

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CAMPBELL UNION HIGH SCHOOL DISTRICT,)
)
Employer,)
)
and)
)
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,) Case No. SF-UC-21
CHAPTER 266,)
)
Employee Organization,) PERB Decision No.66
)
and) August 17, 1978
)
SERVICE EMPLOYEES INTERNATIONAL UNION,)
LOCAL 715,)
)
Employee Organization.)
)

Appearances: Daniel C. Cassidy, Attorney (Paterson & Taggart) for Campbell Union High School District; Robert L. Blake, Attorney and Harry Jaramillo, Field Representative for California School Employees Association, Chapter 266; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) and John Tanner, Field Representative for Service Employees International Union, Local 715.

Before: Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

DECISION

On April 28, 1977, pursuant to consent election agreements, elections were held in two Campbell Union High School District (hereafter District) classified employee units. California School Employees Association, Chapter 266 (hereafter CSEA) was certified as exclusive representative for the "clerical, technical, and business services unit" and Service Employees International Union, Local 715 (hereafter SEIU) was certified as exclusive representative for the "operational support" unit. The parties had agreed that the questions of whether principals' secretaries were "confidential"; employees or lead custodians "supervisory" employees within the

meaning of the Educational Employment Relations Act¹ (hereafter EERA) would be settled in a subsequent unit clarification proceeding.²

The agreed upon unit clarification hearing was held and a proposed decision issued. The confidential and supervisory employee issues have reached the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by CSEA³ and SEIU to the hearing officer's proposed findings that principals' secretaries are confidential employees and that lead custodians are supervisory employees. These two issues will be treated separately. For reasons that appear below, we affirm the hearing officer's findings on both questions.

Secretaries to School Principals

FACTS

District has eight high schools and one continuation school. In each of these nine schools there is a principal (or director) and a principal's secretary. The principals are actively involved in employer-employee relations. Although they do not participate in the actual meetings at the negotiation table. Since the inception _____ of the, EERA District has relied upon, school principals to provide input regarding the needs of individual schools and to assess the potential impact of employee organization proposals on school operations. Regular meetings (three to five times per month) are held so that principals and District personnel can review the negotiation positions of the Board of Trustees and of employee organizations. Principals direct site management team evaluations of employee organization

¹The Educational Employment Relations Act is codified at Gov. Code sec. 3540. et seq. All statutory references are to the Government Code unless otherwise specified. See secs. 3540.1(c) (confidential employee defined) and 3540.1(m) (supervisory employee defined), which are quoted in text accompanying notes 4 and 12, infra.

²Cal. Admin. Code, tit. 8, sec. 33260 allows an employee organization, an employer, or both jointly, to file a petition for a change in unit determination.

³The actual date on the document received from CSEA is October 19, 1977. District filed a motion to dismiss CSEA's exceptions as untimely filed, contending that the deadline for filing was October 18, 1977. However, a timely copy of the CSEA document was received in PERB's headquarters office on October 18, 1977. Moreover, CSEA received the proposed decision on October 12, 1977, and thus exceptions were not due until October 19, 1977. Accordingly, the motion to dismiss the exceptions filed by CSEA is denied.

proposals and are responsible for communicating recommended responses to the negotiator for the Board of Trustees. Principals also prepare and communicate to the negotiator recommendations concerning negotiation strategies and priorities. These recommendations are a substantial input into District's ultimate negotiating strategies and positions. In addition to their active involvement in the negotiation process, principals have a central role in the processing of employee grievances.

A principal's secretary handles correspondence as well as routine administrative and clerical detail work for the school principal. Principals' secretaries are not directly involved in the negotiation process, nor do they directly participate in the evaluation of District positions or the formulation of recommendations as to District negotiation priorities and strategies. The secretaries do, however, type all correspondence concerning these matters that the principals send to the negotiator. The secretaries are also responsible for maintaining files containing the negotiating information and they receive and collate negotiation material that is mailed to the principals. Moreover, the secretaries sit in on and take minutes at the site management-team meetings at which recommendations are formulated regarding District negotiation positions, strategies, and priorities.

As to the processing of employee grievances, principals' secretaries maintain the files for such matters, are responsible for getting appropriate correspondence out, and attend meetings of management personnel to take minutes. On at least some occasions a principal's secretary is present and taking minutes during the actual grievance session,

DISCUSSION

A confidential employee is "any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations."^{4,4} We have said that "employer-employee relations" in this context includes, at the minimum, employer-employee negotiations

⁴Sec. 3540.1(c).

and the processing of employee grievances.⁵ Principals' secretaries maintain files and process correspondence containing information relating to negotiations and employee grievances; they are present at management meetings relating to these matters; they receive and collate related material that is sent to the principals. Thus, on the clear facts presented, principals' secretaries both have access to and possess the sort of information that would warrant their designation as confidential employees.⁶

The mere access to or possession of confidential information by an employee will not, however, in and of itself result in that employee's designation as confidential. A confidential employee must function as such in the regular course of his or her duties before the denial of representation rights that accompanies such classification⁷ is justified. We have said that "more than a 'fraction' of the [employee's] time" must be spent in confidential matters.⁸ The individual must, in other words, have access to or possess sufficient information to warrant the conclusion that the employer's ability to negotiate with employees from an equal posture might be jeopardized, and the balance in employer-employee relations sought to be achieved by the EERA thus distorted, if the information was prematurely made public.⁹ Principal's secretaries have an involvement with employer-employee relations that more than satisfies this requirement. Duties relating to employer-employee relations and grievances take up a significant part of their time. One principal estimated, in uncontradicted testimony, that his secretary spent about 25 percent of her total time on confidential matters. This

⁵Fremont Unified School District (12/16/76) EERB Decision No. 6, at 11.

⁶See Sierra Sands Unified School District (10/14/76) EERB Decision No. 2.

⁷Sec. 3540.1(j) declares that confidential employees are not to be considered public school employees for the purpose of employer-employee relations under the EERA.

⁸Los Rios Community College District (6/9/77) EERB Decision No. 18, at 21.

⁹See Sierra Sands Unified School District (10/14/76) EERB Decision No. 2, at 2-3.

and other testimony relating to their level of involvement convinces us that principals' secretaries have sufficient involvement with confidential **matters** to justify their designation as confidential employees.

In Sierra Sands Unified School District¹⁰ the Board proceeded under the assumption that the employer should be allowed a "small nucleus" of confidential employees so that an orderly and equitable progress could be achieved in the development of employer-employee relations.¹¹ In addition to the nine principals' secretaries, there are five other positions classified as confidential in District: superintendent's secretary, secretaries to the assistant superintendents for instruction and for business services, and the secretaries to the directors of certificated and classified personnel. This total of 14 confidential employees represents 4.5 percent of the total classified employees in District and 12.8 percent of the employees in the clerical, technical, and business services unit,, **CSEA** contends that this violates the "small nucleus" principle **and that to allow** districts to so design their negotiation process **would circumvent** the clear intent of the EERA.

Confidential employees typically become classified as such because they are exposed to confidential matters in the normal course of working with their immediate supervisor. In order to remove principals' secretaries from the confidential category it would be necessary for this Board either to require the principals to perform their own secretarial services (e.g., typing, filing, dictation, minutes) when engaged in confidential matters or to remove the principals themselves from their current level of participation in the negotiation and grievance process, a level of participation that has been present since enactment of the EERA. Since nothing in the record warrants either action, we find that secretaries to the principals are confidential employees.

¹⁰(10/14/76) EERB Decision No.2.

¹¹Id. at 2.

Lead Custodians

FACTS

At each of District's schools there is one school operations foreman, one lead custodian, and four custodians. The lead custodians are responsible for the direct supervision of the four custodians in their crew. During the summer months and vacations when school is not in session, all custodians work the same day shift and the operations foreman, when available, supervises the entire crew. As often occurs, however, the operations foreman is not available because he is involved in special tasks, or is on vacation or ill, and the lead custodian must direct the custodians' work. During the regular school year the operations foreman works the day shift and the lead custodian and crew work the night shift. There is a half hour overlap in shifts and during this overlap period the operations foreman may relay information to the lead custodian concerning special arrangements for the evening. The operations foreman does not, however, become involved in the direct supervision of the custodians and the lead custodian is the only person available for direct supervision.

The lead custodian cannot directly suspend, lay off, transfer, or hire custodians. Lead custodians report directly to the school operation foreman. In some schools lead custodians can take overtime themselves or assign it to others, whereas in other schools the operations foreman must be consulted before overtime is assigned. The lead custodians assign work and establish priorities for its completion. Once the work assignments have been made at the beginning of the year further direction of the work tends to become routine unless there are special events or circumstances, in which case it is the lead custodian's responsibility to adjust the work schedules and reassign people accordingly.

Lead custodians receive a seven percent pay differential and, depending upon the school, may also have a reduction in the amount of work they are responsible for in addition to their supervisory chores. The lead custodian and operations foreman are not allowed to schedule simultaneous vacations. If a teacher complains about

the way a room was cleaned the complaint filters down through the principal, operations foreman, and lead custodian, who is responsible for discussing the problem with the custodian and making certain that improvements are made. The lead custodian is responsible for disciplining employees; he has the authority to require a person to correct unsatisfactory work and determine overtime assignments. The lead custodian reassigns work schedules to accommodate changes in adult education classes; it is the lead custodian who is contacted when class schedules are changed. New custodians are trained and assigned to work areas by lead custodians. Although a custodian who will be absent due to illness is instructed to contact the district maintenance superintendent so that a replacement may be sent, lead custodians may independently allow a custodian to leave work early or to report late for valid personal reasons and are responsible for reporting custodians who arrive late for work.

Entry-level custodians are hired almost exclusively from a substitute custodian list and it is the principal who has the final responsibility for hiring. Before these new permanent custodians are hired, however, it is the practice to have several of the substitute custodians work a shift at the school, following which the lead custodian will make an evaluation of the individual performances and then make a recommendation as to which person should be hired. In one case the principal relied exclusively on the lead custodian's recommendation to hire a replacement, not interviewing the custodian personally. In another case the lead custodian participated in the interview process, together with the principal and operations foreman. In all cases the recommendation received from the lead custodians is given great weight.

District has a policy of evaluating its custodians on an annual basis (bi-annual for probationary employees).. Three people participate in this evaluation: the lead custodian and operations foreman, who each fill out an evaluation form, and the school principal, who prepares a composite evaluation relying largely on the two other evaluations. All three forms are sent to District.

The evaluations of the lead custodian are given considerable weight by the principals. This is because the lead custodian has an opportunity to make closer daily observations than the operations foreman or principal. Such lead custodian evaluations affect a custodian's retention or promotion and have been used as a basis for the termination of incompetent employees. When the evaluation form indicates "needs improvement" in a given category it is the lead custodian's responsibility to discuss the evaluation with the employee, to formulate a plan for improvement and, in serious cases, to participate in joint conferences with the principal, operations foreman, and the errant custodian.

Finally, we note that on at least one occasion an employee organization has filed a grievance regarding a lead custodian's evaluation of a custodian. The lead custodian has no authority to adjust such formal grievances and in the particular matter referred to, reevaluation took place pursuant to normal District policy but after the employee organization had talked to an assistant superintendent concerning the matter.

DISCUSSION

A supervisory employee is:

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.¹²

It is clear that the lead custodians here regularly perform several of the enumerated functions. They effectively recommend the hire, promotion and discipline of employees. They independently direct employees in the performance of their work, alter work assignments,

¹²Sec. 3540.1(m).

and require corrections of faulty work to be made. The school operations foremen also appear to have the authority to perform many of these functions but they are frequently involved in other chores, absent, or working a different shift and are unavailable to exercise their supervisory authority.¹³ Thus, the status of school operations foremen does not preclude a finding of supervisory status as to lead custodians, who have substantial daily contact and interaction with the custodians.

The Board has previously observed that in construing the statutory definition of supervisor, recognition must be given to the basic reality that in public school districts final decisions regarding hiring, discipline, and salaries are traditionally reserved to persons far removed from the employee's immediate supervision.¹⁴ Thus, the ability to indirectly but effectively effectuate these changes in employment status is accorded great weight in the public sector. In this same vein, the EERA directs us to find that an employee is a supervisor if he or she has the authority to effectively recommend the promotion, discharge, or hiring of other employees.¹⁵ It is clear that District's lead custodians have such authority. Principals assign considerable weight to the opinions expressed by lead custodians in the annual evaluation of other employees and in the evaluations and recommendations that accompany the

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These facts alone, of course, do not preclude a finding of supervisory status. Cf. ~~San Diego Unified School District~~ (2/18/77) EERB Decision No. 8 and ~~Sweetwater Union High School District~~ (11/23/76) EERB Decision No. 4. In ~~San Diego~~ and ~~Sweetwater~~ we held that physical presence was not a necessary prerequisite to a finding of supervisory status. The building services supervisors and head custodians in those cases were found to be statutory supervisors despite their presence for only a brief part of the custodians' shift because there was an effective communications system whereby daily direction could be given to the custodians and the exercise of supervisory authority was complete. We do not at this time express an opinion as to the possible supervisory or management status of district's school operations foremen.

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~~Sweetwater Union High School District~~ (11/23/76) EERB Decision No. 4, at 13.

¹⁵See sec. 3540.1(m).

hiring of new permanent custodians. In several instances principals have acted, either favorably to hire or unfavorably to discipline or fire, on the basis of the evaluations by lead custodians. It would be difficult to find stronger indicia of supervisory status than the ability to directly affect another's very employment status. We note also that, in apparent recognition of the real importance assigned to a lead custodian's employee evaluation, an employee organization has filed a grievance regarding what it considered to be an unfairly critical evaluation.

SEIU places heavy emphasis upon the fact that there would be a supervisory ratio of one supervisor to two employees (one school operations foreman and one lead custodian for every four custodians) if lead custodians are classified as supervisors. Their argument is not persuasive. We rely upon supervisory functions, not ratios, in making our determination and the record demonstrates that lead custodians possess several indicia of supervisory status. Accordingly, we find them to be supervisors within the meaning of the EERA.

ORDER

The Public Employment Relations Board orders that:

- (1) The motion to dismiss the exceptions filed by California School Employees Association, Chapter 266 is dismissed.
- (2) The position of principal's secretary and that of secretary to the director of the continuation school are confidential within the meaning of Government Code section 3540.1(c).
- (3) The position of lead custodian is supervisory within the meaning of Government Code section 3540.1(m).

~~By~~ Jerilou Cossack Twohey, Member

~~Harry Gluck, Chairperson~~

Raymond J. Gonzales, dissenting in part:

I dissent from the majority's conclusion that the secretaries to the school principals and to the director of the continuation school are confidential employees.

The definition set forth in Government Code section 3540.1(c) states that:

"Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

There is some question on the facts of this case as to whether the secretaries to the school principals and to the director of the continuation school do, in the regular course of their duties, have access to and possess information relating to the Campbell Union High School District's employer-employee relations in both the areas of negotiations and employee grievances.

However, putting aside a discussion of these facts, further inquiry is necessary based on the fundamental principles established in Sierra Sands Unified School District¹ and Centinela Valley Union High School District.² In Sierra Sands, the Board stated its policy that:

the employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purpose of employer-employee relations.

In Centinela Valley, the Board further specified that:

the small nucleus concept contemplates that only a small number of employees necessary to the employer to do the staff work needed to develop its positions shall be given access to confidential information. Employers cannot unnecessarily distribute confidential information to large numbers of employees and then claim them as confidential.

The small nucleus concept is important because employees who are designated confidential are denied representation rights under

¹(10/14/76) EERB Decision No. 2.

²(8/7/78) PERB Decision No. 62.

Educational Employment Relations Act section 3540.1(j).³ Therefore, an employer should not be allowed to design its negotiations and grievance processing systems in a way that unnecessarily designates a large number of employees as confidential.

In the present case, already stipulated as confidential are the secretaries to the superintendent, assistant superintendent for instruction, assistant superintendent for business services, director of certificated personnel, and director of classified personnel. The nine confidential employees the majority adds to these five gives the District a total of 14 confidential classified employees. This total represents 4.5 percent of the total number of classified employees in the District and 12.8 percent of the employees in the clerical, technical and business services unit.

The majority decides that this large number of confidential employees does not violate the small nucleus concept and decides that the District need not change its negotiations system. Thus the majority sacrifices the secretaries' right to representation under the EERA to the employer's ability to design its negotiations system in any way it desires. This is both unfair to the employees and a mockery of good faith on the part of the employer.

I cannot support this. I believe this employer has involved more employees than are necessary to do the staff work needed on confidential matters. The number of confidential employees is so excessive that the District should be required to revise its negotiations system, as well as its grievance processing system if necessary. I will not comment as to what changes will be required, but leave such changes to the District's determination.

³Government Code section 3540.1(j) states:

"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.
(Emphasis added.)

Additionally, I note that the dictionary definition of "confidential" which is pertinent to this case reads "known only to a limited few."⁴ Under this definition, none of the secretaries could be designated confidential. There are so many so-called confidential employees that any information concerning negotiations would likely be public knowledge.

The small nucleus concept in fact protects the District. The smaller the number of employees who know confidential information, the less likely it will be made public prematurely.

For the foregoing reasons, I find the secretaries to the school principals and to the director of the continuation school are not confidential employees.

Raymond J. Gonzales, Member

⁴Webster's Third New International Dictionary, Unabridged (1976) page 476,

STATE OF CALIFORNIA

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

In the matter of:)	
)	
CAMPBELL UNION HIGH SCHOOL DISTRICT,)	
Employer,)	
- and -)	
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CALIFORNIA SCHOOL EMPLOYEES ASSOCIA-)	CASE No. SF-UC-21
TION,)	
Employee Organization,)	
- and -)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 715,)	
Employee Organization.)	

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Campbell Union High School District; Harry Jaramillo for California School Employees Association; John Tanner for Service Employees International Union, Local 715.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

The parties hereto entered into a consent election agreement for elections in two classified employee units: an operational support unit, and a clerical, technical, and business services unit. The parties further agreed that the issues of whether lead custodians are supervisory or in the former unit, and whether principals' secretaries are confidential or in the latter unit, would be determined in the instant unit clarification proceeding pursuant to EERB Regulation 33260.¹

The elections were held on April 28, 1977. Service Employees International Union, Local 715 (hereinafter "SEIU") was certified as exclusive representative of the operational support unit and California School Employees Association, Chapter 266 (hereinafter "CSEA") was certified

¹ Calif. Admin. Code, Title 8, Section 33260.

as exclusive representative of the clerical, technical and business services unit.

The hearing in this matter was held on May 2, 1977 at the offices of the Campbell Union High School District (hereinafter "District") in San Jose, California. At the start of the hearing, SEIU requested leave to amend the petition for unit clarification to include the positions of cafeteria manager and school operations; foreman, both of which the District designated management. SEIU claimed that the positions are supervisory. The requested amendment was denied on two grounds. First, under EERB Resolution 6, there was no showing of a change in circumstances since the operations support unit was first determined. Second, even if the two positions in fact are supervisory, they would not be included in the unit represented by SEIU and thus the issues were inappropriate in a unit clarification proceeding under EERB Regulation 33260, supra.

The parties stipulated that the average daily attendance in the District is approximately 14,000 in eight high schools and one continuation high school.

ISSUES

1. Is the position of lead custodian supervisory within the meaning of Government Code §3540.1(m) or included in the operational support unit?

2. Are the positions of principal's secretary and secretary to the director of the continuation school confidential within the meaning of Government Code §3540.1(c) or included in the clerical, technical, and business service unit?

DISCUSSION AND CONCLUSIONS OF LAW

A. Lead Custodian

There is one school operations foreman and one lead custodian at each of the District's schools. The lead custodian has a night crew of four custodians and is responsible for custodial activities at his campus from 3:30 p.m. until midnight. The lead custodian reports directly to the school operations foreman who works the day shift.

Government Code §3540.1(m) defines supervisory employee as:

"... 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."

This section is written in the disjunctive, therefore, the possession of any one of the enumerated duties or the effective power to recommend such action, if requiring independent judgment, is sufficient to make an employee a supervisor within the meaning of §3540.1(m).²

The District argues that the lead custodians are supervisors within the meaning of Government Code §3540.1(m). The lead custodians, it contends, are actively involved in hiring new employees, periodically complete performance evaluations of employees in their crew and direct and

² Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976; San Diego Unified School District, EERB Decision No. 8, February 8, 1977; Oakland Unified School District, EERB Decision No. 15, March 28, 1977; Los Rios Community College District, EERB Decision No. 18, June 9, 1977.

assign the work of the night custodians. SEIU claims that the lead custodians are not supervisors.

For the reasons which follow, it is found that the lead custodians are supervisors within the meaning of §3540.1(m).

The lead custodian directs and assigns the work of the night custodial crew. Each school is divided into work areas. It is the lead custodian's responsibility to assign each member of his crew a particular work area. Whenever a special evening event occurs, the lead custodian makes the necessary adjustments in work assignments. Although at times he consults with the school operations foreman before making changes, this is a matter of courtesy and not required. The lead custodian also has the authority to decide at what time his crew will break for coffee and dinner.

Whenever there are special activities on the weekend, the lead custodian is responsible for assigning the overtime work. The lead custodian has authority to determine which member of his crew will have the opportunity to work overtime.

The lead custodian regularly inspects his crew members' work, and has required them to correct improperly performed work. Furthermore, if a teacher has a complaint about the cleaning of his classroom, the teacher talks to the school principal. The principal relays the complaint to the lead custodian who in turn talks to the assigned night custodian and sees that the problem is corrected. "... The authority to regularly inspect the work of others and to direct others to correct improperly performed work constitutes responsible direction of other employees in the performance of their work." Sweetwater, supra, at 15.

The lead custodian makes effective recommendations to the school principal regarding the hiring of new employees. The parties stipulated that vacancies in the night custodian classification usually are not filled from outside the District. Rather, the replacement is chosen from a pool of substitute custodians. Several substitutes each work for a few days. Then the lead custodian recommends to the principal which of the substitutes should be hired on a full-time basis. The principal at Del Mar High School stated that in the two previous years he had hired two custodians from the substitute pool. He did not interview either candidate, but instead relied on the recommendation of the lead custodian. In both instances the individual hired was the one recommended by the lead custodian.

The lead custodian prepares performance evaluations of the night custodians on his crew. Two performance evaluations are completed annually for each member of the night crew: one by the lead custodian, the other by the school operations foreman. The lead custodian bases his evaluation on actual on-the-site observations of the employees in his crew. The school operations foreman bases his evaluation on more limited observations made during the summer months when all custodians work during the day. The school principal receives the two evaluations. If there is a wide discrepancy, the principal discusses the evaluations with both the foreman and lead custodian, and tries to reach a consensus. In any event, the principal then prepares and signs a composite evaluation summary based on the two performance evaluations.

Performance evaluations are utilized by the District in making personnel decisions that relate to the criteria set forth in §3540.1(m) .

A poor evaluation may prevent an employee from obtaining an incremental pay increase. Also, it is the District's policy not to grant permanent status to probationary employees who receive unsatisfactory evaluations. On at least one occasion, a probationary night custodian at Blackford High School was terminated after a series of low performance evaluations by the lead custodian. While the lead custodian's evaluations did not specifically recommend dismissal of the employee, the principal relied on the unsatisfactory evaluations by the lead custodian in deciding to recommend the employee's termination. Thus, on at least one occasion, a lead custodian, through the performance evaluation, had direct and substantial input in the discharge of an employee. The importance of the lead custodian's evaluations in personnel decisions is further underlined by the fact that SEIU filed a grievance to remove an unsatisfactory evaluation from a night custodian's personnel file .

It is found that the position of lead custodian is supervisory within the meaning of Government Code §3540.1(m). Through the performance evaluation process he has substantial input in rewarding and firing employees. He directs and assigns work to his crew. Finally, he makes effective recommendations on hiring new employees.

B. Principal's Secretary

Government Code §3540.1(c) defines a confidential employee as:

"... any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations."

In Sierra Sands Unified School District,³ at 2, the Board

stated that:

³ EERB Decision No. 2, October 4, 1976.

"(T)he employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purposes of employer-employee relations. It is further assumed that this nucleus of individuals would be required to keep confidential those matters that if made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture."

In Fremont Unified School District,⁴ at 11, the Board stated that employer-employee relations at least include negotiations and the processing of employee grievances.

In the present case, principals and their site management teams⁵ are actively involved in the negotiations process. Although they do not actually negotiate, principals participate in establishing negotiation priorities and model negotiation outcomes (the desired end results of negotiations from the District's point of view) and in recommending District negotiation positions and strategies. The stated purpose of involving principals in the negotiation process is to give the District input on the effect of possible negotiation outcomes on the individual schools' operations.

This participation occurs in essentially three ways. First, all employee organizations' proposals are sent to the individual schools to be critiqued by the principal and his staff. Their respective recommendations for the District's response are sent back to the District for formulation of a consensus document which is again reviewed by the local schools and eventually presented to the governing board for consideration as its initial counter-proposal. Thereafter, once actual negotiations commence, proposed District negotiations positions and strategies, along with the cumulative inputs from other schools on these items, will be sent back and

⁴EERB Decision No. 6, December 16, 1976.

⁵The management teams include the vice-principal, the director of activities, two deans, and usually four counselors. All are designated management by the District. In this opinion, "school principal" includes the director of the continuation school.

forth between the District and the schools for review and rewriting until a consensus position is reached.

The second method of involving the principals is that they and their staffs review model negotiation outcomes for the effect on their schools' operations. Draft model outcomes are initially formulated by the director of certificated personnel based on the organization's initial proposal, the District's counterproposal, and what he perceives to be the organization's negotiations objectives. The drafts then are sent to the principals for review with their management staffs. Depending upon the recommendations made at the school level, the draft model outcomes are rewritten. Finally, principals and their staffs assist in drafting contract language to implement the finalized model outcomes.

Third, essentially the same back and forth process will be used "to establish the District's negotiations priorities and to determine which model outcomes will be emphasized in negotiations. These priorities are part of the District's strategy to effectuate its model outcomes.

Two school principals testified as to their secretaries' involvement in these processes. The District and CSEA stipulated that, if called, the testimony of three other principals would be substantially the same.

The principal of Campbell High School testified that at his school, his management team meets to discuss negotiations priorities, review organization proposals and suggest counterproposals and negotiations strategies. His school's input has been reflected in the District's negotiations proposals or positions. The principal's secretary sits in on all these meetings and takes minutes. The secretary is

responsible for all materials and correspondence passing between the management team and the District. This includes receipt and dissemination to team members of negotiations materials received from the District (including model outcomes, the cumulative negotiations strategies, positions and priorities and the input thereon from other schools) typing up the principal's composite of the team members' input and sending it to the District, and maintaining a confidential file for negotiation materials.

The principal of Westmont High School testified similarly. He added that his secretary performed similar duties under the Winton Act⁶ and that he estimated that these duties concerning negotiations take up to approximately 25 percent of his secretary's time.

In addition, the two principals' secretaries are involved in employee grievances. Both principals testified that their secretaries are privy to strategy discussions involved in the processing of grievances at the school level.

Thus, principals' secretaries assist the District in the development of its negotiations positions. They also have access to negotiations strategies, positions and priorities, as well as the District's model negotiations outcomes, which if made public prematurely might jeopardize the District's negotiations posture. See Sierra Sands Unified School District, ~~supra~~, Note 3, quoted above at p. 6 and 7. This especially is true in the case of the model outcomes which if known to the exclusive representative, would severely restrict the District's negotiating ability at the table.

Since the principals' secretaries have access to confidential information regarding employer-employee relations in the regular course of their duties, the sole remaining question is whether the consequent

⁶Repealed, former Ed. Code §13080, et seq.

number of confidential employees is so large as to violate the principle that only a "small nucleus" of confidential employees is permitted.

In addition to the nine principal's secretaries in issue in this proceeding, five other positions, making a total of 14, are designated confidential: the superintendent's secretary, and the secretaries to the assistant superintendents for instruction and for business services, and the secretaries to the directors of certificated and classified personnel. Fourteen confidential positions constitute more than 12 percent of the clerical, technical, and business services unit and approximately 4 percent of the total number of classified employees.

Although 14 is a fairly large number of confidential employees for a district of this size, the hearing officer does not believe that it is so excessive in this case as to require, in effect, a drastic revision by the District of its negotiations procedures. Factoring the input from individual schools in the District into the process surely is an acceptable negotiations technique. Even if similar input could be obtained without involving the principals' secretaries, the District's present procedure certainly is reasonably calculated to accomplish this end. Accordingly, since principals' secretaries have access to confidential information, they are found to be confidential employees within the meaning of Government Code §3540.1(c).

PROPOSED ORDER

It is the proposed decision that:

1. The position of lead custodian is supervisory within the

meaning of Government Code §3540.1(m);

2. The positions of principal's secretary and secretary to the director of the continuation school are confidential within the meaning of Government Code §3540.1 (c).

The parties have seven calendar days from receipt of this proposed decision in which to file exceptions in accordance with EERB Regulation 33380. If no party files timely exceptions, this proposed decision will be a final order on October 20, 1977 and a notice of decision will issue from the Board.

Dated: October 8, 1977

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GERALD A. BECKER
Hearing Officer