

STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)	
ASSOCIATION AND ITS CHAPTER)	
NO. 3 99,)	
)	
Exclusive Representative,)	Case No. LA-UM-407
)	(R-461)
and)	
)	PERB Decision No. 800
CALEXICO UNIFIED SCHOOL DISTRICT,)	
)	March 29, 1990
Employer.)	
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Appearance: Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Calexico Unified School District.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Calexico Unified School District (District) to a PERB hearing officer's proposed decision. Pursuant to PERB Regulation 32781(a)(2)¹ the California School Employees Association and its

¹PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. PERB Regulation 32781 states, in pertinent part:

Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(a) A recognized or certified employee organization may file with the regional office a petition for unit modification:

.....

(2) To add to the unit unrepresented classifications or positions created since

Chapter No. 399 (CSEA or Association) filed a unit modification petition on December 1, 1986. In its petition, CSEA sought to include the District's newly created Assistant Personnel Clerk (APC) position within the existing wall-to-wall unit of classified employees, of which CSEA is the exclusive representative. The hearing officer rejected the District's allegations that the APC position should be designated as a "confidential employee," as defined under the Educational Employment Relations Act (EERA) section 3540.1(c).² Accordingly, the hearing officer granted the Association's unit modification petition.

We have examined the record, including the proposed decision and the District's exceptions, and reverse the hearing officer's decision for the reasons discussed below.

recognition or certification of the current exclusive representative.

This regulation was subsequently amended, effective February 1, 1989. This change has no impact on the disposition of this case.

²EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3540.1 states, in pertinent part:

As used in this chapter:

.

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

FACTUAL SUMMARY

Prior to September 1986, the District employed approximately 475 employees, 4 of whom filled confidential positions. In September 1986, the District created a fifth confidential position, the APC. The APC job description (Jt. Exh. No. 1) has two primary sections. One section lists the specific recruitment and selection duties that only the APC would complete and be held accountable for. The other section describes "other personnel related duties" where the APC would assist the personnel clerk (PC)³ in completing certain tasks. It is undisputed that a majority of these tasks are confidential duties. Generally, the confidential duties of the APC primarily involved maintaining employee confidential files,⁴ collecting information necessary for the formulation of bargaining unit contract proposals, and gathering and investigating information regarding employee grievances.

In September 1986, the District hired Augustina Samaniego to fill the newly created APC position. During the five months

³The PC position was one of the four original confidential positions existing prior to the creation of the APC.

⁴The District maintained two sets of files for each employee: (1) a public file containing personal data and work history; and (2) a confidential file containing evaluations, reprimands, and records of disciplinary actions. Both sets of files had recently been transferred from the superintendent's secretary to the office space occupied by the APC and PC. The record shows that only the APC and PC had regular access to the locked confidential files, even though employees could obtain a limited supervised review.

prior to the hearing, Samaniego was trained and performed all tasks assigned to her. However, very few of these tasks included the confidential tasks listed in her job description. At the time of the hearing, there had been no grievances filed during her five months of service. Irene Gruenberg, personnel clerk and Samaniego's supervisor, testified that the negotiation process had been completed before Samaniego could "get her feet wet." No negotiations were scheduled until the following spring. Consequently, Samaniego had not investigated any grievances and she had not been involved in any bargaining unit negotiations. At the same time, however, there was evidence at the hearing that she had contacted other school districts in the Imperial Valley to obtain salary bus schedules for bus drivers, and that she had taken notes at a District management meeting. Additionally, the evidence indicated that she possessed more than mere access to the confidential employee files as she had pulled information from these files at the request of the assistant superintendent.

DISCUSSION

The issue before the Board is to what extent must an employer, in a unit modification petition hearing where the petition seeks to include the employer's newly created confidential position in the bargaining unit, provide evidence that confidential duties have actually been performed. Because the District failed to show that Samaniego had actually performed her expected confidential duties by the time of the hearing, the

hearing officer granted the Association's unit modification petition.

In Sierra Sands Unified School District (1976) EERB Decision No. 2,⁵ the Board stated that an employer "should be allowed a small nucleus of the employer's positions for purposes of employer-employee relations." PERB has typically determined a position to be confidential, as defined by EERA section 3540.1(c), by looking to the job description, the immediate supervisor, the relationship of the position to the supervisor, the expected role that the position is intended to serve, and past performance. (See Sierra Sands Unified School District, supra; Fremont Unified School District (1976) EERB Decision No. 6; Campbell Union High School District (1978) PERB Decision No. 66; and Unit Determination for Professional Librarians of the University of California (1983) PERB Decision No. 247b-H.)

Here, the position met the definition of a confidential employee as set forth in section 3540.1(c). The APC's immediate supervisor is a confidential employee who the APC will assist in a number of confidential matters, as listed in the job description. Moreover, the testimony at the hearing indicated that both Samaniego and Gruenberg regard their positions as interchangeable and closely connected. Despite these factors, the hearing officer found the confidential classification too speculative because Samaniego had not yet performed most of the

⁵Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

confidential tasks listed in the job description during her first five months of employment in the APC position.

In deciding whether a position is confidential, the Board usually has had the benefit of examining positions that have existed for a number of years. (See Sierra Sands Unified School District, supra, EERB Decision No. 2; Fremont Unified School District, supra, PERB Decision No. 66; and Unit Determination for Professional Librarians of the University of California, supra, PERB Decision No. 247b-H.) However, where an employer creates a new position and classifies it as confidential, evidence of actually performed confidential duties may not always exist. The APC's confidential duties primarily involve the area of grievances, bargaining unit negotiations, and confidential personnel files. Although there was evidence that Samaniego had pulled information from employee confidential files for the deputy superintendent, the record contained no evidence of her performing confidential duties relating to grievances and negotiations. On the other hand, no grievances were filed during the five-month period in which Samaniego worked as the APC, and negotiations were not expected to begin until spring. The Board has found that the frequency with which an employee has access to or possesses confidential information is not controlling if such access or possession is in the regular course of an employee's duties and more than a happenstance. (Imperial Unified School District (1987) PERB Decision No. 647; Unit Determination for Professional Librarians of the University of California, supra,

PERB Decision No. 247b-H.) The Board finds that the undisputed testimony, coupled with the APC job description, confidential status of the APC's supervisor, and interchangeable duties between the APC and the supervisor, constitutes sufficient evidence that the APC position is confidential as defined in EERA, and, therefore, properly excluded from the bargaining unit.⁶

ORDER

For the reasons discussed above, the request for the unit modification petition in Case No. LA-UM-407 is hereby DENIED.

Members Craib and Shank joined in this Decision.

⁶It is, however, important to note the hearing officer's concern that employers may attempt to create so-called "confidential" positions in order to exclude employees from the bargaining unit. An employer's ability to circumvent the bargaining unit remains limited by the Sierra Sands "small nucleus" test. Here, the APC position did not exceed the Sierra Sands "small nucleus" limitation, since it left the District with 5 confidential positions from the total 475 employees. Additionally, an association can, at any time, challenge whether a district's confidential position actually performs confidential tasks.