STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GAIL WELD, Charging Party, v. HAYWARD UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-189 PERB Decision No. 172 August 24, 1981

Appearances: Dr. Thomas C. Agin for Gail Weld; Alison MacKenzie, Attorney (Paterson & Taggart) for Hayward Unified School District.

Before: Gluck, Chairperson; Moore and Jaeger, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions to the attached hearing officer's proposed decision filed by Charging Party Gail Weld (hereafter Weld). The hearing officer found that Weld, as a managerial employee, lacked standing to file a charge and thus dismissed the complaint. We affirm the result arrived at by the hearing officer, and adopt his decision to the extent consistent with the discussion below.

FACTS

The hearing officer's findings of fact are free of prejudicial error and are adopted as the findings of the Board.[1]

DISCUSSION

Based on the parties' position that Weld was a managerial employee, and sections 3541.5(a) and 3540.1(j) of the Educational Employment Relations Act (hereafter EERA)[2], the hearing officer found that Weld lacked standing to file an unfair practice charge. The hearing officer correctly held

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[1]We note that the hearing officer found that the parties stipulated that Weld and other psychologists were managerial. We are unaware of a formal stipulation to that effect in the record. However, as noted, infra, the parties did not dispute Weld's alleged managerial status and litigated the case in a manner consistent with that position. We thus find the hearing officer's reference to a "stipulation" to be nonprejudicial error.

[2]The EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references are to the Government Code.

Section 3541.5(a) provides, in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge . . . .

Section 3540.1(j) provides:

> "Public school employee" or "employee" means 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.

that, as a matter of law, the statute proscribes managerial persons from filing charges. As noted by the hearing officer, managerial status would remove Weld from the statutorily defined class "employee". Based on the parties' position that Weld was managerial, he thus concluded that Weld lacked standing to file the instant charge.

It is unnecessary to determine whether Weld was, in fact, a manager, because we would dismiss this case even if she were not. As a non-managerial person, Weld would not be within the class of persons conditionally eligible to receive the life insurance benefit at issue herein. The District would thus not have offered her the life insurance benefit whether or not she joined the Association of California Administrators. It follows that she would not even arguably have been unduly influenced to join that organization, and hence she would not have standing to file the instant unfair if she were found to be non-managerial.

For all of the above reasons, we affirm the dismissal of the instant unfair practice charge.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS that:

The instant unfair practice charge, Case No. SF-CE-189, is DISMISSED in its entirety.

Barbara D. Moore, Member John Jaeger, Member

Harry Gluck, Chairman, dissenting:

During the original PERB unit determination hearing conducted in 1977 the District contended that psychologists are managerial employees.[1] This position was contested by an intervening employee organization although not by the present exclusive representative. As a consequence, the PERB regional director ordered an election prior to the resolution of the psychologists' status and, thus, to the final determination of an appropriate unit. The psychologists were permitted to vote challenged ballots. Because they eventually proved not to be "determinative" of the election outcome, the challenges were

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[1]EERA section 3543.4 reads, in part:

> No person serving in a management position . . . shall be represented by an exclusive representative. . . .

never resolved.[2] Thus, it has never been decided whether psychologists are in the unit or excluded therefrom.[3]

Whether an employee is eligible to participate in collective bargaining is a question of law to be answered according to the facts produced.[4] The hearing officer's acceptance of the parties' joint position (he referred to it as a "stipulation") that Weld is a manager, ignored Centinela Valley Union High School District (8/7/78) PERB Decision No. 62, which made it clear that stipulations of law unsupported by facts would not be accepted by this Board. Particularly, there was little justification for accepting this so-called stipulation since PERB had already established the precedent of placing psychologists in a representation unit.[5]

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[2]Challenged ballots are designed to resolve the eligibility of individual employees to vote in an established unit, not to determine the composition of the unit itself. It is anomalous to conduct an election in a unit which has not yet been determined. See Board rule 33460 which permits consent election in units mutually agreed upon as appropriate and rule 33470 which provides for voter eligibility in units determined to be appropriate by the Board. The PERB rules and regulations are found at California Administrative Code section 31000 et seq.

[3]The record indicates that negotiations have never been conducted on behalf of the psychologists.

[4]Section 3540.1(g) defines "management employee."

[5]Placer Union High School District (9/12/77) EERB Decision No. 25. The only "evidence" of the psychologists' managerial status offered by the District in the present case consisted of general statements and legal conclusions as to their responsibility for directing the child assessment team and their involvement in the development of related policy. The hearing officer relied solely on the "stipulation".

It may be true that Weld would not be successful in this matter irrespective of a final disposition of her status. However, the majority overlooks the fact that she may have "agreed" to her managerial status believing that she had no choice--that her status had been determined by the employer and the ensuing years of silence as to the challenged ballots. The majority, which now ignores this Board's invariable placement of psychologists in units since 1977,[6] cannot know Ms. Weld's true preference and should not assume that she would decline to enroll as a member of the exclusive representative in order to accept the benefits of its services and membership programs were she to learn that she is not a managerial employee.

By avoiding the "standing" issue raised here, the majority closes its eyes to an administrative oversight, ignores precedential holdings and usurps Ms. Weld's ultimate right to make an informed decision as to her future course of action.

Because the matter of the unresolved challenged ballots is beyond the reach of this case, I would remand to determine Ms. Weld's status based on her individual duties and responsibilities.

Harry Gluck, Chairman

[6]E.g., Arcadia Unified School District (5/17/79) PERB Decision No. 93; Pleasanton Joint School District/Amador Valley Joint Union High School District (6/25/81) PERB Decision No. 169.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GAIL WELD, Charging Party, v HAYWARD UNIFIED SCHOOL DISTRICT, Employer.	)	Unfair Practice Case No. SF-CE-189 PROPOSED DECISION (12/12/78)

Appearances: Dr. Thomas Agin, Director, California Pupil Services Labor Relations, for Charging Party; Alison MacKenzie, Attorney (Paterson and Taggart) for Hayward Unified School District.

Before Michael J. Tonsing, Hearing Officer.

PROCEDURAL HISTORY

On May 11, 1978, Gail Weld, the charging party, filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or the Board) alleging that the respondent, Hayward Unified School District (hereafter District) violated Government Code section 3543.5(d) by offering a fringe benefit to designated management employees who became members of the state Association of California School Administrators (hereafter Association), thereby encouraging employees to join that organization. An informal conference was held on June 2, 1978. A formal hearing was conducted on August 22, 1978.

POSITIONS OF PARTIES

The charging party contends that since the District grants

a life insurance policy to management employees who are members of the Association while refusing to provide the same coverage to management employees who are not members, the District is violating section 3543.5(d)[1] in that its action encourages employees to join a particular employee organization.

The charging party further asserts that the Association is an employee organization within the meaning of section 3540.1(d).[2] The charging party also contends that she has the right to file an unfair practice charge even though she is designated as a management employee by the District, a designation she does not challenge. Finally, she contends that the charge was timely filed, since it was filed within six months of the date of the District's formal and final refusal to provide her with a comparable benefit.

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[1]All references are to section 3540 et seq. of the Government Code. Section 3543.5(d) states that it shall be unlawful for a public school employer to:

> Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[2]Section 3540.1(d) states in pertinent part:

> 'Employee organization' means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. 'Employee organization' shall also include any person such an organization authorizes to act on its behalf.

The District contends that the Association does not meet the definition of an employee organization and that there is therefore no basis for finding a section 3543.5(d) violation. It further argues that a management employee does not have the right to file an unfair practice charge under the Educational Employment Relations Act (hereafter EERA or the Act).[3]

Finally, the District contends that if an unfair practice took place, it occurred no later than when the agreement providing the insurance benefit went into effect, admittedly more than six months prior to the filing of the charge. Thus, the District argues, the charge was not timely filed.[4]

ISSUES

1. Does a management employee have standing to file an unfair practice charge on her own behalf under the Act?
2. Was the charge timely filed?
3. Does the Association fulfill the definition of an employee organization so as to bring the charge within section

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[3]The EERA consists of Government Code section 3540 et seq.

[4]Section 3541.5(a) states:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: 1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge...

3543.5(d), prohibiting employer support of an employee organization?

4. Does the requirement that an employee join an employee organization in order to receive a fringe benefit violate the prohibition against employer support of an employee organization contained in section 3543.5(d)?

FINDINGS OF FACT

Ms. Weld is employed by the District as a half-time psychologist. The parties have stipulated that she is a management employee. The District has designated all psychologists in the District as management employees because they have responsibility for developing policies for the District's child assessment program and also for administering the program. Psychologists are excluded from the certificated negotiating unit that is represented by the Hayward Unified Teachers Association, CTA/NEA. The District has employed 9.5 psychologists to work in its 37 schools. In all there are approximately 2,000 District employees, of whom approximately 109 are designated as management.

According to the uncontradicted testimony of Mr. Paul Goldman, who was president-elect of the local affiliate of the statewide Association during the 1976-77 school year, the designated management employees in the District desired to have the terms of their compensation and working conditions reduced to writing. The management employees held numerous committee meetings during the 1976-77 school year to formulate a written

agreement. It became apparent that the large size of the management group made it more feasible to select a representative to act on their behalf than to have many individuals draft the agreement.

The Association was selected for this representative role because 90 percent of the management employees already belonged to it. A board of directors of the local affiliate of the statewide Association was subsequently elected and began consulting with the District in May of 1977 regarding the proposed agreement.

The District had in the past offered all its employees a "cafeteria style" fringe benefits package. Each employee could use a fixed dollar allotment to "buy" various fringe benefits tailored to his/her specific needs. The allotment was the same for all full-time District employees, whether or not they were within negotiating units. Under this plan, every half-time employee would be entitled to 50 percent of the full time fringe benefit allotment. The customary fringe benefit package was to be continued under terms of the proposed agreement, but the District sought to provide an extra benefit to employees designated as management by offering to purchase a $25,000 life insurance policy for each such employee. The District chose to secure this life insurance through the Association because, according to Mr. Jack Weinstein, assistant superintendent for personnel for the District, it was the only organization that had a group insurance program that could be provided by the

District at the desired price. The proposed agreement incorporated this choice and provided that the policy would be available "to those members who qualify for the program." An employee had to be a member of the state Association in order to qualify.

The finished agreement was presented to the management employees, including Ms. Weld, at a meeting on June 22, 1977. The terms of the agreement were explained, including the qualifying provision of the insurance policy.

The agreement became effective July 1, 1977. Formal parties to the agreement were the superintendent of the District and the Hayward chapter of the state Association. A copy was furnished to the Board of Education of the District, which did not take any action with respect to it. The agreement recognized the local chapter's right to consult with the District on any educational matter. It also provided that agreements concerning salaries, working conditions, and fringe benefits should be made with the local Association through the conferring process. It specified the current understanding of particular items in the above mentioned areas.

Ms. Weld subsequently was denied the life insurance benefit because she was not a member of the state Association and thus was not a "qualifying member" under terms of the agreement. She filed the charge in this case on May 11, 1978, shortly after formal and final notification that the District would not provide her with a comparable benefit.

CONCLUSIONS OF LAW

Section 3541.5(a) explicitly addresses the question of who may file an unfair practice charge. It provides in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge... .

The charging party is plainly not an employee organization or an employer. She must therefore fit the statutory definition of "employee" in order to file. The definition of "employee" is found in section 3540.1(j):

> ...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. (Emphasis added.)

It is stipulated that the charging party is a management employee. As such, she is excluded from filing an unfair practice charge if the definition of "employee" in section 3540.1(j) controls as to section 3541.5(a). The charging party argues, however, that the phrase "any employee" in section 3541.5(a) should be read in its broad, lay or literal meaning rather than according to its statutorily defined meaning. Such a broad reading would allow any employee, including person selected by popular vote or appointed by the Governor to file

an unfair practice charge.[5] In support of this theory, the charging party points out that if the word "employee" were to be used in its statutory sense throughout the Act, it would result in certain inconsistencies.[6] In view of the obvious use of the lay definition of the word "employee" elsewhere, she argues that a similarly broad definition should be used in section 3541.5 concerning who may file.

It is apparent from a close reading of various sections of the Act that the less inclusive definition of employee is not always used. However, the fact that some inconsistent uses exist does not in itself compel the use of the lay definition in this particular instance. The crucial question is, which of the alternative readings better effectuates the purposes of the Act? "[C]ourts should enforce a statute in such a manner that

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[5]The fundamental policy consideration motivating the limitation of the right to protected activity by management employees appears to be the belief that the dividing line separating management from "other employees" is the appropriate place to focus the tensions regarding matters related to wages, hours and other terms and conditions of employment over which negotiation ought to take place. If this line were obliterated, it would not be difficult to imagine a "solid phalanx" of management and other employees arrayed against the remaining citizens of the community in the public sector or against the stockholders in the private sector. See Justice Douglas' dissenting opinion in Packard Co. v. Labor Board (1947) 330 U.S. 485 [19 LRRM 2397] cited in Bell Aerospace (1974) 416 U.S. 267 [85 LRRM 2945, 2949]. As the Bell Aerospace court notes, the Packard decision was "reversed" by subsequent legislative action.

[6]The charging party cites sections 3540.1(g), 3540.1(c), and 3543.4 as examples in which the lay definition of employee must be applied in order to give meaning to the section.

its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation." Haberman v. Finch (2d Cir. 1969) 418 F.2d 664, 666. In interpreting statutes, "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." U.S. v. Whitridge (1905) 197 U.S. 135, 143.

Section 3540.1 specifically defines the various terms "[a]s used in this chapter... ." [Emphasis added.] For example, the terms "confidential employee", "exclusive representative", "management employee", and "meeting and negotiating" are given express statutory definitions. The word "employee" is defined in subsection 3540.1(j). The effect of the language "[a]s used in this chapter" is to create a presumed intent that the word "employee" will be used in its defined sense throughout the Act.

The charging party appears to argue that if the Act is read as a whole, so that the statutory definition of employee is used when the word "employee" occurs, the result will sometimes be absurd and sometimes unfair.

While it can be rather easily granted that the Legislature would not intend a result which is absurd, it does not necessarily follow that the Legislature did not intend a result which, to the charging party, seems unfair. As a leading commentator on statutory construction points out,

> Although the presumption against absurdity is strong,the presumptions against unfairness and

> unreasonableness, depending on degree, are usually weak.[7]

The burden of overcoming the presumption that the Legislature meant for the statutory definition of employee to be applied where it would not create an absurd result weighs heavily, therefore, on the charging party. That burden is not met in this case. Merely demonstrating that in other parts of the statutory scheme the term is subject to a possible alternative definition does not rebut the strong presumption created.

The argument for the use of the lay definition of "employee" in this context also fails when comparison is made to the clearly expressed legislative intent in other sections. In short, use of the statutory definition here is compatible with the intent expressed elsewhere in the Act.

The only provision of the Act explicitly conferring any

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[7]Dickensen, The Interpretation and Application of Statutes (1975) p. 232.

rights on management employees is section 3543.4.[8] It provides a management employee with the right to represent himself or herself individually, or to be represented by an employee organization whose membership is composed entirely of management employees, in his or her employment relationship. Significantly, this right is circumscribed, in that "meeting and negotiating" is forbidden in general, and then pointedly and explicitly ruled out with respect to "any benefit or compensation." Although management employees are given a limited right to representation on other than a meet and negotiate basis, the enforcement of this right is conspicuously absent from the list of enforceable rights explicitly contained in the unfair practice provisions of section 3543.5. It is also significant that the entire concept of exclusive representation provided by section 3543.1(a) is made inapplicable to

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[8]Section 3543.4 states:

> No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employer, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position.

management employees because of the very explicit limiting language of section 3543.4 which unequivocally precludes management employees from being represented by an exclusive representative. It can thus be concluded that the Act, when read as a whole, does not suggest that the Legislature intended the result which the charging party urges.

In the absence of clear evidence or stronger arguments refuting express statutory language, it must be concluded that management employees do not have the right to file unfair practice charges on their own behalf.

Two references to the federal experience serve to reinforce this conclusion. First, although management employees have the right to file charges to institute National Labor Relations Board (hereafter NLRB) proceedings, the right stems from NLRB Rules and Regulations section 102.9 which gives the right to file to "any person". Although many sections of the Act are patterned after the Labor Management Relations Act, as amended (hereafter LMRA),[9] it is significant that the California Legislature chose different language in this section than that used in cases arising under the LMRA . While it could have provided "any person" with the right to file, the Legislature chose instead to identify such individuals specifically. That is, it chose to limit them to "employees", "employee

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[9]29 U.S.C. 151 et seq.

organizations" or "employers". This choice tends to reinforce the conclusion that the Legislature intended that a strict exclusionary construction should be given the statutory definition of "employee".

Second, it is noted that management employees are generally excluded from NLRB jurisdiction. NLRB v. Bell Aerospace Co., Div. of Textron, Inc. (1974) 416 U.S. 267 [85 LRRM 2945]; Retail Clerks International Association v. NLRB (D.C.Cir. 1966) 366 F.2d 642 [62 LRRM 2837]. The charging party attempts to distinguish these decisions, however, on the grounds that they deal strictly with bargaining unit inclusion issues rather than with the filing of unfair labor practice charges. It is true that the NLRB held in North Arkansas Electric Cooperative Inc. (1970) 185 NLRB 550 [75 LRRM 1068] that although a management employee had been excluded from the bargaining unit because of his management status, he nevertheless was entitled to the protection afforded "employees". In this case, the NLRB held that a management employee should be protected under section 8(a)(3) of the LMRA where he had been discharged for union sympathies expressed during an election campaign. Prior to North Arkansas, however, the NLRB had consistently held that management employees were excluded from the coverage of the LMRA. See, e.g., Eastern Camera and Photo Corp. (1963) 140 NLRB 569, 571 [52 LRRM 1068]; AFL-CIO (1958) 120 NLRB 969, 973 [42 LRRM 1075]; General Tel. Co. of Ohio (1955) 112 NLRB 1225, 1229 [36 LRRM 1178]. The Court of Appeals reversed the NLRB

ruling in NLRB v. North Arkansas Electric Cooperative, Inc. (8th Cir. 1971) 446 F.2d 602 [77 LRRM 3114], holding instead that there was:

> ...nothing in the Act [National Labor Relations Act] or its legislative history to indicate that Congress intended the word 'employee' to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity. (NLRB v. North Arkansas, supra, 77 LRRM at 3120).

The Court of Appeals decision in NLRB v. North Arkansas is cited with apparent approval by the Supreme Court in NLRB v. Bell Aerospace, supra, 85 LRRM at 2953.

If the California Legislature had intended that management employees be granted the right to initiate unfair practice charges on their own behalf, that decision would have represented a substantial departure from the established rule of law developed over more than two decades of federal experience. It is logical to conclude that, had such a departure been intended, the Legislature would have clearly signaled its intent. It did not do so.

Based on all of the above, it is concluded that the charging party, a management employee, lacks the standing necessary to file and pursue an unfair practice charge on her own behalf under the Act. Since the charge is resolved on this basis it is not necessary that the other issues raised be considered here.

PROPOSED ORDER

It is the Proposed Order, based upon the findings of fact and conclusions of law and the entire record of the case, that the unfair practice charge filed by Ms. Gail Weld is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 3, 1979 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on January 2, 1979 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: December 12, 1978

MICHAEL J. TONSING
Hearing Officer