

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

PLEASANTON JOINT ELEMENTARY SCHOOL DISTRICT,)
Employer)
and)
AMADOR VALLEY TEACHERS ASSOCIATION, CTA/NEA,) Case No. SF-R-92
Employee Organization) EERB Decision No. 24) September 12, 1977
PLEASANTON ELEMENTARY SCHOOL COUNSELORS,)
Employee Organization)

Appearances: Jon Hudak, Attorney (Galgani, Breon and Godino) for Pleasanton Joint Elementary School District; Charlie Hinton for Amador Valley Teachers Association, CTA/NEA; Thomas C. Agin for Pleasanton Elementary School Counselors.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION AND ORDER

This case is before the Educational Employment Relations Board on Pleasanton Elementary School Counselor's exception to the hearing officer's attached proposed decision concluding that counselors are appropriately included in a unit with other certificated employees. The Board has considered the record and the decision in light of the exception.

The hearing officer's decision is substantially in accord with Board precedent. See Grossmont Union High School District.¹ Accordingly, the hearing officer's proposed order is adopted as the order of the Educational Employment Relations Board.

By: Reginald Alleyne, Chairman

Raymond J. Gonzales, Member, concurring:

I concur with the decision of the Board in sustaining the hearing officer's decision in this case. I do so, not because I have altered my position that counselors and psychologists should have a separate unit for bargaining on the basis of sufficient community of interest, but because in this case there are

¹EERB Decision No. 11, March 9, 1977.

only four counselors in the district. I feel it would impose a hardship on the district and adversely affect the efficiency of operation (see Section 3545(a) of the Educational Employment Relations Act) to require the district to negotiate separately with such a small number of employees.

I hold firm to my dissent as articulated in Grossmont Union High School District 2/ in those cases where a sufficient number of employees would warrant a separate unit given that I firmly believe that a sufficient community of interest will always exist among counselors and psychologists.

By: Raymond J. Gonzales, Member

Jerilou H. Cossack, Member, concurring:

I agree that here, as in Washington Unified School District, EERB Decision No. 27, September 14, 1977, counselors and psychologists should be included in the overall certificated unit not only because they possess a community of interest with other certificated employees but also because there are so few of them.

Jerilou H. Cossack, Member

Dated: September 12, 1977

²Grossmont Union High School District, EERB Decision No. 11, March 9, 1977, pages 11-24.

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

ORDER

PLEASANTON JOINT ELEMENTARY SCHOOL DISTRICT,)
Employer)
and)
AMADOR VALLEY TEACHERS ASSOCIATION, CTA/NEA,) Case No. SA-CE-2140-E
Employee Organization) EERB Decision No. 24
and)
PLEASANTON ELEMENTARY SCHOOL COUNSELORS,)
Employee Organization)

The Educational Employment Relations Board directs that:

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

All certificated employees including counselors but excluding management, supervisory and confidential employees.

Within ten (10) workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if (1) both employee organizations qualify for the ballot or (2) one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Educational Employment Relations Board

by

Charles Cole
Executive Director

9/12/77

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of:)
) Case No. SF-R-92
PLEASANTON JOINT ELEMENTARY)
SCHOOL DISTRICT,) PROPOSED DECISION
)
Employer,)
)
and) August 10, 1977
AMADOR VALLEY TEACHERS ASSOCIATION, CTA/NEA,)
)
Employee Organization,)
and)
)
PLEASANTON ELEMENTARY SCHOOL COUNSELORS,)
)
Employee Organization)

Appearances: Jon Hudak, Attorney (Galgani, Breon and Godino) for Pleasanton Joint Elementary School District; Charlie Hinton for Amador Valley Teachers Association, CTA/NEA; Thomas C. Agin for Pleasanton Elementary School Counselors.

Proposed Decision by Terry Filliman, Hearing Officer.

PROCEDURAL HISTORY

On April 1, 1976, the Amador Valley Teachers Association, CTA/NEA (hereinafter "AVTA"), filed a request for recognition as exclusive representative for a unit of certificated employees with the Pleasanton Joint Elementary School District (hereinafter "District").¹

¹The proposed unit included all District certificated employees, excluding the following positions: superintendent, assistant superintendent of business, assistant superintendent of personnel, assistant superintendent of education, director of research, director of fiscal services, coordinator of pupil services, coordinator of district media center, principals, vice principals, assistant principals.

On April 2, 1976, the Pleasanton Elementary School Counselors (hereinafter "PESC") filed a request for recognition as exclusive representative for all certificated counselors.

On May 5, 1976, the District notified the Educational Employment Relations Board (hereinafter "Board") that it doubted the appropriateness of the broad certificated unit proposed by AVTA. A formal unit determination hearing was held on March 24, 1977, before Board agent James Pinnell.

ISSUE

Is a separate certificated unit of counselors appropriate?

DISCUSSION

I

The Pleasanton Joint Elementary School District has an average daily attendance of 10,299 students. There are four counselors employed by the District.

The District and PESC assert that the counselors lack a community of interest with the District teachers, that the counselors' past practices necessitate a separate unit, and that efficiency of operations would be impaired by a single unit. AVTA argues that there is a substantial community of interest and that the small counselor unit would detract from efficient operation of the District.²

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AVTA did not present any witnesses at the hearing nor did they submit a written brief.

Criteria for determining the appropriate unit are delineated in Section 3545(a) of the Educational Employment Relations Act³ (hereinafter "Act") as follows:

"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 organization, and the effect of the size of the unit on the efficient operation of the school district."

In Los Angeles Unified School District,⁴ Grossmont Union High School District,⁵ and Oakland Unified School District,⁶ the Board placed counselors in the same negotiating unit with other certificated employees. In those three cases wherein the counselor issue was presented, the Board's consistent holdings have raised a presumption that a unit containing counselors and other certificated employees is an appropriate unit. The presumption is rebuttable. Thus, "a party may show that a unit which deviates from a presumptively appropriate unit is also appropriate."⁷ However, in this case, since the parties do not present a substantial showing that a separate counselor unit is appropriate, the overall certificated unit including counselors remains appropriate.

³ Government Code Section 3540 et seq.

⁴ EERB Decision No. 5, November 5, 1976.

⁵ EERB Decision No. 11, March 9, 1977.

⁶ EERB Decision No. 15, March 28, 1977.

⁷ Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976.

II

The Board in Sweetwater in defining "community of interest" cited factors traditionally used by the National Labor Relations Board: qualifications, method of wages or pay schedule, hours of work, fringe benefits, supervision, frequency of contact with other employees, integration of work functions of other employees,⁸ and interchange with other employees. These factors when compared and contrasted do not result in a separate and distinct community of interest between and among the two groups in dispute.

In Los Angeles, the Board found that the school counselors shared a community of interest with other certificated employees. Citing similar qualifications, fringe benefits, salary schedules, duties and functions, the Board held that under the circumstances the several distinguishing characteristics (particularly separate facilities, no preparation period, special credentials and separate evaluation criteria) were not sufficient to establish a distinct and separate community of interest.

More recently in Grossmont the Board held that the counselors, along with school psychologists, nurses and social workers, were to be included in a single unit of certificated employees. Once again, the Board found that the minor differences between the classifications did not warrant separate units. Moreover, the Board found that the counselors, among other

⁸Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

classifications, possessed a "functional coherence and interdependence as an integral part of a larger unit."⁹ And, in Oakland, the Board stressed the similarities in terms and conditions of employment between the counselors and other certificated employees. They held that similar common employment interests in tenure standards, salary schedules, fringe benefits, faculty meetings and extra duty assignments outweighed inherent dissimilarities.

In both Los Angeles and Grossmont, the Board found that the credential requirements of certificated teachers and counselors were substantially similar.¹⁰ Likewise in this case, while the emphasis may differ, both teachers and counselors require a bachelor or higher degree plus some specialized training.

In the precedent decisions, the teachers and counselors were similarly placed upon a single salary schedule as a base from which salaries were derived. The same is true in the instant case. While it is true that the counselors in the District receive a stipend which is a percentage of the base

⁹Supra, at 9.

¹⁰ See Education Code Sections 44259 and 44266 (formerly Sections 13130 and 13136).

salary, such percentage reflects the additional time which the counselors must devote to their profession. Additionally, the counselors enjoy the same fringe benefits as teachers including sick leave, vacation, holidays and retirement. Counselors also possess employee numbers and bumping rights as do teachers, but the facts are unclear whether the bumping rights are among the counselors only, or apply equally in order to bump teachers. Teachers and counselors both have tenure rights, however the evidence is unclear as to which job classification the tenure rights apply.

The counselors assert that their supervisory duties regarding student activities differ distinctively from those of teachers. However, the evidence presented indicates that the counselors supervise extracurricular activities of the students, as well as lunch-time school yard activities, much as teachers do. Although the counselors are not assigned the same morning and bus supervision duties as teachers are, the counselors do provide some comparable student supervisory function.

In Los Angeles, the counselors had "frequent contact" with teachers. In this case, the record indicates that there is considerable interaction between teachers and counselors. Both are required to attend faculty meetings. The teachers and counselors also interact through consultation sessions between teachers, counselors and parents as well as through common contact with students.

Notwithstanding the marked similarities between the counselors and other certificated employees in the District, the District argues that since the counselors' overall function and authority closely resemble that of supervisory or management personnel, their community of interest is distinguishable from other certificated employees. However, the District and PESC present evidence showing no more than a superficial "special relationship" with school supervisors or management. And although there are some distinctions presented by the District and PESC, these are by no means controlling or determinative.

The record indicates that the counselors participate as members of the school management team. The counselors, unlike the teachers, form a team with the principal, vice principal and teaching vice principal at each school. This group meets weekly to review the week's activities, the overall school program, scheduling of classes and staffing problems. The counselors contribute at these meetings by providing input regarding personnel problems and inservice activities for certificated employees. The record reflects that the counselors are representatives of certificated employees at these meetings, presenting the views of teachers, among others, as spokespersons. Additionally, the counselors attended the school management planning retreat which took place before the opening of school. Teachers were not invited to this retreat. The counselors did not elaborate on why they were chosen to attend the retreat or what function they served there.

When the administrators leave the school site, the counselors are placed in charge until they return. However, the counselors present no evidence that they function as supervisory or management employees. Moreover, this delegated authority apparently occurs so infrequently and irregularly as to provide no distinguishing employment characteristic. And lastly, counselors are given master keys to the school buildings, whereas teachers are not.

Although neither the District nor PESC contends that counselors should be excluded from the unit as management or supervisory, they urge in an attempt to rebut the appropriate unit presumption that their "special relationship" with supervisors or management functionally separates counselors from the remaining certificated employees. However the counselors repeatedly stated that they do not evaluate certificated employees. Although the counselors may be given temporary and occasional responsibility for administering the functions of the school in the administrators' absence, the evidence does not support a finding that the counselors manage or supervise within the meaning of the Act.¹¹

¹¹Government Code Section 3540.1(g) states: "'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."

Section 3540.1 (m) states: "'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."

Furthermore, the evidence of a purported "alliance" of counselors with management or supervisors is not substantial enough to overcome the presumed appropriateness of the overall certificated unit. The purported "alliance" implies separate or even conflicting communities of interest between and among the counselors and the other certificated employees but this implication is not supported by the facts.

The facts indicate that a fundamental coherence is shared by both counselors and the remaining certificated employees. Different job classifications inherently have different characteristics. But in this case the distinctions are not controlling. The similarities of qualifications, salaries, duties and functions, fringe benefits and interaction among employees outweigh the, few disparate qualities. Thus it is found that the counselors share a community of interest with the balance of certificated employees.

Established Practices

An agreement was reached between AVTA, PESC and the District on May 10, 1976, whereby they agreed to submit the issue of appropriateness of the representation unit to the Board. AVTA and PESC agreed to negotiate separately with the District for the 1976-77 school year. The two organizations have negotiated separately from the date of the said agreement.

The underlying rationale in looking to established practices and negotiations history is that the expectations of the parties

concerning their future relationship may derive in large part from peaceful and satisfactory experiences in prior negotiations.¹² It is important to note that the agreement in the instant case made future separate negotiations conditional upon a Board determination of the appropriateness of an overall certificated unit containing counselors. Thus the parties anticipated a possible short separate negotiations life span. They also anticipated a possibility of a single comprehensive unit by leaving the matter to be decided by the Board. Thus the Board would not significantly disturb the relationships of the parties by placing the counselors in a single certificated unit since the parties to the above agreement foresaw such a possibility.

While notice is taken of past separate negotiating history, in this case it is felt that such history is not significant enough to warrant a separate certificated unit of counselors.

Efficient Operation

In determining the appropriate unit for representation, it is necessary to examine the size of the unit and its effect upon the efficient operation of the District.

Four counselors currently seek recognition as a separate unit. Furthermore, the District contends that two units would not detract from its efficiency of operation. On the other hand, the AVTA argues that the size of the proposed unit will

¹² R. Gorman, Labor Law - Unionization and Collective Bargaining, at 71 (1976):

lead to inefficient operations of the District. Although the NLRB has held that small size alone does not render a unit inappropriate,¹³ it is unnecessary to decide the issue here because a finding has already been made that the unit lacks a separate community of interest based upon other factors. Further, no showing was made as to why two units would be more efficient to overcome other community of interest criteria.

The parties urging a separate counselors' unit have not met their burden of proof to overcome the presumed appropriateness of an overall unit of certificated employees including counselors. Thus, in light of Board precedent indicating that counselors have been included in a negotiating unit with other certificated employees, the evidence of a shared community of interest, the conditional nature of the bargaining history and the smallness of the proposed separate unit, the counselors will be placed in the same unit with other certificated employees.

¹³Royal Tallon and Soap Company, Inc., 78 NLRB 834 (1948); See also Crispo Cake Cone Company, Inc., 201 NLRB 309, 82 LRRM 1198 (1973) (unit of two employees).

PROPOSED DECISION

It is proposed that:

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

All certificated employees including counselors but excluding management, supervisory and confidential employees.

The parties have seven (7) calendar days from the receipt of this Proposed Decision in which to file exceptions in accordance with Section 33380 of the Board's Rules and Regulations. If no party files timely exceptions, this Proposed Decision will become final on August 22, 1976 and the Notice of Decision will issue from the Board.

Within ten (10) work days after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if (1) both employee organizations qualify for the ballot or (2) one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Dated: August 10, 1977.

Terry Filliman
Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

Headquarters Office
923 12th Street, Suite 201
Sacramento, California 95814
(916) 322-3088



September 13, 1977

Jon Hudak, Esq.
Galgani, Breon and Godino
100 Bush Street, Suite 428
San Francisco, CA 94104

Dr. Thomas C. Agin, Director
California Pupil Services Labor
Relations
652 East Commonwealth Avenue
Fullerton, CA 92631

Charlie Hinton
Field Representative
California Teachers Association
3330 Muscat Court
Pleasanton, CA 94566

RE: Pleasanton Joint Elementary School District, SF-R-92, EERB Decision No. 24

Enclosed is a copy of the Order adopted by the Educational Employment Relations Board concerning the Pleasanton Elementary School Counselors' exception to the hearing officer's proposed decision dated August 10, 1977.

Sincerely,

Charles L. Cole
Executive Director

Enclosure
CLC:sm

cc: Bruce C. Newlin, Superintendent
Pleasanton Joint Elementary School District
123 Main Street
Pleasanton, CA 94566

Thomas Zach
Amador Valley Teachers Association
3330 Muscat Court
Pleasanton, CA 94566

Jackie Barnett
Valley Pupil Services Association
Pleasanton Elementary School Counselors
4510 Entrada Court
Pleasanton, CA 94566

David Woolworth
AVSEA
8151 Village Parkway
Dublin, CA 94566

PROOF OF SERVICE BY MAIL - C.C.P. 1013a

I declare that I am employed in the county of Sacramento, California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 923 - 12th Street, Suite 201, Sacramento, California 95814.

On September 13, 1977, I served the Board Order re Pleasanton Joint Elementary School District, SF-R-92 on the parties to the case by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, CA addressed as follows:

Jon Hudak, Esq.
Galgani, Breon and Godino
100 Bush Street, Suite 428
San Francisco, CA 94104

Thomas Zach
Amador Valley Teachers Association
3330 Muscat Court
Pleasanton, CA 94566

Charlie Hinton
Field Representative
California Teachers Association
3330 Muscat Court
Pleasanton, CA 94566

Jackie Barnett
Valley Pupil Services Assn.
Pleasanton Elementary School Counselors
4510 Entrada Court
Pleasanton, CA 94566

Dr. Thomas C. Agin, Director
California Pupil Services Labor
Relations
652 East Commonwealth Avenue
Fullerton, CA 92631

David Woolworth
AVSEA
8151 Village Parkway
Dublin, CA 94566

Bruce C. Newlin, Superintendent
Pleasanton Joint Elementary School District
123 Main Street
Pleasanton, CA 94566

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 13, 1977 at Sacramento, California.

Sue McCubbin

(Type or print name)

(Signature)