

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

LOMPOC UNIFIED SCHOOL DISTRICT,)
Employer)
)
-and-)
)
LOMPOC EDUCATION ASSOCIATION, CTA/NEA,) Case Nos. LA-R-38
Employee Organization) LA-R-268
)
-and-) EERB Decision No. 13
)
LOMPOC FEDERATION OF TEACHERS, LOCAL 3151,)
CFT/AFT, AFL-CIO,)
Employee Organization)
_____)

Appearances: J. Michael Taggart, Attorney (Paterson & Taggart), for the Lompoc Unified School District; Charles Gustafson, Attorney, for the Lompoc Education Association, CTA/NEA; Robert Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger), for Lompoc Federation of Teachers, Local 3151, CFT/AFT, AFL-CIO.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

On April 1, 1976, Lompoc Education Association (LEA) and Lompoc Federation of Teachers (LFT) filed with the Lompoc Unified School District separate requests to be recognized as the exclusive representative of different groups of employees in the district. Subsequently, the district declined to recognize either organization in the absence of certification by the Educational Employment Relations Board as exclusive representative of an appropriate negotiating unit. A hearing on negotiating unit issues was conducted by an EERB Hearing Officer in order to make a record for original consideration by this Board. At that hearing all parties entered into a stipulation describing the extent of their agreement and their disagreement on the matter of an appropriate negotiating unit. Specifically, they agreed to the following description of the negotiating unit:

All regular, full-time and part-time, probationary and permanent certificated employees, special contract employees (Education Code Section 13329) and those temporaries who are employed 75% or more of the days regular

school is in session, excluding the positions designated as Management by the Governing Board on April 1, 1976, and substitute teachers.¹

The parties agreed that the following positions are in dispute on the question of their placement in or out of the negotiating unit: homebound teachers, adult education teachers, subject coordinators, and supervisor of nurses.

The Lompoc Unified School District has an average daily attendance of approximately 11,837 students in grades kindergarten through twelve and adult school. There are 22 school sites on which are distributed 13 elementary schools, two junior high schools, two high schools, three special education schools, one adult high school, and one continuation high school. The district employs approximately 670 certificated employees.² During the 1975-76 school year, the district employed 17 homebound teachers, 56 adult education teachers, eight subject coordinators, and one supervisor of nurses.

In respect to the adult education and homebound teachers, the issue for decision is whether, within the meaning of the community of interest and established practices criteria contained in the Government Code Section 3545(a), they should be included in or excluded from the unit. On the subject coordinators and the supervisor of nurses, the issue is whether they are management or supervisory employees within the meaning of the Act. If they are either management or supervisory employees, they are ineligible for inclusion in the unit. If the subject coordinators and the supervisor of nurses are neither management nor supervisory employees, they shall be included in the negotiating unit, since there is no other dispute concerning their unit placement.

The parties have taken the following positions on the matters in dispute: LEA would include in the unit adult education teachers, full-time and part-time subject coordinators and the supervisor of nurses. LFT would include in the unit adult education teachers, homebound teachers and part-time subject coordinators and, exclude full-time coordinators from the unit.

1 We assume that the parties also intend to exclude supervisory and confidential employees from the unit, as required by the Act.

2 This number is based on full-time equivalent positions as reported in the Annual Apportionments Report, California State Department of Education (July 1976.) The actual number of employees would depend upon the number of part-time certificated employees.

The district would exclude from the unit adult education teachers, homebound teachers, full-time and part-time subject coordinators and the supervisor of nurses. LFT takes no position on the supervisor of nurses; LEA takes no position on homebound teachers.

The criteria for resolving the unit issue concerning the adult education and homebound teachers are contained in Government Code Section 3545(a), which provides:

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.

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In our decision in Los Angeles Unified School District, a case involving certificated employees, we discussed the Act's Section 3545(a) criteria. There we said:

In defining what constitutes a community of interest among and between employees, there are several factors which have been established by the National Labor Relations Board: qualifications, training and skills, job functions, method of wages or pay schedule, hours of work, fringe benefits, supervision, frequency of contact with other employees, integration with work functions of other employees, and interchange with other employees.⁴

We apply those criteria, where applicable here, first to adult education teachers and then to homebound teachers.

I

Adult Education Teachers

Adult education teachers are hired by the district to teach evening courses open to adults. An adult education course is offered when at least fifteen persons express an interest in a subject and the district has instructor and other necessary resources available for the course. Candidates for the position

3 EERB Decision No. 5, November 24, 1976.

4 See Kalamazoo Paper Box Corp., 136 NLRB 134, 49 LRRM 1715 (1962).

of adult education teacher are interviewed and selected by the adult school principal, who also maintains records on requests for an adult education course.

The minimum qualifications for an adult education teacher in the district are four years of experience in the field taught in the adult education program and a high school diploma, or a combination of experience and two years of college. Adult education teachers are paid on an hourly basis and are not entitled to fringe benefits. They may acquire tenure as adult teachers,⁵ but no adult education teacher in the district has ever served in that capacity long enough to achieve tenure. Service as an adult education teacher may not be included in computing the service required to achieve tenure as a teacher in the day school.⁶

During the first pay period of the 1975-76 school year, the district employed 56 adult education teachers, of whom 24 were regular full-time teachers employed in the district day schools; the remainder were not regular full-time teachers employed by the district. Of the 56 adult education teachers, 50 taught no more than 25 percent of a regular full-time teaching load.

In 1975-76, the school year in the adult education program was 152 days, in comparison with the school year of 180 days in the day program. Classes in the adult program are taught from 7:00 to 9:30 p.m., four days a week, in comparison to 8:30 a.m. to 4:00 p.m., five days a week, in the regular day school. Unlike regular day teachers, adult education teachers have no extra-duty assignments such as chaperoning dances or supervising athletic events. They are not covered by the layoff provisions of the Education Code.⁷ Adult teachers are not evaluated.⁸ They are supervised by the adult school principal, who is not the regular day principal. If enrollment in a class drops and the district is unable to support a class financially, the course is dropped and the adult education teacher is given a verbal release notice.

5 Education Code Section 13309 (Deering, 1976 Supp.)

6 Education Code Section 13311 (Deering, 1976 Supp.)

7 Education Code Section 13447 (Deering, 1976 Supp.)

8 See Education Code Section 13485 et seq.

In contrast with the adult education teachers, the regular day teachers in the negotiating unit generally teach a full-time or close to a full-time teaching load. Regular day teachers receive fringe benefits; they are eligible for tenure and in many instances have achieved tenure. Additionally, the day program curriculum usually differs from that offered in the evening program. The evening program is basically an enrichment program where the curriculum is based on student interest. A proposed adult education class can be scheduled in the day program. Finally, evening classes are separated into quarters rather than semesters.

On the basis of these findings, we conclude that a community of interest between adult education teachers and the employees in the stipulated negotiating unit does not exist. Since, in addition, the record contains no evidence on established practices, we shall exclude adult education teachers from the negotiating unit.

Homebound Teachers

Homebound teachers teach students who are unable to attend classes because of a physical disability which confines them to their home or a hospital. Homebound teachers are selected and assigned by the Assistant Superintendent of Personnel and Special Services from a list of applications filed with the district. The minimum qualifications for a homebound teaching position are a substitute credential, which requires 90 semester units of college work. The five-year teaching credential required of day program teachers is not required of homebound teachers. Their work brings them into contact with regular day teachers through an effort to coordinate the confined student's work with the work being done in the regular class at the confined student's grade level. Homebound teachers teach without a contract. According to the uncontradicted testimony of the Assistant Superintendent of Personnel and Special Services, homebound teachers in the district are not eligible for tenure and fringe benefits; and they are not evaluated.⁹ They are paid on an

⁹ Education Code Section 13489 gives the governing board of a school district the discretion not to evaluate hourly and temporary hourly certificated employees.

hourly basis with funds from the State Master Plan Program, a source of funding for all district special education teachers. When there are no homebound students to teach, homebound teachers are not employed by the district.

During the 1975-76 school year, the 17 homebound teachers employed by the district averaged 81 hours of homebound teaching assignments for the year. Day program teachers worked a 7-1/2 hour day for the 180 day school year or 1350 hours for the year. The maximum number of hours that a homebound teacher taught during the 1975-76 school year was 273.

On these facts, we conclude that homebound teachers do not have a community of interest with employees in the negotiating unit.

LFT has represented homebound teachers in the past in grievances relating to wages and relies on this as a factor in favor of including homebound teachers in the negotiating unit. The grievances were filed during the period of November and December of 1975 and January 1976. Through the grievances, LFT sought pay and fringe benefits for homebound teachers equal to the pay and fringe benefits of regular day teachers.

Government Code Section 3545(a) requires that we consider "established practices" in considering the appropriateness of a unit, but prior representation by LFT in a grievance procedure, alone, has little bearing on the question of whether homebound teachers should be included in the negotiating unit. Under the Winton Act, any employee organization could file a grievance for any certificated employee. Homebound teachers could have been represented in a grievance procedure as part of a negotiating unit or as a separate negotiating unit or as homebound teachers not affiliated with a negotiating unit of any kind. There is no evidence that the grievance procedure was a negotiated grievance procedure, with an exclusive representative as a party, as distinguished from one unilaterally promulgated by the district and open to any representative acceptable to the grievants.¹⁰

10 The Winton Act, Education Code Section 13080 et seq., which formerly governed employer-employee relations, contained no procedures for exclusive representation. The Winton Act was repealed July 1, 1976, by Section 1, Chapter 961 of the Government Code.

On the basis of the foregoing, we shall exclude homebound teachers from the negotiating unit.¹¹

II

Subject Coordinators

There are eight subject coordinators in the district, of which three work full time as subject coordinators and five divide their time between subject coordinating and teaching. The full-time coordinators are the vocational education coordinator, the Title I, Early Childhood Education coordinator and the migrant education coordinator; the part-time coordinators are the reading, music, science, math and physical education coordinators.

Subject coordinators work out of the district office under the supervision of the Director of Curriculum. Subject coordinators develop and recommend curriculum for the district in kindergarten through grade three and for each of the subject areas for which they are responsible. Curriculum development is based on a recommended state framework in the various subject areas. Subject coordinators develop a plan to bring existing curriculum in line with the state framework. The subject coordinators' recommendations are then made directly to the Director of Curriculum, who makes recommendations to the Assistant Superintendent, who then makes recommendations to the school board. In making recommendations to the Assistant Superintendent, the Director of Curriculum relies heavily upon the expertise of the subject coordinators.

Subject coordinators also participate in the development of secondary curriculum. They sit on the curriculum council, which is composed of the subject coordinators, two representatives from teachers' professional organizations, and secondary principals. This group studies, recommends, and approves programs to be recommended to the Superintendent and to the school board.

Some coordinators also serve on screening panels which recommend teachers for hiring, and have been used to observe teachers in their subject areas. Coordinators also make recommendations concerning the purchase of books and supplies and assist the Director of Curriculum in the development of those portions of the budget in their area of responsibility. They are paid on the teachers' salary schedule but receive an additional \$738 stipend for their services as coordinators. All subject coordinators, including full-time subject coordinators, have been required to perform some teaching duties. There is one

11 Our decision in Petaluma City Elementary and High School Districts, EERB Decision No. 9, February 22, 1977, also excludes adult education teachers and homebound teachers from a unit of certificated employees.

clerk assigned to the Title I, Early Childhood Education coordinator and the migrant education coordinator, and an unspecified number of aides assigned to the migrant education coordinator.

We must decide whether in each of the subject coordinator classifications the individual is a supervisor within the meaning of the Act, and if not, whether the individual is a management employee within the meaning of the Act. Supervisors may not be included in nonsupervisory negotiating units, and management employees may not be included in any negotiating unit.¹²

A. Subject Coordinators' Supervisory Status

Government Code Section 3540.1(m) defines a supervisory employee as follows:

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

With the exception of the migrant education coordinator, there is little evidence in the record that subject coordinators meet any of the supervisory criteria contained in Government Code Section 3540.1(m). The record contains uncontradicted testimony that no subject coordinators adjust grievances, grant leaves of absence, grant time off or assign certificated teachers to teach classes. The Director of Curriculum testified that only the migrant education coordinator actually directs teachers in the sense that they are told how to conduct classes. Other subject coordinators meet from time to time with teachers and share with them information concerning the programs they administer and coordinate their activities as they relate to the program. For example, in response to a leading question, the Director of Curriculum testified that the music coordinator tells music teachers how to give lessons. But the witness quickly qualified his testimony as follows:

A. Well, I'd like to clarify something. Not systematically, is there an observation of the music teachers going on but, they frequently are having rehearsals and performances and the music coordinator will observe and comment on them to the, to the traveling music teachers and the test of any of the performing arts is what kind of a product do you produce.

¹² See Government Code Section 3543.4. Government Code Section 3545(b)(2) provides for separate supervisory units. Government Code Section 3540.1(j) provides that management employees are not employees within the meaning of the Act.

Q. In other words, the -- would you say they're just helpful hints to enable the teachers to do their job better?

A. Yeah, how to... how to function better, more effectively.

This testimony reveals that the music coordinator does not tell teachers how to teach but rather passes on to them suggestions about effective teaching. There is no evidence that teachers are obligated to follow the music coordinator's suggestions. On other subject coordinators, the evidence contains even less evidence of authority to direct.

It is the Director of Curriculum who evaluates and signs evaluation reports on reading teachers, although on occasion the reading coordinator assists in the evaluation.

Only the migrant education coordinator possesses any of the supervisory authority listed in Section 3540.1(m) of the Act. On the basis of the undisputed evidence that he is solely responsible for the selection of aides for the migrant education program and the teachers for the summer component of that program, we conclude that he is a supervisor within the meaning of the Act and for that reason is not eligible for inclusion in the negotiating unit. However, none of the other subject coordinators shall be excluded from the unit on that ground.

B. Subject Coordinators' Managerial Status

Government Code Section 3540.1(g) defines a management employee as follows:

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

This is the first case in which a dispute over managerial status is before us. We have considered federal cases in our recent decisions on the supervisory issue.¹³ Here, we find the parallel between the Government Code definition of management employee and the definition of management employee

13 In partial reliance on federal cases interpreting the NLRA, we have decided, for example that the use of the disjunctive in the Government Code definition of supervisor means that satisfaction of only one of the enumerated criteria in the definition is sufficient to make an individual a supervisor under the Act. See Sweetwater Unified School District, EERB Decision No. 4» November 23, 1976.

used in NLRB decisions relevant to our decision, for as we said in our recent decision in Los Angeles Unified School District:¹⁴

While we are not bound by NLRB decisions, we will take cognizance of them, where appropriate. Where provisions of California and federal labor legislation are parallel, the California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analogous California legislation.¹⁵

Although the NLRA itself contains no definition of management employee, the National Labor Relations Board (NLRB), with the approval of the federal courts, has defined management employees as those "who are in a position to formulate, determine and effectuate management policies."¹⁶ That definition is basically similar to the definition in Government Code Section 3540.1(g). The single real difference appears to be the use of the conjunctive in the NLRB definition and the disjunctive in the Government Code definition in demarcating the formulation and administration of policy. The NLRB has expanded on the phrase "formulate and effectuate management policies," as follows:

14 EERB Decision No. 5, November 24, 1976.

15 See Fire Fighters Union, Local 1186, IAFF v. City of Vallejo, 12 Cal. 3d 608, 616, 87 LRRM 2453, 2457, where the California Supreme Court referred to federal precedents in interpreting parallel language in state labor legislation. In Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 46 LRRM 3065, 3066 (1960), the California Supreme Court said: "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes." California appellate courts have followed National Labor Relations Act precedents involving language with a parallel in state labor legislation in the following cases, among others, concerning appropriate unit issues: Alameda County Assistant Public Defenders' Assn. v. County of Alameda, 33 C.A. 3d 825, 109 Cal. Rptr. 392, 84 LRRM 2237 (1973); Social Workers' Union, Local 535 v. Alameda County Welfare Dept., 113 Cal Rptr. 461, 86 LRRM 2954; Santa Clara County District Attorney Investigators Assn. v. County of Santa Clara, 51 C.A. 3d 255, 124 Cal. Rptr. 115, 90 LRRM 3192 (1975).

16 Ford Motor Co., 66 NLRB 1317 1322, 17 LRRM 394 (1946). See also NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974), a United States Supreme Court decision in which the history of the NLRB's treatment of management employees is traced, and the legislative history of the supervisory issue as well as its treatment by the NLRB and the federal courts is exhaustively outlined.

The Board defines managerial employees as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.¹⁷

1ft

In Flintkote Co., the NLRB decided that project engineers who made engineering studies and recommendations concerning whether to automate various manufacturing processes, are not management employees, even though those making the final decision on automation had to rely heavily on the discretion and technical expertise of the project engineers. The NLRB explained its decision as follows:

In the case at hand, engineering judgments do form the basis of the critical decision of whether or not to automate a particular process, but, "in every instance, management makes that policy decision, the effective decision whether to reject or pursue the results of those technical judgments, all of which have been routinely rendered on the basis of, and as a result of, professional and/or technical expertise and in accordance with the task assigned. . . . Their decisions are predicated solely on a technical base, and culminate in technical reports or recommendations to managerial superiors who, in turn determine, establish, and carry out management direction, i.e., 'policy,' by approving or disapproving the recommendations presented." In short, we conclude that the project engineers do not formulate or effectuate management policies, since their recommendations must be approved by management officials, and they do not have discretion in their job performance independent of their Employer's established policy. Therefore, we find that the project engineers are not managerial employees.¹⁹ Other NLRB cases reveal that a management employee is one who has

minor executive functions outside of policy making areas. For example, in Eastern Camera & Photo Corp.,²⁰ the NLRB held that the manager and assistant

17 Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295, 1297 (1975).

18 Ibid.

19 The decision in Flintkote Co., followed NLRB decisions in General Dynamics Corporation, Convair Aerospace Division, San Diego Operations, 213 NLRB 851 87 LRRM 1705 (1974); Palace Laundry Dry Cleaning Corporation, 75 NLRB: 320, 21 LRRM 1039 (1947); Eastern Camera and Photo Corp., 140 NLRB 569, 52 LRRM 1068 (1963). In NLRB v. Bell Aerospace Company, 416 U.S. 267, 85 LRRM 2945 (1974), the U.S. Supreme Court approved the NLRB's basic approach to the managerial issue and its definition of managerial employee, except that it reversed the NLRB and held that the definition of management employee is not limited in its application to those with a labor relations function.

20 140 NLRB 569, 52 LRRM 1068 (1963).

manager of a camera store are managers since they formulate and submit bids and order equipment directly from a manufacturer, and in doing so commit the credit of the employer. In Eljer Co.,²¹ the NLRB held that an individual authorized to quote prices or grant discounts without supervision is not a manager, since the individual's authority to quote prices and grant discounts was limited.

No private sector cases involving the managerial status of employees of primary and secondary level schools have been brought to our attention. However, we note that in cases involving the managerial status of various faculty members at the university level, the NLRB distinguishes between the exercise of influence over decision making, and discretion exercised in the interest of the employer.²² The NLRB has been especially reluctant to find that a university employee is a management employee when the facts in the record do not clearly establish that the employee is closely allied with management.²³

In determining whether any of the subject coordinators are managerial employees within the meaning of Section 3540.1(g), we first consider the full-time subject coordinators, and then consider the part-time subject coordinators.

1. Full-time Subject Coordinators

Since we exclude the migrant education coordinator from the negotiating unit because of a supervisory status, we need not determine whether he should

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be excluded from the unit as a management employee. We are therefore concerned here with only the vocational education coordinator and the Title I, Early Childhood Education coordinator.

21 108 NLRB 1417, 34 LRRM 1226 (1954).

22 New York University, 221 NLRB 1148, 91 LRRM 1165, 1169 (1975).

23 Id. at 1171.

24 The NLRB follows the accepted judicial practice of avoiding a decision on both of two proposed theories when a decision on one decides the case in favor of the party making the alternative arguments. See Aeronca, Inc., 221 NLRB 326, 90 LRRM 1709, 1712 (1975), where, on finding a managerial status, the NLRB said: "we need not, and do not, reach the issues raised as to whether or not they are confidential or supervisory employees." And see New York University, 221 NLRB 1148, 91 LRRM 1165, 1172 (1975), where the NLRB determined that division heads are supervisory employees, without determining their managerial status, even though the employer argued that the division heads were supervisory or managerial employees.

The vocational education program offers specific vocational training to students in junior and senior high school. It is funded by the federal government and administered through the state. The program offers such courses as industrial arts, home economics, business, electronics, graphic arts and agriculture; they are designed to make students more employable upon leaving high school. In addition to the general duties of a subject coordinator, the vocational education coordinator writes the district's plan, which includes a proposed budget and a description of the proposed allocation of resources, for the program. After the plan is approved, it is submitted to the state for funding. The vocational education coordinator represents the district in communications with the state and federal government. However, final authority, including any changes, would have to be approved and signed by the Director of Curriculum, the Superintendent, or the school advisory committee chairman when the application is consolidated with funding requests of other programs.

The Title I, Early Childhood Education program is governed by federal law.²⁵ It is the duty of the Title I, Early Childhood Education coordinator to see that the program complies with the applicable federal law. Toward this end he develops comparability reports which indicate district expenditures of federal funds and writes general evaluations of the program. These reports are submitted to appropriate state or federal officers. The Title I, Early Childhood Education coordinator is also the executive officer of the District Advisory Committee, which develops district proposals and recommends appropriate changes in the program. All such proposals, as well as expenditures of money for workshops, consultants, books, materials, and equipment for the program, require his signature before they can be recommended to the Director of Curriculum.

Following the NLRB's reasoning in Flintkote,^{26 ft} it is our view that the vocational education coordinator and the Title I, Early Childhood Education

25 20 U.S.C. 241(a) et seq.

26 217 NLRB No. 85, 89 LRRM 1295, 1297 (1975); see note 19 supra and accompanying text.

coordinator act basically as experts in their particular field. According to the testimony of the Director of Curriculum when asked about the nature of recommendations made by subject coordinators:

. . . they go through to the Assistant Superintendent through me, the Superintendent, to the board. They make recommendations directly to me and frankly, it would be impossible for me to be responsible for all those subject areas without their expertise because no one could be that well informed about all the various subject areas taught in the elementary and secondary schools.

These employees cannot be said to formulate district policies since their recommendations usually have to be approved on at least two higher levels, usually by the Director of Curriculum and the Superintendent.

Similarly, we find that these two subject coordinators lack substantial managerial discretion in the administration of their respective programs. Although the Director of Curriculum testified at the hearing that they exercise independent judgment in the performance of their duties, we find no evidence that their discretion or authority went beyond the district's established policy. For example, although the vocational education coordinator actually writes proposals to be submitted to state and federal agencies for funding, and often represents the district at funding negotiations, he does not have direct authority to bind the district. All proposals or changes must be approved by the Director of Curriculum, the district, or an appropriate committee. Supplies, books, or materials requested or recommended for purchase usually require the signature of the Director of Curriculum, Superintendent or other higher level official in addition to the signature of the vocational education coordinator or the Title I, Early Childhood Education coordinator.

Since the vocational education coordinator and the Title I, Early Childhood Education coordinator are neither supervisory nor managerial employees, they shall be included in the negotiating unit.

2. Part-time Subject Coordinators

The remaining subject coordinators are coordinators of specific academic subjects. They spend half their working time as subject coordinators. The other half is spent as classroom teachers. As classroom teachers, they report directly to the Principal as would any other teacher. As subject coordinators, however, they work out of the curriculum office under the supervision of the Director of Curriculum.

The reading coordinator helps, to develop a program for reading instruction at all levels. She compiles and evaluates information to be submitted to the state for funding of an elementary level reading program conducted by teachers who are reading specialists. The reading coordinator meets with the reading specialists on a monthly basis to share curriculum information. She assists the Director of Curriculum in the evaluation of the teachers in a remedial reading program for grades four, five and SIX. She also conducts workshops to inform the staff of new or promising programs. The music coordinator writes the description of the program in grades kindergarten through twelve. She recommends and helps develop bidding requirements for musical instruments and makes recommendations to the purchasing department on items to be purchased. She conducts workshops and is responsible for setting up areas where students can work independently to improve their musical skills.

The music coordinator also coordinates activities of traveling music teachers and develops equitable time schedules for the school receiving their services. On occasion she observes these teachers during rehearsals and performances and makes comments and suggestions. These comments, however, are not made in the form of an evaluation. The music coordinator also coordinates and organizes a music fair, which gives local merchants a chance to meet with parents and teachers of prospective students.

The science coordinator develops a description of the science program for kindergarten through the twelfth grade. He also recommends materials for purchase by the Teachers' Resource Center for use in the elementary schools and trains teachers in the use of these materials. He also recommends the replacement of worn and obsolete science equipment used at all levels.

During the 1975-76 school year, the science coordinator developed a program for environmental camping. Although the science coordinator discussed the lease arrangements with personnel from Vandenberg Air Force Base, the program has not been implemented because of insufficient funding. The science coordinator also coordinates the marine biology program, which affords teachers and high school students the opportunity to study fauna and flora from the ocean and tide pools.

The mathematics coordinator develops course descriptions for mathematics and a chart of objectives for teachers to use in implementing the mathematics

program. He is also responsible for developing special programs in mathematics.

The physical educational coordinator develops a description of the physical education program at the elementary school level. He is also responsible for composing guidelines to insure that all district physical education programs comply with the sex discrimination portions of Title IX of the Education Amendments of 1972.²⁷

None of the duties mentioned above indicates that the academic subject coordinators are any more involved in the formulation of district policies or the administration of district programs than are the vocational education coordinator or the Title I, Early Childhood Education coordinator. In each case the final work product of the academic coordinators must be reviewed and approved by the Director of Curriculum. In many cases the academic subject coordinators act merely as repositories of information and expertise upon which both management and staff can draw.

In summary, these academic subject coordinators possess only minor executive functions and generally implement policies already formulated or determined by the school board, the Superintendent, or the Director of Curriculum. Accordingly, we conclude that they are not "management employees" within the meaning of Government Code Section 3540.1(g). Since the part-time academic subject coordinators are neither supervisory nor managerial employees, they shall be included in the negotiating unit.

Ill

Supervisor of Nurses²⁸

Eight nurses and a supervisor of nurses are employed by the district. The supervisor of nurses is both the nurse at Lompoc Senior High School and the

27 20 U.S.C. 1681.

28 The Lompoc Unified School District job description for this position describes it by the title "Coordinator of Nurses." Throughout the hearing, the position title used was "Supervisor of Nurses."

supervisor of the entire nursing program in the district. She evaluates, assigns and schedules the work day for the eight nurses in the district. She determines what is the best time allotment for nurses in the district. Evidence to that effect, while sparse, was uncontradicted. Accordingly, we find that the record supports the district's contention that the supervisor of nurses is a supervisor within the meaning of the Act. Having found that the supervisor of nurses is a supervisor, we need not consider whether she is a manager within the meaning of the Act.²⁹

ORDER

The Educational Employment Relations Board directs that:

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

All regular, full-time and part-time probationary and permanent certificated employees, all special contract employees within the meaning of Education Code Section 13329, temporary certificated employees who are employed 75% or more of the days regular school is in session, and all subject coordinators except the migrant education coordinator; but excluding adult education teachers, home-bound teachers, migrant education coordinator, supervisor of nurses, all other employees, management, supervisory and confidential employees.

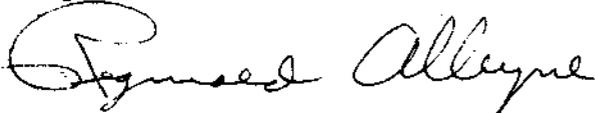
2. Subject coordinators, with the exception of the migrant education coordinator, are neither "supervisors" within the meaning of Section 3540.1(m) of the Act nor "managers" within the meaning of Section 3540.1(g) of the Act.

3. The migrant education coordinator is a "supervisor" within the meaning of Section 3540.1(m) of the Act.

4. The supervisor of nurses is a "supervisor" within the meaning of Section 3540.1(m) of the Act.

²⁹ See note 24 supra and accompanying text.

Upon posting the Notice of Decision, the employee organizations have a 10 workday period in which to demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if; (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.



By: Reginald Alleyne, Chairman

Dated: March 17, 1977

Raymond J. Gonzales, Member, in concurrence.

I agree with the result reached by my colleague, Chairman Alleyne, on all the issues presented in this case. These are (1) the unit placement of adult education and homebound teachers, (2) the supervisory status of subject coordinators, and (3) the managerial status of the subject coordinators. I differ with his analysis, however, concerning adult education and homebound teachers. Further, I would approach the question of whether or not certain subject coordinators are management employees under Government Code section 3540.1(g) differently.

Regarding Chairman Alleyne's conclusion that adult education teacher and homebound teachers are excluded from the overall unit, I disagree with the analysis therein to the extent that it fails to consider language set forth in Government Code section 3545(b)(1)¹ concerning the unit placement of "classroom teachers." We dealt with this issue previously in Belmont Elementary School² District³ and Petaluma City Elementary and High School Districts. In both decisions, while one member and I disagreed on the unit placement of several

¹Government Code Section 3545(b)(1) provides:

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees and confidential employees.

²EERB Decision No. 7, December 30, 1976.

³EERB Decision No. 9, February 22, 1977.

categories of certificated staff, we agreed on the application and interpretation to be given Section 3545(b)(1) in unit determination disputes.⁴ We found this section to be a Legislative mandate requiring the Board to consider its applicability in all cases where unit designation of instructional staff is at issue.⁵ Further, we found that the language "classroom teachers" includes only "the regular full-time probationary and permanent teachers."⁶ As such, there is no need to apply to them the criteria set forth, in Section 3545(a). Accordingly, in this case I would first find, as in Petaluma, that neither the adult education nor homebound teachers are "classroom teachers" within the meaning of Section 3545(b)(1) and that a resolution of the case therefore rests on an analysis of the criteria set forth in Section 3545(a),

I disagree with that portion of the Chairman's opinion concerning representation of homebound teachers in past grievance procedures. I would accord such evidence little weight for reasons other than those expressed therein.⁷ Specifically, I would balance the thrust of eft's evidence relating to the employees¹ established practices, which is relatively sparse, against the wealth of evidence demonstrating that homebound teachers lack a community of interest with those employees in the negotiated unit.

Lastly, concerning the question of whether or not two of the full-time and all of the part-time subject coordinators are management employees within the meaning of Government Code section 3540.1(g),⁸ I concur in the finding that they are not. However, I would consider federal case law as supplemental only. The National Labor Relations Act (NLRA)⁹ does not define management employees. Definitions of such employees under National Labor Relations Board case law evolve on a case-by-case basis,¹⁰ are therefore imprecise, and to date contain language obviously different from that used in the California

⁴ Supra note 2, (Gonzales, concurring, and Cossack, concurring in part) and supra note 3, (Cossack, concurring in part).

⁵ Supra note 2, at 10, 11, 13 and supra note 3, at 2.

⁶ Supra note 2, at 8-10, and supra note 3, at 2, 12-15,

⁷ See also Grossmont Union High School District, EERB Decision No. 11, (Gonzales, dissenting in part).

⁸ California Government Code section 3540.1(g) defines a management employee as "...any employee in a position having significant responsibilities for formulating district policies or administering district programs."

⁹ 29 U.S.C. Section 141 et seq.

¹⁰ North Ark. Electric Corp., 185 NLRB 550, 75 LRRM 1068 (1970), enforcement denied in 446 F. 2d, 602, 77 LRRM 3114 (8th.Cir. 1971).

statutory definition,¹¹ Accordingly, I prefer to rely on commonly accepted rules of statutory construction for interpreting the definition of management employees under Section 3540.1(g),

I narrowly view the language defining a management employee as set forth in 3540.1(g). First, the overall scheme of the Educational Employment Relations Act (EERA or Act)¹² indicates an intent to make negotiating rights broadly available - even more so than under the NLRA. The fact that supervisors are accorded negotiating rights under our Act¹³ and not under the NLRA demonstrates this. Second, our Act limits management employees to those with "significant" described responsibilities and excludes such personnel from its definition of employees entitled to negotiating rights (Government Code sections 3540.1(g), 3540.1(j), 3543.4). In view of the aforesaid intent of the Act, as well as the general rule that exceptions in a statute are to be strictly construed,¹⁴ we must interpret the language in Section 3540.1(g) narrowly.

No controlling significance can be ascribed to the Legislature's use of the disjunctive in Section 3540.1(g). The reference to "significant responsibilities" in that section modifies both the "formulating of district policies" and the "administering of district programs." It is settled that the disjunctive particle "or" should be construed as "and" in cases where such construction is necessary to carry out the obvious intent of the Legislature.¹⁵ Clearly, a person who has supervisory status has significant responsibility for administering a school district's personnel program.¹⁶ Yet, nowhere in the

¹¹See e.g. Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946); Palace Laundry Dry Cleaning Corp., 75 NLRB 320, 21 LRRM 1039 (1947); Retail Clerks v. NLRB, 366 F. 2d 642, 153 NLRB 204, 62 LRRM 2837 (1966).

Government Code section 3540 et seq.

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Government Code sections 3543.4 and 3545(b) (2),

¹⁴City of National City v. Fritz, 33 Cal, 2d 635, 636 (1949); Valdez v. Federal Mut. Ins. Co., 272 Cal. App. 2d 223, 227 (1969),

¹⁵Houge v. Ford, 44 Cal, 2d, 706, 712 (1955),

¹⁶Government Code section 3540.1(m) succinctly lists various areas of personnel management in which a supervisor may exercise independent judgment in administering district personnel matters. In Sweetwater Union High School District, EERB Decision No, 4, November 23, 1976, we held that the definition of "supervisory employee" in Section 3540.1(m) is to be broadly construed.

definition of "supervisory employee" as found in Government Code section 3540.1(m) is there any indication that such a person also has significant responsibility for formulating a school district's personnel policy. Therefore, to read Section 3540,1(g) in the disjunctive would qualify even supervisors as management employees, which/ in turn, would be inconsistent with the legislative grant of negotiating rights to supervisors.

Applying the foregoing to the facts of this case, I find that none of the subject coordinators are management employees.

Raymond J. Gonzales, Member

Raymond Jerilou H. Cossack, Member, in concurrence:

I note, consistent with my opinions in Belmont Elementary School District and Petaluma City Elementary and High School Districts,² that neither adult education nor homebound teachers are classroom teacher classifications within the meaning of Government Code section 3545(b)(1) since none are regular full-time probationary or permanent teacher positions. We are therefore free to apply the criteria of Government Code section 3545(a).

In this context, Chairman Alleyne's failure to consider whether section 3545(b)(1) is applicable in no way saps the continued vitality of the Belmont majority interpretation of "classroom teachers." The latter interpretation—jointly arrived at by Dr. Gonzales and myself—constitutes a holding of this Board. (Gov. Code secs. 3541(a), 3541.3(k); see Ursino v. Superior Court, 39 Cal.App. 3d 611, 620 (1974).) When the same question arises in cases subsequent to Belmont (as it does here), the Chairman is as much bound by that prior holding as are Dr. Gonzales and I. (Cf. Jensen v. Reno Central Trades & Labor Council, 68 Nev. 269, 229 P.2d 908, 914 (1951).) "It is an elementary tenet of administrative law that an agency must either conform

1.
EERB Decision No. 7, December 30, 1976.

2
EERB Decision No. 9, February 22, 1977.

to its own precedents or explain its departure from them." (International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1341, 79 LRRM 2332, 2340 (D.C. Cir. 1972); see also Davis, Administrative Law of the Seventies, sec. 17.07-4, pp. 413-416 (1976).) In the instant case, Chairman Alleyne elects neither course. His sub silentio rejection of this aspect of Belmont is as incompatible with majority rule as was his reargument concerning "classroom teachers" in Petaluma. Such repeated attempts to resurrect a recently settled issue create unwarranted uncertainty in the public as to whether Board decisions have any precedential value.

I agree that in this case, unlike Petaluma, homebound teachers should be excluded from the negotiating unit, since in this case homebound teachers have only a de minimis employment relationship with the district. In Petaluma at least one homebound teacher taught full-time. In the instant case, the 17 homebound teachers teach an average of six percent of a full-time schedule and no homebound teacher taught more than 21 percent of a full-time schedule. Unlike Petaluma, homebound teachers here are not required to have the same teaching credential as regular teachers nor does the district employ its regular teachers as homebound teachers. Further, again unlike Petaluma, homebound teachers in this district are not entitled to any leave benefits, pro rata or otherwise, and their homebound teaching time does not count toward attaining tenure.

Finally, in reaching the conclusion that subject coordinators are not management employees, I agree with Dr. Gonzales' rationale concerning the construction of "management employee" set forth in Government Code section 3540.1(g) and reject the Chairman's total reliance on federal precedent.

Jerilou H. Cossack, Member