

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA, (DEPARTMENTS OF)
TRANSPORTATION & INDUSTRIAL RELATIONS))
Employer,)
and)
PROFESSIONAL ENGINEERS IN CALIFORNIA)
GOVERNMENT,)
Employee Organization,)
APPELLANT.)

Case No. S-SR-9-1S
PERB Order No. Ad-136-S
Administrative Appeal
May 16, 1983

Appearances: Barbara T. Stuart, Attorney for the State of California (Departments of Transportation and Industrial Relations); Ernest F. Schulzke, Attorney for Professional Engineers in California Government.

Before Tovar, Jaeger and Burt, Members.

DECISION

TOVAR, Member: The Professional Engineers in California Government (PECG) appeal a determination by the Sacramento regional director that it is not within the statutory jurisdiction of the Public Employment Relations Board (PERB or Board) to determine whether or not an employee is supervisory as opposed to managerial or confidential. After considering the entire record in light of the appeal, the Board affirms the regional director's findings and conclusions attached hereto, and affirms her administrative determinations.

ORDER

The Board AFFIRMS the determinations of the Sacramento regional director, and DENIES the appeal.

Members Jaeger and Burt joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA,)	
)	
Employer,)	Case No. S-SR-9-1S
)	
and)	
)	
PROFESSIONAL ENGINEERS IN CALIFORNIA)	April 28, 1982
GOVERNMENT,)	
)	
Employee Organization.)	
<hr/>		

PROCEDURAL HISTORY

On December 18, 1981, the Professional Engineers in California Government (hereafter PEEG) filed with the Sacramento regional office a request that the Public Employment Relations Board (hereafter PERB or Board) determine that employees in the classification Regional Manager, Division of Industrial Safety are supervisory employees as opposed to managerial employees as defined by the State Employer-Employee Relations Act (hereafter SEERA).¹ This filing incorporated by reference an earlier letter to the regional office (filed December 4, 1981) which outlined PEEG's position on this issue.

On January 11, 1982, I requested the state employer to file a response to the PEEG request by January 26, 1982. On January 25, 1982, PEEG filed with the Sacramento regional

¹SEERA is codified at Government Code section 3512 et seq.

office a request that PERB determine that Mr. Jerry Drennan, a Supervising Transportation Engineer, in Caltrans District 2, is a supervisory and not a managerial employee under SEERA. The state employer responded to both requests on February 2, 1982. I then afforded PEGC an opportunity to file a response to the state employer's filing of February 2, 1982. The PEGC response was received on March 18, 1982.

ISSUES

In letters received on December 4, 1981 and March 18, 1982, PEGC raises the issue of an employee organization's right to file an unfair practice charge alleging that its right to represent its supervisory members has been denied. PEGC asks that PERB "reconsider its earlier ruling" to deny access to the unfair practice procedures in such cases. The Board dealt specifically and definitively with this issue in Professional Engineers in California Government (PEGC) v. State of California, (3/19/80) PERB Decision No. 118-S. A petition for a writ of extraordinary relief filed with the court of appeal within 30 days after issuance of the Board's order in this case would have been the only appropriate forum in which to seek review of the decision. No such petition was filed. This issue is inappropriately raised with the regional director and will not be addressed herein.

PEGC requests PERB to make a finding that a particular civil service classification (Regional Manager, Division of

Industrial Safety) and a particular civil service position (that of Mr. Jerry Drennan, Supervising Transportation Engineer) are supervisory and not managerial under SEERA. The state employer contends that PERB does not have the authority to determine whether a state employee excluded from bargaining units is managerial or supervisory.

Prior to reaching the questions raised by PEGC, the issue of whether or not PERB has jurisdiction to resolve those questions must be decided. As stated to the parties in my letter of March 8, 1982, this determination will be limited to the jurisdictional issue.

DISCUSSION

PEGC argues that only PERB has jurisdiction to resolve the managerial versus supervisory status of employees excluded from bargaining units under SEERA. To support its contention, PEGC points out that the Educational Employment Relations Act (hereafter EERA)² authorizes school district employers to designate management positions, but that SEERA contains no such authorization. They further argue that an earlier attempt by the state employer to deny PERB its jurisdiction to make this determination failed (citing In Re: The State Employer-Employee Relations Act, Phase III Unit Determination Proceeding (10/18/79) PERB Order No. Ad-79-S). PEGC also contends that

²EERA is codified at Government Code section 3540 et seq.

"PERB policy" that employees are to be afforded maximum representation rights unless it is proven that lesser rights are more appropriate is equally applicable to the determination of supervisory versus managerial status.

The state employer, on the other hand, takes the position that PERB does not have the authority to make a ruling on the issue raised by PEEG. The employer contends that PEEG's request is, in reality, nothing more than a disguised unfair practice charge that PEEG is being denied its right to represent supervisory employees. The employer argues that PERB does not have the authority to determine appropriate supervisory bargaining units, and did not, when excluding employees from rank and file SEERA bargaining units, focus on the distinction between various reasons for exclusion. The employer further maintains that PERB is prohibited by statute from assuming jurisdiction to decide the issue of managerial versus supervisory status of state employees.

First, I reject the employer's argument that PEEG's request is simply an unfair practice charge relating to PEEG's right to represent supervisors. The determination that an employee is or is not a supervisor, a manager or a confidential employee involves application and perhaps interpretation of statutory definitions of these categories. It is an entirely different matter to allege a violation of a supervisory employee's

rights, or violation of an organization's right to represent supervisory employees. Such allegations actually presuppose a finding that the employees in question are, in fact, supervisory employees.

Secondly, while it is true that the employer previously raised the question of PERB's jurisdiction to specifically designate an employee as managerial, supervisory or confidential, it is not true, as PEEG suggests, that the Board rejected this argument. Rather, in its decision In Re: The State Employer-Employee Relations Act, Phase III Unit Determination Proceeding, supra, the Board found it unnecessary to respond to the employer's contention that it (the Board) was without jurisdiction to specifically designate such employees, for to do so would confront an issue not in controversy.

It is relevant to this determination to examine more closely the "Phase III" or exclusionary process recently concluded under SEERA. In its decision In Re: The State Employer-Employee Relations Act, Phase III Unit Determination Proceeding, supra, page 2, the Board stated

. . . that it . . . views the focus of the Phase III unit determination proceedings to be a determination of those rank and file employees who are to be included in the designated appropriate units. However, the burden is on the State--and any other party which may seek to exclude employees from units because of alleged managerial, supervisory or confidential status--to affirmatively justify their exclusion. This

can be done by showing evidence of actual job requirements which would disqualify the subject employees from placement in representation units irrespective of which exclusionary category those employees may fit.

In its actual decision outlining classifications and positions excluded from SEERA units (In Re: Unit Determination for the State of California (12/31/80) PERB Decision No. 110c-S, page 1) the Board reaffirmed this position.

That the Board chose to focus on inclusions as opposed to exclusions, and when confronted with the precise jurisdictional question of the instant case, declared it not to be an issue in controversy, supports the employer's contention that PERB's findings in the Phase III unit determination were not absolute as to management, supervisory or confidential status of employees. It is further noted that both civil service classifications covered by this case were included by the Board in its decision on a list entitled, "Excluded Supervisory/Managerial/Confidential Classifications."³

The employer argues that PERB is not authorized by statute to make a determination that an employee is supervisory as opposed to management or confidential. I find ample justification to support the employer's claim.

³In Re: Unit Determination for the State of California (12/31/80) PERB Decision No. 110c-S, pages B-107 through B-116.

Government Code section 3522 provides:

Except as provided by Sections 3522.1 to 3522.9, inclusive, supervisory employees shall not have the rights or be covered by any provision or definition established by this chapter.⁴ (Emphasis added.)

As discussed earlier, the Board has, in interpreting this section, made a finding that the unfair practice mechanisms of SEERA⁵ are not available to supervisors or employee organizations seeking to enforce a right solely related to supervisors.⁶ The Board discusses its powers and duties as related to supervisors in California State Employees Association v. State of California, Department of Health (1/10/79) PERB Decision No. 86-S. On page 4 of this decision the Board notes that Government Code section 3513(g), in pertinent part, states:

The powers and duties of the board described in section 3541.3 shall also apply, as appropriate, to this chapter. (Emphasis added.)

⁴Government Code sections 3522.1 through 3522.9 define the term supervisory employee (section 3522.1), outline rights and prohibitions related to supervisory employees (sections 3522.2, 3522.3, 3522.4 and 3522.8), define the scope of representation and meet and confer rights and obligations relating to supervisory employees (sections 3522.5, 3522.6, 3522.65 and 3522.7), and grant authority to the employer to adopt rules and regulations for the administration of supervisory employer-employee relations (section 3522.9).

⁵Government Code section 3519.

⁶Professional Engineers in California Government (PECG) v. State of California, (3/19/80) PERB Decision No. 118-S.

In looking at the specifically enumerated powers of section 3541.3, the Board selects perhaps the broadest one, section 3541.3(n) which allows PERB to take such other action deemed necessary to effectuate the purposes of the statute, and declares that this section is inapplicable to supervisors. The decision goes on to say that "the statutory scheme indicates an intention to exclude supervisors from PERB jurisdiction."

(Page 6.)

In reviewing the powers and duties of the Board, and all sections of SEERA relating to supervisors, I can find no provision which would arguably authorize PERB to assume jurisdiction for deciding that an employee is a supervisor as opposed to a manager. Rather, section 3522.9 of SEERA grants to the employer the authority to adopt rules and regulations for the administration of supervisory employee relations. The sections of SEERA over which the employer is granted rule making authority (sections 3522.1 to 3522.9 inclusive) include the section which defines the term supervisory employee.

Although it is true that the Board, in the SEERA Phase III exclusionary process, interpreted Government Code section 3522.1 which defines a supervisory employee, it is clear, as discussed earlier, that any findings made pursuant to this definition were for the purpose of exercising the Board's power "to determine in disputed cases, or otherwise approve, appropriate units." (Government Code section 3541.3(a).)

PECG points out that, unlike the EERA, SEERA does not contain a provision authorizing the employer to designate management positions. They argue that only PERB, therefore, has the authority to do so, and thus to distinguish between management and supervisory employees. I disagree. Government Code section 3534 provides that:

. . . the state may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the state. . . .

This section of the Government Code is not within SEERA, or any other statute which PERB administers. Its separate existence is further substantiation of PERB's lack of jurisdiction in the instant case.

Finally, PECG expresses the idea that, in essence, the concept adopted by the Board in its Phase III dealings that employees were to be included in rank and file units unless an exclusionary claim was proven, can be stretched to mean that all employees excluded from rank and file units as "excluded supervisory/managerial/confidential classifications" are to be afforded the rights of supervisors until proven to be managerial or confidential. Since I have concluded that PERB does not have jurisdiction in this matter, I make no finding regarding this argument.

ORDER

For the reasons enumerated above, the requests that PERB determine that the classification of Regional Manager, Division of Industrial Safety, and the position of Mr. Jerry Drennan, Supervising Transportation Engineer, CALTRANS are supervisory are hereby dismissed.

An appeal of this decision may be made to the Board itself within 10 calendar days of service of this decision by filing a statement of the facts upon which the appeal is based with the Executive Assistant to the Board at 1031 18th Street, Sacramento, California, 95814. Copies of any appeal must be concurrently served upon all parties and the Sacramento regional office. Proof of service of the appeal must be filed with the Executive Assistant.

Janet E. Caraway
Regional Director