

**STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD**

PITTSBURG UNIFIED SCHOOL DISTRICT, Employer)))	
and))	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, PITTSBURG CHAPTER #44, Employee Organization)))	Case No. SF-R-106
and))	EERB Decision No. 3
PITTSBURG FEDERATION OF TEACHERS, LOCAL 2001, AFT, AFL-CIO, Employee Organization))))	

Appearances: Breon, Galgani and Godino by Keith V. Breon, Attorney, for Pittsburg Unified School District; Robert L. Blake, Attorney, for California School Employees Association, Pittsburg Chapter #44; Van Bourg, Allen, Weinberg & Roger by Stewart Weinberg, Attorney, for Pittsburg Federation of Teachers, Local 2001, AFT, AFL-CIO.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

Pursuant to a Request for Recognition filed by California School Employees Association, Pittsburg Chapter #44 (CSEA); a Notice of Request for Recognition posted by Pittsburg Unified School District (Employer); an Intervention and an amended Intervention filed by Pittsburg Federation of Teachers, Local 2001. AFT, AFL-CIO (PFT); a Notice of Employer Decision dated May 5, 1976; and a Petition for Hearing filed by the Employer on May 25, 1976, a hearing was held on July 22, 1976 before a hearing officer of the Educational Employment Relations Board at the Employer's premises.

CSEA requested the following unit:

All the district's classified employees. . . , which shall include but not limited to the following major grouping of jobs: Food Services, Clerical and Secretarial, Operations and Maintenance to include custodial/maintenance/grounds, Instructional Aides (paraprofessional), and Transportation. The unit excludes noon duty supervisors (by whatever name) when the job description does not authorize or require the performance of duties other than playground supervision for the purpose of providing certificated personnel with a duty-free lunch period, and those positions which can lawfully be declared management, confidential, and supervisory.

PFT's amended intervention described the following unit:

All paraprofessionals: aides, Community Liaison (secondary schools) and Pupil Services Liaison.

At the hearing, following PFT clarification that it intended to include noon-duty supervisors in its intervention, CSEA amended its position to include noon-duty supervisors in its requested unit. The employer contends that the appropriate unit in this case is consonant with that originally requested by CSEA, and one which excludes noon-duty supervisors.

The district is comprised of 11 schools: 1 preschool, 6 elementary schools, 2 junior high schools, 1 high school, and 1 adult education school. It has an average daily attendance of approximately 6,200 students. There are approximately 141 employees whose unit placement is undisputed.^{1/} There are approximately 227 persons who are classified as aides whose unit placement is in dispute: 220 teacher aides, including 197 instructional aides, 3 health aides, 8 clerical aides, 3 campus aides, 6 community aides, and 3 shop instructional aides; 3 campus supervisor aides (high school); 1 pupil service liaison; and 3 secondary school community liaisons. There are 16 noon-duty supervisors whose inclusion or exclusion in the unit is in dispute.

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Account Clerk; Account Clerk-Intermediate; Account Clerk-Senior; Bus Driver; Carpenter; Composer Technician; Custodian; Custodian-Auditorium; Deliveryman/Gardener; Duplicating Center Technician; Electrician; Equipment Serviceman; Food Service Assistant; Food Service Assistant-Senior; Grounds Equipment Operator; Groundsman Gardener; Groundsman-Stadium; Groundsman-Stadium Assistant; Library Assistant; Library Assistant-Senior; Maintenance-Senior; Painter; Plumber; Pool Operator/Gardener; Purchasing Clerk; Receptionist; School Secretary; School Secretary-Intermediate; School Secretary-Senior; Secretary; Secretary-Federal Projects; Typist Clerk; Typist Clerk-Senior and Housekeeper.

All of the classifications in dispute, with the exception of pupil services liaison, are assigned to a school site or a cluster of school sites. In contrast, most of the classified employees are not assigned to a school site but rather work out of a central location. Instructional aides and shop instructional aides work directly in the classroom assisting in the instruction and supervision of students. Health aides assist nurses with the examination of students and with the instruction of health in the classroom and maintain health records. Community aides work with elementary and junior high students and parents outside the classroom and enforce disciplinary and safety rules in building and campus grounds; campus aides perform similar functions at the high school level. Campus supervisor aides observe and assist students and patrol high school grounds. Secondary school community liaison persons work with parents, counselors, deans and students to resolve problems; they regularly visit student homes. Pupil services liaison persons provide counseling services for parents and students through the auspices of the employer's pupil services office. Noon-duty supervisors are responsible for elementary school yard and cafeteria supervision; their job description is virtually identical to that of campus aides. Finally, clerical aides perform various standard clerical functions. Unlike all other aide classifications, the job requirements for a clerical aide do not include the ability to work effectively or cooperatively with students; further, the testimony established that they do not have any extensive interaction with students.

The employer has three separate salary schedules for classified employees: the aide schedule, the noon-duty supervisor schedule and the regular classified schedule. The aide schedule, pursuant to which campus, community, health, instructional, shop instructional, campus supervisor and clerical aides are paid, contains four steps based on longevity of employment with the employer. There are seven classes within each step; each class is based on increasing increments of educational credit. The aides paid on this schedule are the only classified employees who receive premium pay based on increased educational credit. The noon-duty supervisor schedule contains four steps. The four steps are identical with the four steps at class I rates of the aide schedule. The classified schedule, pursuant to which other employees, including secondary school community liaison and pupil service liaison persons are paid, contains fifty-two ranges. Each job classification is assigned a range. There are five steps within each range; each step reflects an additional year of service with the district.

All aides, including secondary school community liaison and pupil service liaison persons, are employed for ten months a year, whereas the overwhelming majority of other

classified employees work twelve months a year. Two-thirds of the aides work three hours per day; the vast majority of the classified employees work an eight hour day. All employees sought to be represented, except noon-duty supervisors, receive district paid health and welfare benefits if they work a minimum of four hours per day. Thus, aides who work three hours per day do not receive these benefits. All employees sought to be represented, except noon-duty supervisors, receive sick and vacation leave on a prorata basis and receive permanent status at the end of a six month probationary period. Upon attaining permanent status employees cannot be terminated except for disciplinary reasons or lack of funds. Approximately eighty percent of all aides are categorically funded by state or federal money; aides comprise most, but not all, of the classified employees who are categorically funded. Categorically funded employees are given notice annually that they are employed subject to continued funding.

All classified employees are hired pursuant to district administered testing and placement on an eligibility list. Noon-duty supervisors are interviewed and selected by individual principals. Aides, by and large, are also selected by individual principals, sometimes in conjunction with the classroom teacher to whom they will be assigned. All aides and noon-duty supervisors are under the direct supervision of the principal or chief administrative person at the school site.

Aides who wish to become part of the regular classified service must take the requisite examination along with all other applicants. Where possible, incumbent employees are given some preference over outside applicants for available jobs. Although there has been some minimal transfer from aide classifications to regular classified positions, primarily clerical, the overwhelming majority of transfers and promotions within regular classified positions have not included aides. None of the current aides have transferred from the regular classified service to aide classifications.

Finally, the Employer's records indicate that as of May 31, 1976, of the 227 aides then employed, 30 had executed payroll dues deductions on behalf of PFT, 81 on behalf of CSEA, 1 on behalf of both organizations, and 115 persons had executed no payroll dues deduction authorizations. Furthermore, both CSEA and PFT have, in the past, met with and represented various aides in their relations with the employer.

DISCUSSION

The substantive issues thus presented are first, whether the only appropriate unit is an overall classified unit; second, whether paraprofessionals constitute a

separate appropriate unit; third, whether noon-duty supervisors are employees within the meaning of the Act.

In reaching our conclusions with respect to the appropriateness of any unit, we are required by Section 3545 of the Act, to base our decision on three factors: (1) The community of interest between and among the employees; (2) The established practices of the employees including, among other things, the extent to which such employees belong to the same employee organization; and (3) The effect of the size of the unit on the efficient operation of the school district.

We conclude, based on the record before us, that a single overall unit is not appropriate in this case. Rather, we find that a separate unit of paraprofessionals is appropriate.

In reaching this conclusion we find merit in the PFT's basic argument that the paraprofessional persons whom it seeks to represent are distinguishable from other classified employees since their primary functions involve dealing directly with students either at the instructional or disciplinary level, whereas other classified employees are primarily charged with providing a physical environment for students. We would, however, exclude clerical aides from the paraprofessional unit. In addition, we note that all but one of these paraprofessional employees, unlike most of the remaining classified employees, are regularly assigned to a specific school site or cluster of sites; that the separate salary schedule for aides includes additional compensation for educational experience, unlike the regular classified salary schedule; that these persons uniformly work no more than ten months a year while most regular classified employees work a twelve-month year; that they are supervised differently and by different persons than the regular classified employees; and that they are selected for employment by different persons than regular classified employees.

We conclude, however, that clerical aides, while meeting some of the above enumerated criteria, perform tasks identical to those of other classified clerical personnel under identical supervision and share an identical working environment. They are, therefore, more appropriately included in the regular classified unit.

All parties at the hearing stipulated that the employees sought to be represented, presumably including noon-duty supervisors, are employees within the meaning of the Act. While we have enunciated a general proposition that we do not intend to look beyond the stipulations of the parties before us unless such stipulations

are clearly contrary to the provisions of the Act or clearly contravene the rights guaranteed by the Act, we do not base our decision in the instant case solely on that stipulation. Unlike the Employer, we do not view Section 13581 of the Education Code, which specifically excludes "Noon Time Playground Supervisors" from the classified service, as precluding employees so designated from the exercise of rights guaranteed in this Act. In our view, this section of the Education Code must be considered in conjunction with the definition of employee contained in the Act. Employee is defined in the Act as "...any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." This definition is not limited in any way to certificated employees or employees in the classified service.

Noon-duty supervisors work a set number of hours per day on a regularly scheduled basis during the course of the school year. There is not one scintilla of evidence in this record to indicate that these employees only report to work when needed and called upon by the Employer. Thus, as regularly scheduled part-time employees who work on a regular basis, they share a community of interest with full-time employees who perform similar duties. The job description of noon-duty supervisor is virtually identical to that of campus aide; the pay schedule is identical to the first step of the Class I rates of the aide schedule; and like other paraprofessional employees they are selected by the principal. We further note that they, like the vast majority of other paraprofessional employees who do not work a sufficient number of hours to qualify, are excluded from fringe benefit coverage. We conclude, therefore, that noon-duty supervisors should be included in the paraprofessional unit.

While the Act requires us to take cognizance of the extent to which employees belong to the same employee organization, we do not find any evidence in this case which would warrant a conclusion that a paraprofessional unit is inappropriate. Nor do we find any evidence in this record to indicate that a separate paraprofessional unit would disrupt the efficient operation of the Employer.

ORDER

The Educational Employment Relations Board directs that:

1. The following units are appropriate for the purpose of meeting and negotiating, providing an employee organization becomes the exclusive representative:

Unit A

Included: All classified employees, including clerical aides.

Excluded: All other employees, including instructional aides, health aides, campus aides, community aides, campus supervisor aides (high school), pupil service liaison, secondary school community liaison, noon duty supervisors, managerial employees, supervisory employees, and confidential employees.

Unit B

Included: Instructional aides, health aides, campus aides, community aides, shop instructional aides, campus supervisor aides (high school), pupil service liaison, secondary school community liaison, and noon duty supervisors.

Excluded: All other employees, including managerial employees, supervisory employees, and confidential employees.

2. The employee organizations have the 10 workday posting period of the Notice of Decision to demonstrate to the Regional Director at least 30 percent support in the above units. At the end of the posting period, should more than one employee organization qualify for the ballot or if only one employee organization qualified for the ballot and the employer has not granted voluntary recognition, the Regional Director shall conduct an election.

By: Jerilou H. Cossack, Member

Reginald Alleyne, Chairman

Date: October 14, 1976

Raymond J. Gonzales, Member, dissenting in part:

I agree with the majority in finding that those classified employees within an aide category form an appropriate unit separate and apart from other classified employees of the school district. Unlike the majority, however, I would exclude noon duty supervisors on three grounds. First, I am not entirely satisfied that the majority opinion demonstrates that noon duty supervisors are public school employees² within the meaning of Government

² The majority incorrectly accepts the stipulation among the parties that the employees sought to be represented are employees within the meaning of the Act. A careful examination of the record reveals that the stipulation was entered into the record at a time when it was unknown that PFT intended to amend its request to include noon duty supervisors within its proposed unit. In any event, it is well established that a stipulation as to jurisdiction of a tribunal is not binding. 1 Witkin, California Procedure, "Jurisdiction", Section 10, pages 534-36 (2d Ed. 1971).

Code section 3540 et. seq., and therefore entitled to representation rights. Second, even assuming for the purpose of argument that noon duty supervisors as a class are public school employees within the meaning of the Act, this record clearly demonstrates that there exists such an insufficient community of interest between noon duty supervisors and classified employees of the Pittsburg Unified School District as to result in a very tenuous employment relationship, almost casual in nature, between the noon duty supervisors and the district. Third, there is no evidence indicating whether either of the organizations seeking to represent them in their proposed units has included them in their past bargaining endeavors with the district or, in fact, interacted with these employees in any manner.

The majority has failed to address adequately those considerations which militate for a finding that noon duty supervisors are not employees under Government Code section 3540 et. seq. Government Code section 3540.1 (j), which defines a "public school employee" does not expressly exclude those employees which are not part of the classified service as provided for in section 13581 of the Education Code. However, I would submit that a reasonable interpretation of this section in light of the purpose underlying the enactment of Education Code section 13581, as well as, the language found in other parts of the Act, particularly section 3545, both argue for the implicit exclusion of noon duty supervisors from any bargaining rights under the Act. Further, although the definition of a public school employee as stated in section 3540.1(j) of the Act expressly excludes certain individuals, for example, public officials either elected or Governor appointed, that list of exclusions cannot be assumed to include every conceivable type of individual who receives a pay warrant from a public school employer. Temporary professionals, education consultants, crossing guards, and legal counsel, are not specifically excluded, yet there are numerous instances where they too have received remuneration from public school employers.

Section 13581 of the Education Code provides in pertinent part as follows:

The governing board of any school district shall employ persons for positions not requiring certification qualifications. The governing board shall, except where Article 5 (commencing at Section 13701) of this chapter of Section 13756 applies, classify all such employees and positions. The employees and positions shall be known as the classified service. Substitute and short-term employees, employed and paid for less than 75

percent of a school year, shall not be a part of the classified service. Part-time playground positions, apprentices and professional experts employed on a temporary basis for a specific project, regardless of length of employment, shall not be a part of the classified service...."

This section implements a classified service system for school districts not incorporating the merit system. Excluded from that scheme along with several other types of persons employed by a school district are "part-time playground positions", herein noon duty supervisors. It should be noted that no one disputes the fact that noon duty supervisors fill part-time playground positions; it is clear from the record that they patrol and supervise throughout the school premises at the elementary level.

A review of case law interpreting that section indicates that the legislative purpose in establishing a classified service for certain employees of a school district was to provide those persons with a guarantee of job protection. See California School Employees Association v. Willits Unified School District 243 Cal. App. 2d 776, 52 Cal. Rptr. 765 (1966) and California School Employees Association v. Sunnyvale Elementary School District 36 Cal. App. 3d 46, 111 Cal. Rptr. 433 (1973). As stated by the court in California School Employees Association v. Willits Unified School District, supra at 784-85:

Not only, however, are there statutory protections for the pupils, but there are also statutory regulations in favor of school district employees which would not be applicable to employees of a contractor, for example, Education Code Sections 13651.1 (leaves of absence and accumulation thereof), 13651.1 (leave for funeral of relative). These are but a few examples. The entire statutory scheme of protection of employees applies to those who are classified under Section 13581. (Emphasis added)

Similarly, in California School Employees Association v. Sunnyvale Elementary School District, supra at 63-64, the court stated:

Also section 13581 is intended to strengthen the position of non-certified school employees by classifying them. (Citation omitted) Certain rights are afforded them pursuant to sections 13580-13655 of the Education Code. Persons outside the school system, especially temporary professionals, would not be in need of such protections. (Emphasis added)

Consequently, those provisions of the Education Code, sections 13580 et. seq., provide only classified employees various rights relating to job security and employment benefits.

While it has never been judicially determined why part-time playground positions are excluded from the classified service under Education Code section 13581, I would submit the reason lies in the tenuous nature of their employment. The fact that they are exempted along with other employees who themselves are engaged in a temporary employment relationship with the school district suggests that the employment relationship of persons employed in part-time playground positions were exempted for similar reasons. Further, the fact that the Legislature has not seen fit to change the exempt status of the part-time playground position since the enactment of Education Code section 13581 in 1959 suggests that that position continues to exemplify the same temporary employment characteristics.

Since employees exempted under Education Code section 13581 are not afforded the protections of classified employment, presumably due to the tentative nature of their employment relationship with the school district, to now require that negotiations over wages, hours, and working conditions of the district's career employees be burdened with the same considerations for a category of employees whose interests the Legislature has found to be less than critical, does not appear justified. Considering the financial pressures that the educational system now faces, we should not lightly ignore the policy established by the Legislature and endorsed by the courts in interpreting Education Code section 13581.

Another compelling reason for excluding noon duty supervisors as not being employees within the meaning of the Act is that no where in the language of the Act is reference made to any category of employees of the type to which the noon duty supervisors belong. This omission is particularly obvious in that section of the Act pertaining to the appropriateness of the unit issue, Government Code section 3545. Here, the Legislature only addressed itself to certain categories of employees who are neither "management" nor "confidential". Therefore, I would argue that the Legislature's concern with only "supervisory", "certificated", and "classified" employees in the context of giving direction to the Board on matters regarding what does or does not constitute an appropriate unit, implies that the Legislature intended that only employees within those categories are employees who may constitute an appropriate unit for

negotiating purposes under Government Code section 3545. On the basis of the foregoing the only conclusion that can be reached is that there are no provisions in the Act for dealing with any employee who is neither "supervisory", "certificated", or "classified" in determining what constitutes an appropriate unit.

A second basis for my dissenting in part from the majority opinion is that even assuming that noon duty supervisors as a class are not precluded from the exercise of rights guaranteed under the Act, it is clearly evident from the record that because of the tentative nature of their employment relationship with the Pittsburgh Unified School District, there exists no community of interest with the district's classified employees.

As noted by the majority, section 3545 of the Government Code requires the Board to determine the appropriateness of any unit on the basis of a tripartite test, one element of which requires a showing of community of interest between and among the employees. Although the Board is not bound by decisions in other jurisdictions or decisions under the National Labor Relations Act, application of the "community of interest" criterion has resulted over the years in a consideration of a number of variables inherent in the employer-employee relationship, the ultimate goal being that there be "a 'common enough aspect of employment' to make it reasonable for the employees to negotiate jointly." L.C. Shaw, and R.T. Clark, Jr., "Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems," 51 Oregon L. Rev. 152 (1971). Albeit, the majority has considered a number of factors relevant to whether a community of interest exists between and among the employees in this case, I cannot agree with the analysis and conclusion reached by them regarding the noon duty supervisors.

First, regarding the job description of noon duty supervisors, I am not convinced that they perform responsibilities which can properly be characterized as "paraprofessional" in nature. Their level of interaction with the students at the elementary level is much less than that of the aides, whom I believe more appropriately can be termed, "paraprofessional". Unlike the majority of the aides, noon duty supervisors do not participate in instructional or counseling services for the students. Nor are they required for purposes of advancement to pursue educational goals that would enhance their ability to relate to students in the instructional or counseling areas. And further, unlike the aides, they are not required to take in-service training during the period of their employment.

The work schedule of noon duty supervisors also provides another distinctive basis for finding that they do not share a community of interest with classified

employees in the district. While they, like the aides, may be ten-month employees, the fact that they substitute for certificated personnel during the noon recess suggests that they work less than two hours per day. The record clearly demonstrates that the minimum number of hours worked by any employees in the classified service is three hours. Further, the fact that noon duty supervisors work only primarily in the noon recess suggests that there is little opportunity for interaction with classified personnel. Further, because of their limited work assignment, noon duty supervisors are the only employees who are totally excluded from any employee benefits. And even though some aides are excluded from health and dental benefits, they are entitled to sick leave and vacation leave on a prorated basis. Lastly, all classified staff have reemployment rights; noon duty supervisors have none.

The school district has also apparently established a different pay schedule for noon duty supervisors. It is not clear from the record, however, whether the schedule for noon duty supervisors referred to by the majority is, in fact, utilized by the district. The record only notes that it is a recommended schedule for noon duty supervisors. The only point that is clearly uncontradicted regarding earnings of the noon duty supervisors is that they are paid on an hourly basis. Assuming that the district does utilize the recommended schedule, the top of the pay schedule for them is a third lower than the top of the aide pay schedule. Further, as noted above, only aides are given credit for initial placement and advancement purposes on the pay schedule for college units taken and completed.

The work conditions of noon duty supervisors greatly differ from those of the classified personnel. Noon duty supervisors can never attain permanency status in the school district. Further, while a few aides have moved to the regular classified service, there has been no similar mobility for the noon duty supervisors. Additionally, disciplinary procedures differ for noon duty supervisors. Unlike classified employees, they are not entitled to a notice of disciplinary action. Consequently, they may be fired at will by the principal of the school at which they work. On the other hand, all classified employees are protected by certain grievance procedures.

Final noteworthy distinctions between noon duty supervisors and classified staff are the circumstances under which they are hired and the line of supervision under which they fall. The majority has given the impression that aides are hired solely by the principal at a particular school site. While the

statement is accurate insofar as noon duty supervisors are concerned, a careful reading of the record indicates that aides must be tested and interviewed by district administrators before qualifying for an eligibility list. The principal must then limit his selection to persons on the list. Noon duty supervisors are not tested nor must they qualify for any list. They, in fact, are selected by the principal. Additionally, it appears that noon duty supervisors are solely accountable to the principal. The line of supervision ceases there. This is not so with the classified service. For example, the ultimate responsibility for the aides rests at the district administrative level such as with the Coordinator of Aides.

In sum, on the basis of the community of interest test, I would not include noon duty supervisors within either of the two units designated by the majority. Rather, viewing their job status in total, their employment relationship is much too tenuous since there is no measure of permanency in the position of noon duty supervisors.

The final argument upon which I would exclude noon duty supervisors from any bargaining unit is that neither employee organization has in the past sought to represent them in matters pertaining to employer-employee relations. Nor is there any evidence that either employee organization has attempted to meet and interact with these employees to any extent. Hence, there is no evidence of past bargaining history regarding these employees.

On the basis of the foregoing, I would hold that noon duty supervisors should not be included within any bargaining unit of employees sought by the employee organizations herein. Further, in my opinion there is too little in the record to find as the majority has found that noon duty supervisors should be included. Of the two hundred and thirty six pages of transcript in this case, only two and a half pages pertain to noon duty supervisors. And of these two and a half pages, the most significant testimony, regarding working conditions, has its basis in Education Code sections 13580 et. seq., provisions which themselves are already judicially noticeable and have been relied upon to some extent in this dissent. In this regard, I am concerned that persons appearing before this Board might be less than encouraged to prepare adequately for the presentation of their cases, knowing that the majority, in this instance, has been willing to base its decision regarding noon duty supervisors on relatively sparse evidence in the record.

Raymond J. Gonzales, Member