STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PERALTA COMMUNITY COLLEGE DISTRICT, Employer, and PERALTA FEDERATION OF TEACHERS, AFT LOCAL 1603, Employee Organization, and PERALTA HIGHER EDUCATION ASSOCIATION, CTA/NEA, Employee Organization, and PERALTA DISTRICT TEACHERS ASSOCIATION, Employee Organization.	)	Case No. SF-R-501 PERB Decision No. 77 November 17, 1978

Appearances; Lee T. Paterson, Attorney (Paterson & Taggart) for Peralta Community College District; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Peralta Federation of Teachers, AFT Local 1603; Francis R. Giambroni, Attorney (White, Giambroni & Walters) for Peralta Higher Education Association, CTA/NEA; Charles I. Eisner, Attorney (Boornazian, King & Schulze) for Peralta District Teachers Association.

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

DECISION

This case comes before the Public Employment Relations Board (hereafter PERB or Board) on exceptions to the hearing officer's proposed decision filed by the Peralta Federation of Teachers, AFT Local 1603 (hereafter AFT) and the Peralta Higher

Education Association, CTA/NEA (hereafter CTA). The sole issue in the case is whether, as the hearing officer found, employees of the East Bay Skills Center (hereafter Skills Center or Center) component of the Peralta Community College District (hereafter District) shall be excluded from the unit of all certificated employees. The District supports the hearing officer's decision, while the third employee organization, the Peralta District Teachers Association, took no position on the issue in this case. We affirm the finding of the hearing officer.[1]

FACTS

The District has five colleges - Merritt and Laney Colleges in Oakland, the College of Alameda in Alameda, the Peralta College for Non-traditional Study in Berkeley, and Feather River College in Quincy.

The Skills Center has approximately 32 certificated employees who offer vocational training and guidance at a location in Oakland five to eight miles from any of the District's other facilities. The Center's operation depends on its procurement of contracts from numerous government agencies calling for the training of students in specified vocational

[1]An election was held on November 1-3, 1977 pursuant to a consent agreement allowing Skills Center employees to vote challenged ballots pending the final decision of this case. The results of the election have not been certified because the 19 votes challenged here could have changed the result. The Federation received 300 votes, the Peralta District Teachers Association 202 and the Association 194.

areas. It is continuously making application for new contracts and this results in variation in the amount of funding available to the Center at any given time. At present, about 90 percent of the Center's funding originates from the federal government under the Comprehensive Employment Training Act (CETA) program and passes through various governmental intermediaries which make the direct contract awards. The remaining 10 percent is derived from the state in average daily attendance (ADA) funds.

The Center is in year-round operation and its classes have highly variable lengths ranging from two weeks up. The classes meet for at least six hours daily and instructors teach 32 hours a week. In contrast to this intensive system, other District instructors teach an average of 15 hours a week and have five office hours a week during two 18-week semesters or three quarters, depending on the District college with which they are affiliated.

Faculty members are hired to teach under specific contracts. They can be terminated at the end of the contract if no new contract requires their services. Employees are paid on an hourly basis, ranging from $10.00 to $11.50 an hour. This salary schedule is not related to the compensation of other District personnel. Employees also receive dental, medical and life insurance. They receive sick leave, but this cannot be accumulated from year to year. Vacation time is accumulated year-round. Some faculty pay into the Public Employees Retirement System (PERS) while others are members of

the State Teachers Retirement System (STRS). No sabbatical leave is available.

Separate personnel policies exist for the Skills Center including distinct grievance and evaluation procedures and a different seniority system. Employees serve a 90-day probationary period and do not receive tenure.[2] The Skills Center director supervises only Skills Center certificated employees and reports to the president of Merritt College.

Skills Center faculty come in at least occasional contact with other certificated staff of the District at meetings of District faculty, of the Academic Senate and of District-wide committees. Faculty only occasionally teach at another District facility in addition to their work at the Skills Center. They have no transfer rights to the other District colleges. Courses similar to those taught at the Skills Center are taught at other colleges in the District. However, the Center's classes are much more intensive, designed to train a student under industry conditions and to release them to find employment as soon as they are able to meet the competency specifications of the program.

Students are referred to the Center by various sponsoring agencies and normally are not "walk-in" enrollees. Students receive a stipend from sponsoring agencies in an amount

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[2]The Federation has brought court challenges to the employment policies of the District seeking equality with other certificated staff. The cases are on appeal to the District Court of Appeal. (Moore v. Peralta Community College District and Robinson v. Peralta Community College District. (Super. Ct., Alameda Co., Nos. 487984-0 and 492190-9).)

sufficient for livelihood during the training period. A student must be present to receive a stipend for that day. Occasionally a student from one of the other District colleges will enroll at the Skills Center. Somewhat more frequently a Skills Center student will take classes elsewhere, usually in order to qualify for an Associate of Arts degree. Students must petition to have Skills Center classes credited toward the Associate of Arts degree.

DISCUSSION

I.

Both AFT and CTA are united in the view that certain Skills Center teachers enjoy a sufficient community of interest to be included in an "overall" unit of certificated personnel. In addition, CTA makes an effort to breathe new life into an argument laid to rest in Belmont Elementary School District[3] and cemented over in Petaluma City Elementary and High School Districts[4] that all persons who teach in a classroom are classroom teachers and must be in the same negotiating unit under the provisions of section 3545(b)(I).[5] Patently, it is

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[3](12/30/76) EERB Decision No. 7.

[4](2/22/77) EERB Decision No. 9.

[5]Unless otherwise indicated, all statutory references are to the Educational Employment Relations Act (hereafter EERA) and the Government Code. The EERA is codified at Government Code section 3540 et seq.

Section 3545(b)(l) is set out in the text below.

CTA's position that the Skills Center teachers are classroom teachers under the EERA.

The hearing officer has relied principally on New Haven Unified School District,[6] adopting, albeit somewhat uncertainly, it seems, the Belmont and Petaluma concept that a classroom teacher is one who is "regular, full-time, permanent or probationary." Apparently finding this definition inapplicable to the Skills Center teachers, he then proceeded to find that these teachers lacked a sufficient community of interest with employees in the "overall" certificated unit to warrant their inclusion in that unit.

The proposed decision is examined here, not against the edicts of prior Board holdings, but in light of the statutory instructions given to this Board by the California Legislature.

* * *

Section 3545 has proven to be a troublesome scripture to advocates and Board members alike. On its face, the provision is alluringly ingenuous, clothed in the calico simplicity of common words and phrases:

> (a) 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.

6(3/22/77) EERB Decision No. 14.

(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. . . (Quoted in pertinent part.)

The term "classroom teacher" is not defined in the EERA. In the Education Code, where the term is also used, no specific definition is given, but particular uses of the term indicate that it is applicable to all persons who teach in a classroom for any period of time.[7] If section 3545(b) of the EERA constituted the sole standard of unit determination, it is possible that the Board would have placed all teachers in a single unit, save possibly those deemed to be "casuals." But sophisticated minds, burdened by private sector precedent and a sensitivity to the dynamics of the negotiating unit, have found themselves unable to whistle past the apparent contradiction contained in section 3545(a). Can the statutory criteria of appropriateness be ignored? Should they be ignored?

After all, the statute must work. PERB, as the EERA frequently reminds us, is obligated to see that it does.[8] There can be no dispute that a primary purpose of the EERA is to promote improved employer-employee relations through the medium of collective negotiations.[9] We believe it to be well

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[7]See, e.g., Education Code sections 41011, 44897, 44898, 54480, 84031, 87458, 87459.

[8]See sections 3540, 3541.3(f), (g), (i), (n), 3541.5, 3541.5(a), (c).

[9]Section 3540.

established that productive and stabilizing bilateral decision-making is dependent, in part, on the essential cohesiveness and compatibility of the various employee constituents of the negotiating unit. While differences and disagreements are unavoidable and are to be expected, they cannot be so severe, so out of joint, as virtually to promise disruption and final frustration of the negotiating process. Certainly, this is the import of the statutory requirement of community of interest and the reason for the preoccupation with that criterion in the pertinent literature.

A literal interpretation of subsection (b)(1) is unlikely to serve the statutory purpose if resulting units, designed to be the vehicles for advancing the legislative aspiration, prove instead to be the dissension-torn carriers of the system's failures.[10] Thus, other theories have been developed.

One theory simply turns its back on subsection (b)(1) and would establish teacher units solely on the basis of the statutory criteria in subsection (a). This approach, unfortunately, ascribes to the Legislature, in creating subsection (b)(1) , the commission of a meaningless act, a conclusion abhorrent to standard principles of statutory construction[11] and devoutly to be avoided here.

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[10]Friends of Mammoth v. Mono County (1972) 8 Cal.3d 247; Interinsurance Exchange v. Ohio Cas. Ins. Co. (1962) 58 Cal. 2d 142, 152 (sound public policy presumed to be preserved.).

[11]See Moyer v. Workmen's Compensation Appeals Board (1974) 10 Cal.3d 222, 230 [514 P.2d 1224, 110 Cal.Rptr. 144].

Another approach to the dilemma of section 3545 is to concede that all classroom teachers must be in the same unit—and then to define classroom teachers in a manner which satisfies one's own view of which teachers should be included in the unit. This, as we understand it, is the circular reasoning of Belmont and Petaluma which has given us a parochial definition limiting the statutory embrace to those considered to be the "core" of the district's faculty.

As diverse as these interpretations are, they constitute efforts to make the statute work and should not be faulted for that effort. They demonstrate that persons of good intentions can read different meanings into the words of another, no matter how exact and uncomplicated they appear to be. Such is the frailty of our multi-cellular intellectuality. It may well also be the strength of our adjudicatory system in a world where often "man takes the limits of his own field of vision for the limits of the world."

Section 3545 remains a burdensome provision. Are Skills Center teachers outside the pale of "core" personnel? Are they classroom teachers? If so, are they to be included in or excluded from the regular certificated unit?

There seems to be little doubt that the Legislature meant to minimize the dispersion of school district faculty into unnecessary negotiating units. It is apparent that unit configurations based on geographical, or campus considerations, or split along lines of academic disciplines and teaching specializations are proscribed by subsection (b)(1). But that

is not to say that the Legislature rejected the possibility that critical, negotiation-related differences between groups of teachers might compel unit separation. We believe that to reduce those possibilities the Legislature directed this Board to combine all classroom teachers into a single unit except where an issue of appropriateness is raised and the requirements of subsection (a), which are then invoked, leave the Board with no other option.

Reading subsection 3545(b) together with its companion subsection (a) gives rise to the presumption that all teachers are to be placed in a single unit save where the criteria of the latter section cannot be met. In this way, the legislative preference, as the Board perceives it, for the largest possible viable unit of teachers can be satisfied. Thus, we would place the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it.

Three points raised in the concurring opinion merit comment. First, the use of the word "shall" in section 3545(b) precludes the exercise of discretion by this Board. The majority's view is apparently misunderstood. The need for interpretation here lies not solely in the words of subsection (b), but in the apparent conflict posed by the entire section 3545. Subsection (a) also employs the term "shall," mandating this Board to determine raised issues of appropriateness according to specified criteria. No exception to that clear directive, [such as "except for classroom teachers,"] is expressed. The concurring opinion acknowledges

that a legislative provision is not to be rendered meaningless by an interpretation. What, then, is the meaning of subsection (a) if this Board may only read and apply subsection (b).

Belmont avoided dealing with this problem by finding a limited meaning for "classroom teacher." In so doing, it attributed to the legislature a unique definition found nowhere else. Even if that definition of classroom teacher were acceptable, could subsection (a) really be ignored? The dissent argues most eloquently that the legislature did not intend PERB to establish units with disparate or conflicting interests or which contain the potential for undesirable results. What, if in fact, such would be the result of establishing a unit of Belmont "classroom teachers?" Would subsection (a) then apply? Of course, that too is a question that Belmont hopefully can avoid, for in selecting a narrow band of teachers innately cohesive in their interests Belmont really relies on an unstated presumption of community of interest.

Second, the concurrence makes a similar point with respect to the "in all cases" language. The majority is charged with having eradicated that language. This argument is inconsistent. To follow the preference expressed in the concurring opinion would require this Board to make the words "in each case" meaningless. Where the majority is attributed with the reading: "in all cases - except in each case where an issue arises," the concurrence interprets this section as 'in each case - except that in all cases ..."

Finally, the concurrence places some reliance on the fact that certain amendments and proposed amendments to EERA did not modify Belmont, concluding therefrom that the legislature approved the Belmont interpretation. We view the failure of an amendment as nothing more than the failure of the author's individual preference to gain legislative support.[12] This is particularly true where the amendments are unrelated to the issue supposedly being supported.[13] SB 1612 would add a subsection to section 3545 as follows:

> (2) A negotiating unit that includes classroom teachers and pupil services employees, as defined in subsection (e) of section 33150 of the Education Code, shall not be appropriate unless a majority of the pupil services employees vote for inclusion in the unit. If a majority of the pupil services employees do not vote to be included in a unit with classroom teachers, a unit consisting of only pupil services employees shall be appropriate.

Thus, if the failure to gain passage does have any special significance, it would be countervailing to the point the concurrence seeks to make. It is unlikely that the legislature would be reticent in allowing non-teaching personnel to escape from a certificated unit, but would condone the exclusion of

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[12]Miles v. Worker's Compensation Appeals Board (1977) 67 Cal.App.3d 243, 248 fn 4 (rejected bills have little value as evidence of legislative intent).

[13]Stats. 1977, ch. 1159, sec. 6, changed the name of the Board from Educational to Public Employment Relations Board; Stats. 1977, ch. 606, sec. 3, made additions to the scope of representation subject to meeting and negotiating; Stats. 1977, ch. 1084, sec. 3, specified new procedures pertaining to decertification petitions.

various groups of teachers, and an expected proliferation of teachers' units. But we are constrained to note that SB 1612 has been referred to interim study. Thus, it may eventually pass, fail, be amended or dropped. To cite so embryonic and uncertain a proposal as evidence of legislative approval of past Board decisions is astounding.

Similarly, the passage of amendments affecting sections of EERA cannot be viewed as freezing interpretations of a totally unrelated section. Indeed, even re-enactment of language will not be construed to approve or condone an administrative agency's prior erroneous interpretation of a statute. (Louis Stores v. Dept. of Alcoholic Bev. Control (1962) 57 Cal.2d 749, 759.) We firmly believe the Belmont definition of classroom teacher is not condoned or approved by the enactment of unrelated amendments. We firmly believe the Belmont definition of classroom teacher to be erroneous.

In the last analysis there is irony in the fact that the majority and concurring views are more alike than appear on the surface. Certainly, it is Belmont's bottom line that only those teachers who share a community of interest shall be in the same unit (teachers who are "out of community" are to be placed in different units or treated as casuals and excluded altogether). The difference between the two views is thus less philosophical than arithmetic. The majority of this Board would subtract from a unit of all teachers only those groups who fail to satisfy section 3545(a) criteria; the concurring member might add those teachers who do meet the criteria.

And here the significant difference between the two approaches to the meaning of section 3545 is revealed. Under Belmont, the Board would retain the right to exclude from a unit of classroom teachers other teachers who share a community of interest with those in the basic unit. This is simply because the EERA does not mandate the most appropriate unit and no such legislative preference is seen in the statutory language. On the other hand, the Board under Peralta would be obligated to combine different groups of instructional personnel absent a finding that such community of interest does not exist.[14]

All in all, it would appear that the majority is substantially closer to a literal, but workable, interpretation of section 3545.

In construing section 3545 in harmony with the various provisions of the EERA which admonish this Board to assist in improving employer-employee relations through a viable system of collective negotiations, the majority finds the concurring member's own words appropriate:

> A literal interpretation [of section 3545] would require the inclusion in the unit of even the most casual employee who spends any amount of time teaching in a classroom regardless of the absence of a community of interest of the employee with other members of the unit. It is probable that employees with greatly disparate or opposing interests would be forced into the same unit. This result could not have been contemplated by the legislature because it would undermine

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[14]The Board does not suggest that the other criteria found in section 3545(a) are to be disregarded. Nevertheless, PERB case history indicates that "established past practices" have actually had little or no impact on unit determination.

> the smooth operation of the collective negotiations process. The community of interest and other unit determination criteria have developed over time precisely because they are useful in determining reasonable, efficient and effective negotiating units which serve to enhance the collective negotiations relationship between the employer and employee organization. A mandated inappropriate unit which ignores these criteria certainly was not the goal of the legislature. [Concurring decision in Belmont Elementary School District (12/30/76) EERB Decision No. 7, in support of the classroom teacher theory. Emphasis added throughout.]

II.

With this understanding of the statute, we find that the Skills Center teachers are sufficiently lacking in community of interest with other certificated employees to justify excluding them from the overall certificated unit. Indeed, the interests of the two groups are sufficiently disparate to raise the possibility that the negotiating process would be seriously impeded by internal disruption. In applying community of interest factors to this case, we find the decisive distinctions between Skills Center employees and other District faculty to be the distinctive means of funding those positions, lack of continuity of employment, differing instructional practices and working conditions, differences in curriculum and educational purpose, and a different method of compensation.

PERB's decision in New Haven Unified School District [15]

[15](3/22/77) Supra, EERB Decision No. 14

and its two decisions in Oakland Unified School District[16] are applicable to the facts here. In New Haven PERB excluded CETA employees from a unit of regular instructors on the ground that the groups did not share a community of interest. There, the instructors were hired directly with CETA funds and taught vocational skills to unemployed youths who received a stipend for attendance. Classes were held year-round and instructors taught between 18 and 37 1/2 hours per week. The teachers held adult vocational credentials and received health insurance if they worked over 30 hours per week. In Oakland (PERB Decision No. 50), we found a classified unit of children's center instructional assistants to be appropriate separately from a unit of K-12 instructional assistants. In Oakland (PERB Decision No. 1.5) a separate certificated unit for children's center teachers, children's center teacher assistants and children's center assistant supervisors was approved. Both decisions were based on the differing job functions, supervision, hours of work, work years, work locations, hiring practices and certain fringe benefits in the children's center.

Here, unlike in New Haven, the Skills Center employees hold community college credentials and receive benefits similar to those of the regular faculty. But more importantly, as in New Haven, the expectancy of continued employment by Skills Center employees is significantly less than that of other

16(3/28/77) EERB Decision No. 15; (4/14/78) PERB Decision No. 50.

certificated employees of the District. The Center employees must rely on short-term federal contracts for employment. The District is seeking new awards continually, and the Center budget is thus in a continuous state of flux.

The Federation and the Association contend that the Skills Center employees have demonstrated continuity of employment in much the same way as the part-time faculty found appropriate to the overall unit in Los Rios Community College District.[17] However, the fact that Skills Center employees may continue their employment from year to year, though not guaranteed such reemployment, is not controlling here. Their continued employment is subject not to the availability of District funds but of federal funds outside District control.

The separateness of the Skills Center is further shown by its instructional practices. While regular faculty teach an average of 15 hours a week and spend another five hours in their offices during the course of two 18-week semesters or three quarters, the Skills Center instructors teach 32 hours a week year-round. The Skills Center counselors deal with personal adjustment problems of students as a primary function, and do not do the course planning for students.

Personnel practices differ substantially. While they are subject to negotiations, and hence modification, they do reflect a history of distinctive treatment, and possibly diverse interests. Skills Center employees do receive similar

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17(6/9/77) EERB Decision No. 18.

health benefits, but their sick leave does not accumulate from year to year like that of other employees. They receive vacation based on their year-round work instead of according to the shorter regular faculty work year. Regular faculty also can take periodic sabbatical leaves not provided to Skills Center employees. The Skills Center certificated employees also presently have a separate grievance procedure and seniority system, and they are supervised separately from other certificated employees of the District. Historically, the salaries of Skills Center employees, which are on an hourly rate, have not been related to the compensation of other certificated employees.

The other working conditions of instructors at the Center also demonstrate their isolation from other certificated employees. The Center is geographically removed not only from other District facilities, but even from Merritt College, to which it is attached administratively. Center students receive a wage for full-time attendance in a work environment, compared to the unpaid and much less intense normal academic organization of the regular programs. While evidence was presented showing interchange of students and faculty between the Skills Center and other District colleges, this interchange is significantly less than the interchange which is sanctioned as a matter of course between the colleges.

The curriculum and educational purposes of the Center are also indicative of the different community of interest of Center employees. The Center offers very intensive programs to

students in need of job training who are referred by government agencies. These programs are intended to make students immediately employable upon their completion. While the other colleges offer some vocational programs, these are uniformly at a slower pace, less in depth, and part of a traditional, general curriculum.

Based on these differences, we find that Skills Center instructors do not share a community of interest with other certificated employees of the District and that a single unit including Skills Center instructors would be inappropriate. In determining the appropriate unit, little weight is given to the limited evidence of negotiating history prior to the EERA. It is not sufficient to overcome the differing community of interest. No evidence was introduced concerning the effect on the efficiency of operation resulting from placement of Skills Center employees. Therefore, we would exclude the Skills Center employees from the unit and uphold the challenges to their ballots.

III.

Finally, it should be made clear that the effect of this reevaluation of the meaning of section 3545 should be prospective only. As already indicated, PERB's prior holdings were rendered soon after the implementation of the EERA on a difficult and patently debatable question. Since then, many districts and many employee organizations, and this Board, have expended considerable time and effort in complying with the

dictates of those decisions. Negotiations and certifications have been granted, contracts have been executed and in many units negotiations are even now in progress. It would not serve the statutory goal of the stabilization of employer-employee organization relations in the public school system if we were to void, or in any way interfere with units already established under the guidelines of Belmont or Petaluma. Similarly, we authorize the completion of pertinent representation elections which have already been scheduled or which are now in progress.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

1. The challenges to the 19 Skills Center employee ballots are sustained and said ballots shall not be included in determining the outcome of the representation election conducted by the Board in the certificated negotiating unit of the Peralta Community College District;

2. The 19 Skills Center employees are excluded from the certificated negotiating unit proposed by the regional director as an appropriate negotiating unit and in which a representation election has been held.

Harry Gluck, Chairperson Jerilou Cossack Twohey, Member

Raymond J. Gonzales, Member, concurring:

I concur with the majority opinion in all respects except its treatment of Government Code section 3545(b)(1). On this

point, I retain those views as expressed by a majority of the Board in Belmont Elementary School District.[1] In that decision, as author of the majority position, I considered, as I still do, section 3545(b)(l) to be a limitation on the Board's discretion in structuring certificated units which include instructional personnel of a school district. Hence, while section 3545(a) sets forth basic criteria by which the Board might exercise considerable discretion in determining appropriate units,[2] that discretion is affected by the patently restrictive language of section 3545(b)(l) given to us by the Legislature. It is clear that the Legislature purposefully adopted this section in pursuit of certain values, namely, ease of administration in the area of collective negotiations and a coherent voice for all the District's teachers. This section reads:

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

Accepting such language as a limitation placed on this Board, I nevertheless acknowledge, as I did in Belmont, that the directive of this subdivision, if applied literally, has the potential for results many would find undesirable. For

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[1](12/30/76) EERB Decision No. 7.

[2]Antioch Unified School District (11/7/77) EERB Decision No. 37.

example, instructional staff who have substantially disparate or conflicting interests or who, on an historical basis, have had demonstrably difficult group negotiations, would be forced to join hands in the negotiating process. Such an amalgamation of employees would be disruptive to the process of collective negotiations, hardly enhancing stability in employer-employee relations. Given the potential for such disruption, it was the opinion of a majority of this Board that an appropriate solution lay in the Board's exercising its authority and duty as an administrative body by narrowly interpreting the undefined term,[3] "classroom teachers" found in section 3545(b)(1), a term which is clearly ambiguous.[4] By doing this, the Board could continue to acknowledge section 3545(b)(1) as a legislative mandate to be applied "in all cases" and at the same time assure that its impact would be consistent with the goals of smooth collective negotiations and

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[3]Sacramento Typographical Union v. State (1971) 18 Cal.App.3d 634. The construction of a statute by an administrative board cannot change its clear language or alter its plain meaning; such construction can only be resorted to in order to clear up uncertainties and ambiguities.

[4]Some would dispute whether or not the term "classroom teachers" is ambiguous. "Ambiguous" is defined as "[c]apable of being understood in more senses than one; having a double meaning." (Standard College Dict. [1963] page 46). In the context of section 3545, it is highly doubtful that the Legislature intended "classroom teachers" to mean only those persons who teach in a classroom to the exclusion of teachers who perform their services in a home, in a gym, on a playing field, in a workshop, or in an automobile. I do not know of anybody, including the members of this Board, who would so favor that interpretation. On the other hand, the Legislature did use the term "classroom teachers" rather than "teachers," and it certainly is arguable that the term does have a limited meaning.

stability of employer-employee relations, goals which section 3545 (a) criteria seek to foster.[5] Thus, the Board interpreted "classroom teachers" to mean "all of the regular full-time probationary and permanent teachers in a district," since teachers meeting this description comprise the largest homogeneous unit of certificated employees within a district.

But while the Legislature has left us room to specify the scope of the limitation imposed by section 3545(b)(1) by defining the statute's undefined terms, it has not invited us to, in effect, repeal a duly-enacted statute by ignoring its clear language and purpose as the majority does now in this case.

Without any statutory authority whatsoever, the majority somehow manages to ignore what is a clear substantive rule of law given to us by the Legislature, section 3545(b)(1), which this Board is obligated to follow.[6] Instead they conveniently and casually conclude that a rebuttable presumption is created by reading subdivision 3545 (a) together

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[5]See Anderson Union High School District v. Schreder (1976) 56 Cal.App.3d 453, where the court held that in interpreting a statutory word, the objective of the statute is a prime consideration and where a word has several meanings, the court must adopt the meaning which will best achieve the statute's purpose.

[6]A legislative mandate, made obvious by the use of the term "shall," has the invariable significance of excluding the idea of discretion. (Gov. Code sec. 14).

with subdivision 3545(b)(I).[7] That presumption is "that all teachers are to be placed in a single unit save where the criteria of subdivision 3545 (a) cannot be met."[8] My colleagues fail to appreciate the exactness of language that the Legislature uses in creating presumptions. In some cases, the Legislature will expressly create presumptions by using the

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[7]For purposes of historical perspective and to demonstrate just how casual the majority's approach to the issue of classroom teacher has been, I would point out that the majority's initial and presumably solid position on this issue was that "subsection (b)(1) creates a statutory presumption that all classroom teachers share a community of interest." They so expressed that view in an opinion signed by them on October 3, 1978. As per Board internal procedure, the opinion was then due for publication within ten days, allowing this board member that time to submit a concurrence. However, after receiving the concurrence which pointed out numerous infirmities in the majority decision, the majority immediately withdrew their opinion, indulging themselves time for an attempted revision. It seems to me that on such a momentous occasion, namely the overruling of a precedent almost as old as this agency, and considering the amount of time that has lapsed since the initial deliberations in this case, almost five months, the majority would have subjected their new holding and supporting rationale to a higher standard of scrutiny then was apparently employed. But given the majority's historical treatment of this issue, I can only conclude that my colleagues were far more interested in achieving a particular result, the overruling of Belmont, than they were in utilizing a reasoned process to arrive at a logical and legitimate alternative to Belmont, if indeed one exists. This is not the first time that my two colleagues have reached a decision before finding a basis for that decision that would meet even their criteria for persuasiveness. I object to this result-oriented procedure as a substitute for deliberations.

[8]The majority never uses the term "rebuttable presumption," but it is clear from the majority's discussion that the presumption found by reading subdivisions 3545 (a) and 3545(b)(1) together operates as a rebuttable presumption. A rebuttable presumption is defined as a "species of legal presumption which holds good until disproved." (Black's Law Dictionary (4th ed.) p. 1432).

term "presumption" or "presumed."[9] Alternatively, statutes which use the phrase "prima facie evidence" rather than the more precise term "presumption" are also treated as rebuttable presumptions.[10]

Interestingly, apropos examples of the Legislature's purposefulness in this area can be found in recently-enacted legislation which this very Board is charged with implementing. I refer specifically to Senate Bill No. 839 and Assembly Bill No. 1091 which relate to employer-employee relations for state employees and higher education employees, respectively. In Senate Bill No. 839, the Legislature created a rebuttable presumption regarding unit designation for professional and non-professional employees in state service. Government Code section 3521(c) states:

> There shall be a presumption that professional employees and nonprofessional employees should not be included in the same unit. However, the presumption shall be rebuttable, depending upon what the evidence pertinent to the criteria set forth in subdivision (b) establishes.[11]

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[9]The Evidence Code is replete with such presumptions. See generally, Ev. Code sec. 600 et seq.

[10]Ev. Code sec. 602, which states "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." See also Witkin, Cal. Evidence (2d Ed. 1966) sec. 253, pp. 215-216.

[11]Gov. Code sec. 3521(c) added by Stats. 1977, ch. 1159, sec. 4, p. .

Assembly Bill No. 1091 creates a rebuttable presumption similar to that above-quoted.[12] Additionally, it creates a rebuttable presumption regarding unit designation of occupational groups. Government Code section 3579 (c) provides:

> There shall be a presumption that all employees within an occupational group or groups shall be included within a single representation unit. However, the presumption shall be rebutted if there is a preponderance of evidence that a single representation unit is inconsistent with the criteria set forth in subdivision (a) or the purposes of this chapter.[13]

That the Legislature acts deliberately in its creation of presumptions is unquestionable. Where the Legislature has purposefully chosen presumption language to create presumptions in other statutes we are charged with enforcing, it simply cannot be contended that the Legislature misspoke its intention in writing section 3545(b)(1). I find it difficult to understand how the majority can so easily dismiss section 3545(b)(1), a clear legislative mandate. In finding a presumption, the majority is not interpreting legislative intent but rather usurping legislative power.

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[12]Gov. Code sec. 3579(b) added by Stats. 1978, ch. 744, sec. 3, p. . This section states:

> There shall be a presumption that professional employees and nonprofessional employees shall not be included in the same representation unit. However, the presumption shall be rebuttable, depending upon what the evidence pertinent to the criteria set forth in subdivision (a) establishes.

[13]Gov. Code sec. 3579(c) added by Stats, 1978, ch. 744, Sec. 3, p .

The majority furthermore has ignored both the structure and careful wording of section 3545 as a whole. Subdivision (a), which specifies the general criteria we are to follow in unit determination cases, is to be applied "[i]n each case where the appropriateness of a unit is at issue..."; the limits on this Board's discretion contained in subdivision (b)(1) are to apply "[i]n all cases...." (Emphasis added). In other words, by including subdivision (b)(1), the Legislature has specifically declared an exception to the general provision of subdivision (a), and in so doing has made the phrase "in each case," (found in subdivision (a)) a virtual nullity where the unit designation of classroom teachers is an issue.[14] However, through interpretive alchemy the majority has done the reverse, causing the language "[i]n all cases" to disappear from section 3545. In effect they have translated "[i]n all cases" into "[i]n all cases [except in each case where the appropriateness of the unit is at issue]." Consequently, to the majority, subdivision 3545(b)(1) takes on a binding quality only in the absence of any issue as to appropriateness of the unit.

By so ignoring the simple language "in all cases" the majority violates the very canon of statutory construction they felt predisposed to cite; namely, that statutory construction which makes some words surplusage is to be avoided because to

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[14]As discussed earlier, however, consistent with the Legislative mandate set forth in section 3545(b)(1), the Board may properly exercise its interpretive powers where language given us by the Legislature is ambiguous. In this way, the apparent tension between subdivisions 3545(a) and (b)(1) can be resolved.

do otherwise is to ascribe to the Legislature a meaningless act.[15] Could it really be that the Legislature intended section 3545(b)(1) to take on a chameleon character, engendering a presumption when there exists an issue of appropriateness, but disappearing when there is no issue of appropriateness? I am baffled by the majority's intuition. Would the Legislature bother to adopt mandatory language and have it apply only in circumstances where, in actuality, the Board does not get involved? We only become aware of the inappropriateness of a unit when an issue is raised on appeal to this Board. Are my colleagues going to go through the Board's files at night in search of misaligned units in order to meet the obligation of placing all classroom teachers in the same unit? I hardly think that the Legislature intended to create an illusory limitation in section 3545(b)(l).

Additionally, it seems to me that the very result that the majority seeks to avoid, a proliferation of negotiating units, is actually promoted by their new holding. Because section 3545(b)(1) is viewed as merely invoking a presumption, the only relevant law for determining the appropriateness of the unit is section 3545(a). The language of section 3545(b)(1) which was obviously intended to be comprehensive, including in all cases all the District's teachers in one unit, is no longer treated as binding. Thus it is conceivable, given a set of facts appealing to the majority, that the community of interest

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[15]Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.

criterion would make units based on subject area, work location, or grade level appropriate since the only operative language to be applied, section 3545(a), is that which gives the Board broad discretion.[16]

Given my approach to subdivision 3545(b)(1), however, the comprehensiveness of a unit is guaranteed since a unit of the District's instructional staff must, at the very least, include "... all of the regular full-time probationary and permanent teachers in a district."[17] Additions to the core unit would then depend on the application of section 3545(a) criteria to the facts of a particular case. If the facts show (1) that other instructional staff, indeed other certificated staff, share a community of interest with the core staff, (2) that the established practices of the employees support a combination of such employees or, alternatively, do not outweigh the community of interest and efficiency of operations considerations, and (3) that the efficient operation of the school district is promoted, not encumbered, then the inclusion of such staff in an overall unit is warranted. To determine otherwise would be an abuse of discretion. Consequently, if the majority feels that the difference between their view and my view of section 3545(b)(l) is "less philosophical than arithmetic,"

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[16]The majority comments otherwise on this point. But they, as well as I, are surely aware that the EERA lacks any legislative history which would support the statement that the Legislature specifically intended to avoid unit configurations based, for example, on geographic lines. It has simply been assumed by many that this is an unspoken legislative intent.

[17]Belmont, supra at 11.

then either they do not understand Belmont or they do not understand arithmetic.

Finally, I would point out that in the almost two years since the Board's issuance of Belmont, the Legislature has had numerous opportunities to amend section 3545(b)(1) if it felt that the Board's interpretation of that section was erroneous. Amendments to the Educational Employment Relations Act (Gov. Code 3540 et seq.) have been introduced and passed upon by the Legislature on several occasions.[18] A recently introduced amendment, in fact, focused on the language of section 3545(b)(1).[19] That bill has been referred to an interim committee for further study regarding the issue of non-instructional certificated staff. The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.[20]

By ignoring the mandate of subsection 3545(b)(1) and instead creating a rebuttable presumption, my colleagues ignore the legislative will and far exceed their discretionary authority.

Raymond J. Gonzales, Member

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[18]E.g. Gov. Code sec. 3540.1 as amended by Stats. 1977, ch. 1159, sec. 6, p. ; Gov. Code sec. 3543.2 as amended by Stats. 1977, ch. 606, sec. 3, p. ; Gov. Code sec. 3544.5 as amended by Stats. 1977, ch. 1084, sec. 3, p.

[19]Senate Bill No. 1612 (1977-1978 Reg. Session) sec. 1.

[20]Place v. Trent (1972) 27 Cal.App.3d 526.