she occupies a position in the certificated service. The employee's return to the classified service at any time shall be treated as if there had

who move from certificated to classified employment and vice-versa. Both arguments miss the mark. The unit placement of the High School Auditoriums Manager may very well affect Mr. Tischer. However, the level of rights and benefits based on unit placement is largely irrelevant to the inquiry here. What is relevant is whether the position of High School Auditoriums Manager belongs in the certificated unit. It is the duties of the position, not the person or the attendant rights and benefits under the certificated collective bargaining agreement, which are determinative here. If the position is found to be classified, it cannot be in the certificated unit under section 3545(b)(3) of the EERA.

#### CONCLUSION

The position of High School Auditoriums Manager does not require certification under Education Code Section 44065 and is therefore part of the classified service under Education Code Section 44104. For this reason, in addition to those stated

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not been an interruption in his or her classified service.

Education Code Section 22504 provides:

Any person who is a member who subsequently is employed by the same or a different school district or by a county superintendent, to perform duties which require membership in a different public retirement system in this state, shall continue to a member, unless he elects, in writing and files in the office of this system, within 90 days after such entry, not to continue as a member in his new position. This section shall also apply to changes in employment on or after January 1, 1976, if an election is made or before April 1, 1977.

above, the High School Auditoriums Manager must be removed from the certificated bargaining unit pursuant to EERA Section 3545(b)(3).

ORDER

For the reasons stated above, it is hereby ORDERED that the instant unit modification petition be GRANTED. A unit modification ORDER reflecting the deletion of the position of High School Auditoriums Manager from the certificated bargaining will be issued by the Sacramento Regional Director upon issuance of a final decision in this matter.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing

upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: June 14, 1990

Jerilyn Gelt  
~~Hearing~~ Hearing Officer