

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA, DEPARTMENT)
OF PERSONNEL ADMINISTRATION,)
)
Employer,) Case Nos. S-UM-380-S
) S-UM-383-S
and) (S-SR-15)
)
CALIFORNIA STATE EMPLOYEES') PERB Decision No. 871-S
ASSOCIATION,)
)
Exclusive Representative.)
_____)
)

Appearances: Joan Branin, Labor Relations Counsel, for State of California, Department of Personnel Administration; Howard Schwartz, Attorney, for California State Employees Association..

Before Hesse, Chairperson; Shank, Camilli and Cunningham, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees' Association (CSEA) and the Department of Personnel Administration (DPA) to a proposed decision of a hearing officer (Board agent), granting the unit modification petitions filed by DPA. DPA sought to exclude Supervising Cook I (SC I) and Food Service Supervisor I (FSS I) classifications from Bargaining Unit 15 (Unit 15) on the grounds that they were supervisory classes under section 3522.1 of the Ralph C. Dills Act (Dills Act or Act).¹ The Board agent found that employees in

¹Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3522.1 provides:

the SC I classification at the Departments of Developmental Services, Mental Health, Education, Veterans Affairs, Rehabilitation, California Conservation Corps and employees in the FSS I classification at the Departments of Developmental Services, Mental Health, Education, and Veterans Affairs, are supervisory, and therefore must be excluded from Unit 15. The Board agent denied DPA's request to exclude from Unit 15 those employees in the SC I classification at the California Highway Patrol, Department of Forestry, and the California Maritime Academy.

The Board, after review of the entire record, including the exceptions and responses filed by the parties, adopts the Board agent's findings of fact and conclusions of law attached hereto, and affirms the decision, consistent with the discussion below.

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

We note, however, that section 3522.1 was repealed by Statutes 1990, Chapter 1522 (S.B. 511), section 6 and added to section 3513 as subdivision (g) without substantive changes by Statutes 1990, Chapter 1522, section 1.

DISCUSSION

Findings of Fact

Although the Board agent's findings of fact are adopted by the Board, there are two misstatements which need correction. Concerning the SCI's at the Department of Education, the Board agent stated:

The amount of time spent in "hands-on" food preparation varies from site to site and is largely a matter of individual style and personality. . . .
(Proposed Decision, p. 7.)

Gloria Cody, an SC I at the School for the Blind, testified, however, that she personally takes the place of a worker in the kitchen only in an emergency. Similarly, although Faye Randolph (Randolph), an SC I at the School for the Deaf, testified a majority of her day is spent in food preparation, her supervisor, Lisa McGregor (McGregor), testified that Randolph rarely assists in food preparation. The Board agent also found McGregor more credible than Randolph in describing the scope of her duties. (Proposed Decision, p. 20.) Therefore, the Board finds, based upon the record before us, that while some variance may exist, in general, the SCI's for the Department of Education participate in food preparation only on an occasional basis.

The Board agent also stated the SCI's with the California Conservation Corps (CCC) ". . . , unlike those in other departments, spend a greater portion of the day in hands-on food preparation." (Proposed Decision, p. 10.) Neither Bill England, an area manager with the CCC, nor Angeline Juhl, an SC I in the

Siskiyou Center, testified concerning what portion of the SC I's work day is spent preparing food. Therefore, the finding that SC I's at the CCC spend a greater portion of their day preparing food than SC I's at other departments is not adopted.

Res Judicata

Prior to addressing the parties' exceptions, it is necessary to first resolve an issue concerning the doctrine of res judicata raised by the petitions in this case.

DPA filed two unit modification petitions with PERB on March 30, 1987, pursuant to PERB Regulation 32781(b)(5). The

²PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The Regulation in effect at the time of the filing provided, in part:

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination:

(5) To delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, or not covered by EERA, HEERA or SEERA provided that:

(A) The petition is filed jointly by the employer and the recognized or certified employee organization, or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding as defined in these regulations in section 33020 for EERA, 40130 for SEERA or 51026 for HEERA.

This Regulation was renumbered as 32781(b)(4) effective

petitions sought the removal of the SC I and FSS I classifications from bargaining Unit 15 on the grounds that they are supervisory within the meaning of section 3522.1 of the Dills Act.

The SC I and FSS I classifications were placed in Unit 15 by the Board when the state bargaining units were initially established. (See Unit Determination for the State of California (SEERA) (1979) PERB Decision No. 110-S.) DPA sought further review of their placement in the Unit on the grounds that they were, in fact, supervisory classifications. The Board in Unit Determination for the State of California (SEERA) (1980) PERB Decision No. 110c-S specifically determined that they were not supervisory and, therefore, should be included in the Unit. Thus, the exclusion of these classifications on supervisory grounds has been previously considered by the Board. Furthermore, the instant petitions has been filed under PERB Regulation 32781(b)(5), rather than on the basis of changed circumstances under subsection (b)(1). As a result, an issue arises as to whether DPA is precluded from relitigating the exclusion of these classifications under the doctrine of res judicata (collateral estoppel).³

January 1, 1989, but no change was made in its substantive provisions.

³The doctrine of res judicata involves two general concepts addressing the relitigation of prior judgments. The Second Restatement of Judgments uses the term "claim preclusion" for the primary aspect of res judicata. (Rest.2d Judgments, Chap. 1, p. 4; 7 Witkin, Cal. Procedure (3rd ed. 1985) Judgments, sec. 190, p. 623.) Collateral estoppel is the second aspect of res

We conclude that the petitions in this case may properly be considered by the Board. In general, the doctrine of res judicata precludes relitigation of an issue in a case when the same issue(s) has been fully and fairly litigated and finally decided in a prior action involving the same parties. (Pacific Coast Medical Enterprises v. Department of Benefit Payments (1983) 140 Cal.App.3d 197, 214 [189 Cal.Rptr. 558].) It has also been generally recognized that res judicata applies in administrative proceedings to decisions of an administrative agency made pursuant to its quasi-judicial functions. (Ibid; also see State of California, Department of Personnel Administration (CAUSE) (1989) PERB Decision No. 727-S.)

However, res judicata must be raised as an affirmative defense. It is not jurisdictional, and, as such, may be waived if not properly raised by the parties. (Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 296 [232 Cal.Rptr. 758]; Sawyer v. First City Financial Corporation (1981) 124 Cal.App.3d 390, 410 [177 Cal.Rptr. 398]; 2 Witkin, Cal. Procedure, supra, Jurisdiction, secs. 78, 79, pp. 447-449; 7 Witkin, Cal. Procedure, supra, Judgment, sec. 189, p. 623.)

judicata and refers to "issue preclusion." (Rest.2d Judgments, Chap. 1, p. 1; Rest.2d Judgments, secs. 27 et seq.; 7 Witkin, Cal. Procedure, supra, Judgments, sec. 253, p. 691.) Under the rule of issue preclusion a prior judgment "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (Todhunter v. Smith (1934) 219 Cal. 690, 695 [28 P.2d 916]; emphasis added.)

It is the rule, of issue preclusion, under the doctrine of res judicata, that we are presented with in this case.

Clearly the prior unit determination decision involving the SC I and FSS I classifications was made pursuant to a quasi-judicial function of PERB. (Unit Determination for State of California (SEERA), supra. PERB Decision No. 110c-S.) Furthermore, CSEA has not asserted res judicata as a defense to the petitions in this case. Accordingly, the Board may consider the merits of the petitions and no showing of changed circumstances is required.

Exceptions

CSEA filed eleven exceptions to the Board agent's proposed decision. In its first two exceptions, CSEA objected to the Board agent's conclusions that: (1) consideration of duties actually performed by SC I's and FSS I's, regardless of job description, is appropriate to determine whether they meet the definition of supervisory employees; and (2) the Board agent was not authorized to determine whether the duties have been lawfully assigned. In its remaining exceptions, CSEA contends the Board agent's findings of fact and conclusions of law were in error with respect to the supervisory authority, responsibilities and actual duties performed by the SC I's and FSS I's at the various work locations identified in the petitions.

DPA excepts to the Board agent's conclusions that: (1) there was insufficient evidence to exclude SC I's at the Department of Forestry, California Maritime Academy and California Highway Patrol from the bargaining unit; and (2) members of the CCC (i.e. corpsmembers) are state employees.

In support of its first exception, CSEA contends:

... job descriptions are fully relevant to the issues involved and that the Hearing Officer committed prejudicial error by refusing or failing to evaluate information contained in these descriptions.

CSEA's contention that the job descriptions are relevant to the issues involved has merit. We reject, however, CSEA's contention that the Board agent refused or failed to evaluate the information contained in them. Specifically, the Board agent held:

At the hearing and through its brief, CSEA argued that the Employer had unlawfully assigned duties not specifically enumerated in each employee's duties statement. It is my role to consider the duties actually performed by the SCIs and FSSIs regardless of job description and determine whether they meet the definition of supervisory employee. [Fn. omitted.] It is not my role to determine whether the duties have been assigned lawfully or not. (Proposed Decision, pp. 3-4; emphasis in original.)

After reviewing the administrative record and the above statements in their full context, it does not appear the Board agent concluded that he was to ignore the job descriptions.⁵

⁴The Board agent used the acronyms "SCI" and "FSSI" to refer to the Supervising Cook I and Food Service Supervisor I classifications, respectively.

⁵The terms "job description" and "duty statement" appear to be used somewhat interchangeably by some of the witnesses and occasionally by the parties. However, based upon the testimony of Nancy Bither (Bither), an assistant section manager in the Classifications and Compensation Division of the DPA, it is clear that these terms are words of art used to describe more specifically the duties and responsibilities demanded of the (Classification at a particular work location. For example, a duty statement for a SC I working at the Department of

Rather, we interpret the Board agent's statement to mean he is not limited in his analysis to the express language contained in the job descriptions when determining whether particular classifications are supervisory, thus rejecting the analysis sought by CSEA that the Board agent consider whether the duties have been lawfully assigned.

Nevertheless, regardless of the Board agent's treatment of the job descriptions, the Board considers them relevant to the issue of whether the SC I and FSS I classifications are

Education's School for the Deaf-Riverside would identify certain responsibilities, together with percent of time allocated to each responsibility, that are unique to that location. Whereas, a duty statement for a FSS I at the Diagnostic Center, Los Angeles, would identify slightly different responsibilities, and possible time allocations, unique to the needs of that work location. Further, duty statements may, and do, vary slightly between agencies as well. Thus, a FSS I (or SC I) assigned to a Department of Education facility might, and indeed did, have duty statements identifying responsibilities slightly different from a FSS I (or SC I) assigned to the Departments of Veterans Affairs or Developmental Services and Mental Health.

It must also be noted that job descriptions, duty statements and classification specifications are distinct documents. As a general rule, the specifications for a classification are prepared by DPA, but ultimately subject to final approval by the State Personnel Board (SPB). The specifications, while generally comprehensive in their definitions of the class and duties performed by incumbents, are typically not specific for departments or work locations. Job descriptions, in contrast, are generally developed by the individual agencies utilizing the classification with the assistance of DPA. They tend to describe more specifically the duties and tasks of the class for that agency than do the class specifications. Similarly, duty statements are more specific documents drawn from the job description and generally prepared with specific work locations in mind. The primary difference between the two documents is that duty statements generally contain statements concerning the allocation of time expected for certain responsibilities. Both job descriptions and duty statements, however, are based on the specification document and therefore are limited in their scope to the responsibilities identified in the class specification.

supervisory for the following reasons. Article VII, section 3 of the California Constitution provides, in pertinent part, that:

(a) The [State Personnel] board shall enforce the civil service statutes and, . . . shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

In accord with this constitutional mandate, the Legislature adopted section 18800 of the Government Code which further provides:

The [State Personnel] board shall create and adjust classes of positions in the State civil service. The classes adopted by the board, shall be known as the Personnel Classification Plan of the State of California. The classification plan shall include a descriptive title and a definition outlining the scope of the duties and responsibilities for each class of positions.

Thus, as a part of its constitutional responsibility, the State Personnel Board (SPB)⁶ is required to develop descriptive titles and definitions outlining the scope of the duties and responsibilities for each class (i.e., class specifications). Further, classification specifications are an integral and

⁶Recently, however, the Legislature transferred a portion of the responsibilities for administering aspects of the Personnel Classification Plan to DPA. (Government Code secs. 19818; 19818.6; also see, Lund v. California State Employees Association (1990) 222 Cal.App.3d 174, 188 [271 Cal.Rptr. 425].) In particular, DPA is required to:

. . . assess the adequacy of the Personnel Classification Plan and, as needed, recommend changes in the plan to the State Personnel Board. The recommendations shall include the need for the establishment of additional classes or the abolishment or alteration of existing classes.
(Government Code sec. 19818.10.)

significant component of the Personnel Classification Plan (Plan) reflecting SPB's intent when creating classifications as well as their status in the overall Plan. Therefore, neither the duty-statement, job description, classification specifications, nor the Plan itself, which the statements represent, should be ignored by PERB when administering the statutes under its jurisdiction. Moreover, recognition and accommodation of the Plan is necessary in light of the California Supreme Court's decision in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (PLF v. Brown).

In PLF v. Brown, supra, the court, responding to a challenge that the Dills Act was unconstitutional on its face noted, *inter alia*, that:

. . . the State Personnel Board's existing classification structure is one of the specific criteria PERB must consider in determining the appropriate units for the selection of an exclusive representative. [Citation and fn. omitted.] (Id. at p. 187; emphasis added.)

Elsewhere, the court stated:

These numerous provisions [of the Act] demonstrate . . . that the Legislature drafted SEERA with the merit principle of article VII [of the California Constitution] firmly in mind, fashioning the statute specifically to avoid any conflict with that constitutional mandate. (Id. at p. 186; emphasis added.)

The Legislature's intent to avoid such conflicts is reflected, in part, in section 3521 of the Dills Act.⁷ In particular, subsection (b)(2) of that section provides, in relevant part:

(b) In determining an appropriate unit, the board shall take into consideration all of the following criteria:

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account such factors as . . . the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.
(Emphasis added.)

In light of the above, the Board finds that the Legislature did not intend for PERB to ignore job descriptions, duty statements, or the civil service classification structure established by SPB in determining whether an employee or classification is supervisory under the Act. Rather, it intended that PERB consider the classification structure, together with the duty statements, job descriptions, and class specifications,

⁷Our concurring colleagues misconstrue our reference to PLF v. Brown, supra. They suggest our decision is based on the mistaken perception that a conflict exists between PERB's role in determining whether a classification is supervisory and SPB's function in administering the civil service system (Hesse concurrence, pp. 24-25; Cunningham concurrence, pp. 29-31), and, further, that the obligation to harmonize PERB's role with SPB's does not arise unless a conflict exists.

While there are many instances in which the function of SPB and PERB may be in conflict, we disagree that such conflict is required before PERB can or should act to harmonize our respective functions.

when modifying or determining "appropriate" bargaining units. Such consideration extends to determining which classifications or positions should be excluded or included in the bargaining unit. Thus, the Board, in determining whether a particular classification is "supervisory," may give some weight to the scope of responsibilities, authority, and duties described in the class specification and job description or duty statement created by SPB.

The Board does not, however, find that the specifications, job descriptions or duty statements create a rebuttable presumption as to the status of the classification. Rather, such documents should be considered in unit modification hearings, along with the Board's analysis concerning supervisors contained in Unit Determination for the State of California (SEERA), supra, PERB Decision No. 110c-S, to the extent they represent probative evidence accurately describing the duties actually performed by incumbents in the class(s). Further, the mere inclusion of the word(s) "supervisor" or "supervisory" in the class title, specification, job description, or duty statement is not sufficient to support a finding by PERB that the class is supervisory.

In addition, once there has been a determination that a classification is, indeed, supervisory, subsequent exclusionary challenges should be made on a position-by-position approach based on the actual duties performed by the incumbent(s) in the disputed positions. In such instances, however, PERB should

allow SPB, or its designee, the opportunity to review the classification to assure that the positions in question are properly allocated and classified under the Personnel Classification Plan.

In the instant case, the evidence demonstrates that the specifications, job descriptions, and duty statements accurately reflect the supervisory nature of the duties actually performed by the SC I and FSS I classifications at the various work locations for which testimony or other evidence was presented. The accuracy of the class specifications is supported in the record by the testimony of Bither, the classification section manager. There is also considerable testimony from other witnesses, representing nearly all of the work locations in question, concerning the duties actually performed by the incumbents. Their testimony is consistent with the information contained in the job descriptions and duty statements. Thus, the Board agent's findings and conclusions concerning the supervisory duties of the SC I and FSS I classifications at the various work locations are adequately supported by the record and adopted by the Board. Accordingly, the nine exceptions asserted by CSEA to those findings are rejected.

With respect to the SC I positions at the Department of Forestry, California Highway Patrol, and the California Maritime Academy, the Board agent also correctly concluded there was insufficient evidence from which to infer their supervisory status. The burden of proving an exclusionary claim is on the

party asserting the claim—in this case DPA. (Unit Determination for the State of California (SEERA), supra, PERB Decision No. 110c-S; In Re the State Employer-Employee Relations Act, Phase III Unit Determination Proceeding (1979) PERB Order No. Ad-79-S.) There were no job descriptions or duty statements offered into evidence by DPA pertaining to the SC I's at these three locations. In addition, no other evidence was offered concerning the specific job duties of the positions at these locations. Accordingly, no finding can be made with respect to those positions. Moreover, while job descriptions or duty statements describing duties performed at specific work locations might constitute "some evidence" of their supervisory status, they would not be sufficient by themselves to establish DPA's exclusionary claim, particularly where the positions have been previously placed in the bargaining unit. Accordingly, the SC I positions at the Department of Forestry, California Highway Patrol, and the California Maritime Academy are not excluded from the Unit.

We also conclude that the Board agent was correct in stating that PERB is not authorized to determine whether the supervisory duties have been lawfully assigned. CSEA's argument is, in effect, a request that PERB consider an out-of-class claim⁸ based

⁸ "Out-of-class claim" is a term generally used to describe duties performed by an employee in one classification which are outside the scope of the duties for that class. When such duties are normally performed by employees in classes paid at a higher rate, the employee may file what is termed an "out-of-class claim" for the difference in pay, in accord with the Government Code, DPA regulations, and provisions of the collective

upon the unlawful assignment of certain duties outside the scope of the SCI or FSS I classifications. Clearly, the Legislature left consideration of such claims to the jurisdiction of DPA. (See Gov. Code secs. 19818.8, 19818.16.) CSEA's argument is, therefore, rejected.

Finally, DPA excepts to the Board agent's finding that Conservation corpsmembers are civil service employees within the meaning of the Dills Act. In arriving at this conclusion the Board agent stated:

The Corps members' [sic] lack of civil service status might have impaired a finding that the SCI, is a supervisor prior to the Board's recent decision [fn. omitted] [in State of California (DPA) (1990) PERB Decision No. 787-S]. Now, however, we must look upon the Corps members [sic] as employees and, based on the SCI's role in transferring, demoting and recommending for permanent status these Corps members [sic], the SCI must be found to be supervisors based on their roles in controlling personnel and not just work processes.
(Proposed Decision, p. 25; emphasis added.)

Although it is not entirely clear from its exception, DPA appears to except primarily to any inference, based upon the above finding, that corpsmembers have [full-merit system] civil service status. DPA cites Bush v. California Conservation Corps (1982) 136 Cal.App.3d 194 [185 Cal.Rptr. 892] in support of its contention that corpsmembers are not public employees. Quoting from the decision, DPA states:

bargaining agreement, if applicable. (See Gov. Code sec. 19818.16; California Code of Regulations, title 2, Regulation 599.608.)

Clearly, the Legislature never contemplated the elevation of corpsmembers to the status of civil service employees; employment is relegated to a role secondary to the emphasis on training and education, fid. at p. 201.)

This citation, however, is not presented in its full context. The corpsmembers in Bush, supra. were challenging their termination from CCC for disciplinary reasons. The corpsmembers argued that they were entitled to the full procedural due process, procedures promulgated in Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14]. The CCC argued that corpsmembers were not public employees nor possessed any other property right in continued employment and consequently were not entitled to due process protection. (Id. at p. 200.) It was in this context that the court arrived at its conclusion. Thus, immediately following the statement above, the court also concluded:

As a consequence, plaintiffs have no statutory property interest as permanent (nonprobationary) public employees per Skelly v. State Personnel Bd., supra. 15 Cal.3d 194. (Ibid.)

Accordingly, when the court stated corpsmembers were not "civil service employees," it used the term according to its traditional meaning referring to corpsmembers' lack of permanent status and selection for employment or promotion by competitive examination under the merit system.

Furthermore, the court, in Bush, supra. did not address the definition of a state employee under the California Constitution nor under section 3513(c) of the Dills Act.

In contrast, that question was squarely addressed by the Board in State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S. In that decision the Board noted that section 3513(c) defines a state employee as: "any civil service employee of the state." (Id. at p. 2.) The Board further noted that Article VII, section 1(a) of the California Constitution states: "Civil service includes every officer and employee of the state except as otherwise provided in this Constitution" (i.e., exempt under Article VII, section 4). (Id. at pp. 3, 11, 14.) The Board concluded that:

[a]ll personnel appointments other than the specific exempt appointments are therefore part of the civil service system and have some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type. (Id. at p. 14; emphasis added.)

In the instant case, corpsmembers are not listed under Article VII, section 4, as one of the categories of employees specifically exempt from civil service. Further, although their relationship with the State is unique in that the primary objective served by their employment is for education and work experience opportunities (Public Resources Code sec. 14000, et seq.), corpsmember positions are, nonetheless, a "personnel appointment . . . whether it be seasonal, limited term, . . . or any other type." Accordingly, we find they are state civil service (nonmerit system) employees for the purposes of the

Dills Act.⁹

ORDER

Based on the foregoing, the unit modification petitions are GRANTED. The positions of Supervising Cook I in the Departments of Developmental Services, Mental Health, Education, Veterans Affairs, Rehabilitation, and California Conservation Corps are excluded from Unit 15. The positions of Food Service Supervisor I in the Departments of Developmental Services, Mental Health, Education and Veterans Affairs are also excluded from Unit 15.

⁹The Board does not adopt the Board agent's conclusion that "The Corps members [sic] lack of civil service status might have impaired a finding that the SCI, is a supervisor" The lack of actual employment status does not preclude the Board from finding the SC I classification is supervisory. In State of California, Department of Personnel Administration (CAUSE) (1989) PERB Decision No. 727-S the Board adopted portions of the administrative law judge's (ALJ) proposed decision which found that Park Ranger II's were supervisors even though they supervised Park Aides who the ALJ stated did not meet the "criteria of civil service employees in the hire and retention of employment." (Proposed Decision, p. 24.) The ALJ noted the Park Aides meet all of the normal "employee" requirements. They work for a state agency, they are paid on an hourly basis with state funds, they represent the state in dealing with the public, they work established hours on state property and are responsible to a full-time state employee. Under such circumstances, the ALJ concluded an employer-employee relationship is established during the time they are functioning as seasonal park aides, irrespective of whether their hiring and tenure rights qualifies them as "civil service" employees.

Thus, the Board has recognized that it is not necessary that the individuals supervised be civil service employees so long as there exists the indicia of an employer-employee relationship. The application of this analysis to the instant case is moot, however, in light of the Board's holding in State of California (Department of Personnel Administration), supra, PERB Decision No. 787-S.

The petitions are DENIED with regard to the SC I positions at the Department of Forestry, California Highway Patrol and California Maritime Academy.

Member Shank joined in this Decision.

Chairperson Hesse's concurrence begins on page 21.

Member Cunningham's concurrence begins on page 26.

Hesse, Chairperson, concurring: I concur with Members Camilli and Shank's findings and conclusions with one exception. Like Member Cunningham, I disagree with the requirement that when an employer or exclusive representative challenges a position's supervisory status, "PERB should allow SPB, or its designee, the to review the classification to assure that the positions in question are properly allocated and classified under the Personnel Classification Plan."

Pursuant to section 3522.1¹ of the Ralph C. Dills Act (Dills Act), the Public Employment Relations Board (PERB or Board) has the authority to determine whether a position is supervisory. Section 3522.1 provides:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

The language in the above section allows the Board to look at the duties as well as the job description or title in determining

¹At the time the unfair practice charge was filed, the definition of "supervisory employee" appeared in section 3522.1 of the Dills Act. In 1990, section 3522.1 of the Dills Act was renumbered. The definition of "supervisory employee" now appears in section 3513(g) of the Dills Act. Except for one minor word change, former section 3522.1 and section 3513(g) are identical.

whether an employee is a supervisor within the meaning of the Dills Act. Generally, if the duties are consistent with the job description or title, then there is no problem with the Board considering both the actual job duties and job description or title in making its determination. The determination of whether an employee is a supervisor is more problematic when the duties do not match the job description or title. In all cases, the Board examines the entire record, including the duties, to determine whether the position should be included in or excluded from the bargaining unit.

Section 3540.1(m) of Educational Employment Relations Act (EERA) is substantially similar to section 3522.1 of the Dills Act. Section 3540.1(m)

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

Cases involving section 3540.1(m) of EERA direct the Board to look at all the evidence in the record to determine whether an employee is a supervisor. In Sweetwater Union High School District (1976) EERB Decision No. 4² and San Diego Unified School

²Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

District (1977) EERB Decision No. 8, the Board held that the .(Supervisory criteria in section 3540.1 (m) are to be viewed in the disjunctive. Therefore, proof that the employee possesses any one of the duties listed in section 3540.1(m) is sufficient to make an employee a supervisor within the meaning of EERA. In Glendale Community College District (1979) PERB Decision No. 88, the Board stated that section 3540.1(m) specifically abjures reliance on job titles. In that case, the Board was faced with determining whether certain division chairpersons were supervisory employees. The Board further noted that in prior cases, the Board had found some personnel with the title of division chairperson to be supervisory (Los Rios Community College District (1977) EERB Decision No. 18), while others were not supervisory (Monterey Peninsula Community College District (1978) PERB Decision No. 76). In Cantua Elementary School District (1983) PERB Decision No. 295, the Board looked to the record as a whole to determine whether the employee was a supervisor pursuant to section 3540.1(m) of EERA.

Finally, in interpreting similar language in section 3580.3 of the Higher Education Employment Relations Act (HEERA),³ the

³Section 3580.3 of HEERA provides, in pertinent part:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the

Board's determination of lack of supervisory status was based upon the totality of evidence presented. (The California State University (1983) PERB Decision No. 351-H.)

As it is apparent from these cases in which the Board interpreted similar statutory language, the Board examines all the evidence in the record (including classification specifications, job descriptions, duty statements, title and actual duties performed) to determine whether an employee is a supervisor. In the present case, I agree with my colleagues that the classification specifications, job descriptions or duty statements should be considered to the extent that they may represent probative evidence of the job duties being performed by the employees. Further, I also agree that the mere inclusion of the word "supervisor" or "supervisory" in the title, classification specification, job description or duty statement is not sufficient, by itself, to support a finding by the Board **that** the position is supervisory.

However, I strongly disagree with Members Camilli and Shank's requirement that PERB allow the State Personnel Board (SPB) the opportunity to review the classification. I believe there is no reason to accord such deference to the SPB. Nor have Members Camilli and Shank provided a reason for their position. Their opinion cites Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (PLF v. Brown) to support their

foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

position that PERB should recognize and accommodate SPB's Personnel Classification Plan. However, PLF v. Brown is inapposite. In PLF v. Brown, the court stated:

Because no actual jurisdictional conflict between PERB and the State Personnel Board confronts us in this proceeding, we have no occasion to speculate on how some hypothetical dispute that might be presented for decision in the future should properly be resolved. As numerous authorities in other jurisdictions make clear, however, any conflicts which may arise in this area can be resolved either by administrative accommodation between the two agencies themselves [fn. omitted] or, failing that, by sensitive application of evolving judicial principles. [Citations.]
(Id, at p. 200.)

In the present case, there is no conflict. Accordingly, Members Camilli and Shank's requirement that the parties ask SPB to review the classification is superfluous. Regardless of SPB's finding, PERB has the authority under the Dills Act to determine whether the position is supervisory.

Cunningham, Member, concurring: I agree that the positions of Supervising Cook I (SC I) and Food Service Supervisor I (FSS I), within the state departments for which evidence was presented in this proceeding, should be excluded from Bargaining Unit 15 (Unit 15) on the grounds that these classifications are performing supervisory duties within the meaning of section 3522.1 of the Ralph C. Dills Act (Dills Act).¹ However, I write separately to present my views on one issue raised by the facts of this case.

The California State Employees' Association (CSEA) argues that the hearing officer (HO) improperly considered all the duties performed by SC I's and FSS I's, whether or not assigned lawfully and whether or not such duties are properly within the state job description/specification. The Department of Personnel Administration (DPA) argues in contrast that the HO does not have the authority to rule on CSEA's claim that SC I's and FSS I's are performing duties which were unlawfully assigned to them. Also, DPA asserts there is no indication that the HO did not consider the specifications and duty statements of these classifications, and that the specifications allow all supervisory duties which are performed.

We are guided in our inquiry as to the proper role of State Personnel Board (SPB) classifications, specifications and duty statements in unit modification procedures by the language of section 3522.1. The scope of section 3522.1 is clear; it states:

¹see footnote 1 of the majority opinion.

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees. [Emphasis added.]

The language quoted above focuses on actual responsibilities carried out by employees in their day-to-day work. The statutory requirement that completion of the enumerated tasks involve the use of independent judgment supports the conclusion that evidence as to actual duties performed constitutes the primary consideration in this proceeding. (See Unit Determination for the State of California (1980) PERB Decision No. 110c-S (Unit Determination).) Stated simply, the relevant inquiry herein is whether SC I's and FSS I's are actually performing supervisory responsibilities on a regular basis. Unit modification cases interpreting similar statutory language under the Educational Employment Relations Act have reached this same conclusion. (See Antioch Unified School District (1984) PERB Decision No. 415.) Additionally, although CSEA's claim that the SC I's and FSS I's are being worked out of class is relevant to the duties actually performed, insofar as evidence may be presented to show that duties performed are not those of the specification or duty statement, the Board and the HO have no jurisdiction under the

Dills Act to remedy any out-of-class claim. Such a claim is properly within the jurisdiction of SPB, as administered by DPA. (Gov. Code, secs. 19818 et seq.)

The above quoted statutory language of section 3522.1 clearly forecloses the Board from looking solely to job descriptions in making the determination that supervisory duties are being performed. This statute would also logically apply to job specifications as created by SPB and administered by DPA. However, the language of section 3522.1 does not appear to foreclose the Board from reviewing job descriptions to the extent that they represent probative evidence of the duties that are actually being performed by the subject classifications. This evidence would, of course, be considered in conjunction with the factors inherent in supervisory duties which are discussed in Unit Determination. My concurring colleagues acknowledge this proposition, and I agree.

Next, however, my colleagues state:

In such instances, however, PERB should allow SPB, or its designee, the opportunity to review the classification to assure that the positions in question are properly allocated and classified under the Personnel Classification Plan.
(Majority opn., pp. 13-14.)

Initially, I fail to see any statutory mandate in the Dills Act that this requirement be satisfied prior to bringing a petition for unit modification. However, my colleagues appear to advance another basis for this new requirement.

Apparently, my colleagues would impose this requirement on parties bringing unit modification petitions based on language contained in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (PLF v. Brown). In PLF v. Brown, the California Supreme Court rejected a challenge that the Dills Act was facially unconstitutional based on conflict with the civil service system of the California Constitution. Regarding the possibility of a conflict with the Constitution in the application of the Dills Act in a specific fact situation, the court stated that resolution of such a conflict could occur through accommodation among SPB and PERB or through the "sensitive application of evolving judicial principles." (Id. at p. 200.) Thus, in the present case, the question is whether there is a conflict with the constitutional mandate for administration of the civil service system by SPB if this Board initially looks to actual duties performed, demonstrated by duty statements and witness testimony, as required by section 3522.1, rather than forbearing from doing so until SPB or DPA, its designee, reaffirms its belief that the positions at issue are accurately classified.

Under Government Code section 18800 et seq., SPB has the responsibility to create and adjust classes of positions in the state civil service system. Government Code section 18802 specifically establishes SPB's prerogative to divide, add or alter existing classes. This section also states that SPB

shall consider recommendations by DPA in so altering classes. Finally, testimony in the hearing on this matter indicated that DPA is vested by SPB with the authority to review existing classifications for accuracy, as well as to determine if an employee is performing duties outside his or her classification. (See Lund v. California State Employees Association (1990) 222 Cal.App.3d 174, 188 [271 Cal.Rptr. 425] cited in the lead opinion at p, 10, fn. 6.)

What this portion of the Government Code does not contain is a definition of supervisor for purposes of the classification system which SPB is to govern. Nancy Bither (Bither), in her testimony, stated that, to her knowledge, there was no written definition of supervisor, as that term is used in SPB specifications. She further stated she would judge supervisory status for purposes of the classification system on a case by case basis. Because SPB does not utilize a constitutionally or legislatively imposed definition of supervisor within its classification system, I fail to see any real or potential conflict with the administration of the civil service system if this Board fulfills its statutory mandate to judge supervisory status according to the provisions of section 3522.1. Most importantly, my concurring colleagues are unable to enunciate any such conflict.

Based on the lack of a definition of the term supervisor, as employed by SPB, and the failure of my colleagues to enunciate any conflict with the constitutional mandate of SPB, I see no

legal or practical basis for requiring some sort of preliminary showing that a petitioning party in a unit modification has sought SPB's or DPA's reaffirmation of the correctness of a position's classification within the civil service system. The classification system and the collective bargaining apparatus created by the Dills Act have acted independently since the Dills Act's inception. Absent a conflict with some function of SPB, the rule requiring accommodation and harmonizing, expressed in PLF v. Brown, does not apply.² If no actual conflict exists, there is no need to enmesh the two systems. Regarding the subject specifications, I further see no conflict by looking primarily to actual duties performed, as has been the practice of this Board since Unit Determination.³

Finally, although my colleagues enunciate what appears to be a new evidentiary showing of some sort to be utilized in unit modification procedures, there is a noticeable failure to properly define the parameters of this new showing. I find this

²My concurring colleagues assert that conflict is not required before PERB should act to harmonize its functions with those of SPB. (Majority Opn., p. 12, fn. 7.) There is no support for this proposition in PLF v. Brown. Nevertheless, my colleagues fail to explain why such accommodation is either required or advisable in the absence of a conflict.

³There is no conflict inherent in the fact that, by looking at actual duties performed, an employee could be deemed a supervisor for collective bargaining purposes, but not viewed as a supervisor by the classification system. The purpose of each system of laws is different and each serves varying goals. Similar variations occur in other areas of employment law. One example is found in the treatment of volunteers under the Education Code. Volunteers are deemed not to be employees of school districts for any purposes except insurance coverage and workers' compensation issues. (See Ed. Code, sec. 35021.)

lack of clarity to be very troubling. In the present proceeding, my colleagues indicate that this showing is satisfied because DPA presented testimony from Bither, one of its own employees, which indicated that these positions are "accurately" classified. However, no guidance is offered as to proper procedures to meet this showing in cases where the moving party is not the employer.

However, I agree that the remaining exceptions brought by CSEA lack merit and that all positions of SC I and FSS I at the subject departments where evidence was presented must be excluded from the unit as supervisory, based on the testimony presented as to the actual duties performed by persons in these positions.

Also, DPA's assertion that corpsmembers are not civil service employees for purposes of the Dills Act lacks merit for the reasons stated in the opinion of my colleagues.

On the facts presented before us, I concur that the SC I's in the Departments of Education, Developmental Services, Mental Health, Veterans Affairs, Rehabilitation and Conservation Corps and the FSS I's in the Departments of Education, Developmental Services, Mental Health, and Veterans Affairs should be excluded from Unit 15 based on the evidence that these positions are performing supervisory duties within the meaning of section 3522.1. Finally, I further concur that the SC I's at the Department of Forestry, California Highway Patrol and the California Maritime Academy must remain in Unit 15 because DPA failed to present evidence as to the actual duties being performed by the persons in these positions.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA, DEPARTMENT OF
PERSONNEL ADMINISTRATION,

Employer,

and

CALIFORNIA STATE EMPLOYEES
ASSOCIATION,

Exclusive Representative.

)
)
) Representation
) Case Nos. S-UM-380-S
) S-UM-383-S
) (S-SR-15)
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) PROPOSED DECISION
) (02/02/90)
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Appearances: Bruce Notareus and Joan Branin for State of California, Department of Personnel Administration; Howard Schwartz and Virginia Guadiana for California State Employees Association.

Before: Roger Smith, Hearing Officer

PROCEDURAL HISTORY

On March 30, 1987, the State of California, Department of Personnel Administration (hereafter DPA or Employer), filed two unit modification petitions with the Public Employment Relations Board (PERB or Board) pursuant to regulation 32781(b)(5).¹ The

¹The regulation in effect at the time of the filing provided in part:

(b) A recognized or certified employee organization, an employer or both jointly may file with the regional office a petition for unit modification:

(5) To delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, or not covered by EERA, HEERA or SEERA provided that:

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

petitions seek to have the positions of Supervising Cook I (hereafter SCI) and Food Service Supervisor I (hereafter FSSI) deemed supervisory employees within the meaning of section 3522.1 of the Dills Act,² and thus removed from Bargaining Unit 15 which

(A) The petition is filed jointly by the employer and recognized or certified employee organization or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding as defined in these regulations in section 33020.

This regulation was renumbered (as 32781(b)(4)) effective January 1, 1989, but no change was made in its substantive provisions.

²The Dills Act is codified at Government Code section 3512 et seq. Section 3522.1 defines supervisory employee as:

. . . any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

is currently represented by California State Employees Association (hereafter CSEA or Union.)³

The SCI and FSSI classifications were placed in the unit by the Board in the initial creation of the State bargaining units. (See Unit Determination for the State of California (1979) PERB Decision No. 110-S.) DPA requested further review of certain exclusionary issues including the status of SCI and FSSI as supervisors, and in Unit Determination for the State of California (1980) PERB Decision No. 110c-S, the Board specifically included both positions in Unit 15. These positions have remained in the unit through the instant filing.

After several attempts to resolve the dispute as to the designation of the SCI and FSSI proved unsuccessful, a hearing was conducted. The formal hearing in this matter was held on November 15, 16 and 18, 1988, February 6, 7, 8, 9, 10 and 14, 1989, and concluded on March 17, 1989. The parties briefed their respective positions and on June 12, 1989, the case was submitted for decision.

At the hearing and through its brief, CSEA argued that the Employer had unlawfully assigned duties not specifically enumerated in each employee's duties statement. It is my role to consider the duties actually performed by SCIs and FSSIs regardless of job description and determine whether they meet the

³CSEA was certified as the exclusive representative for Unit 15 on July 10, 1981, and was a party with DPA to a written agreement in effect July 1, 1985 through June 30, 1987.

definition of supervisory employee.⁴ It is not my role to determine whether the duties have been assigned lawfully or not.

ISSUE

1. Should the SCI and FSSI classifications be deemed supervisory and thus removed from Unit 15?

FINDINGS OF FACT

There were 65 SCIs employed at the time of the hearing: 18 were employed by the Department of Developmental Services, 16 by Mental Health, 16 by Conservation Corps, 7 by Education, 3 by Veterans Affairs, 2 by the Highway Patrol, 1 by Forestry, 1 by Rehabilitation and 1 by the Maritime Academy. Fifty four (54) FSSIs were employed at the time of the hearing: Developmental Services employed 25, Mental Health 21, Veterans Affairs 4 and Education 4. There was testimony which related to the assignments of these positions in all departments but Forestry, Highway Patrol and the Maritime Academy.

The testimony of witnesses called by the parties demonstrated contradictory views of the assignments of FSSIs and SCIs, much as the Board had already reviewed in Unit Determination for the State of California, supra, PERB Decision No. 110c-S. The Board dealt with a review of the duties of these two classification in two pages. The testimony and argument elicited through this proceeding produced well over two thousand pages with results which can be similarly summarized.

⁴See footnote 2 above. See also, San Rafael City Schools (1977) EERB Decision No. 32, at p. 7.

Supervising Cook I

Department of Rehabilitation

The one SCI, Betty Hightower, oversees five full-time employees and one part-time employee at the Orientation Center for the Blind. Work schedules are well established and routine but for accommodations made for absences. The SCI has the responsibility and authority to assure complete coverage for the preparation, serving and clean-up of meals at the Center. Hightower had an active role in recommending for hire a Cook II and has completed probationary reports and performance evaluations for other employees.

The SCI estimates that approximately 25% of her time is spent in the kitchen actually involved in the preparation of breakfast or lunch meals. The remainder of her time is spent processing food and supply orders, overseeing the work of other employees, and generally administering the functioning of the kitchen and food serving areas of the Center.

Veterans Affairs

The SCIs oversee approximately twelve employees per shift at the Veterans Home in Yountville. Work schedules are regular and only need adjustment for absences. The SCI has authority to approve sick leave, vacation or overtime. Assignment schedules are prepared by SCIs two days in advance. Cooks and Food Service Workers (FSW) are given different assignments to break up the monotony of the work and to keep them fresh in their jobs.

A SCI has effectively recommended the dismissals of at least four employees due to absenteeism and/or poor work performance. SCIs are responsible for completing performance evaluations and probationary reports which are effectively acted upon by management. SCIs also participate in panel interviews for promotion and recruitment with an equal voice in recommendation.

SCIs spend a small portion of their time actually involved in the preparation, storage or shipment of food. Most of their time is spent assuring quality control of food preparation, ordering supplies, preparing schedules and overseeing their shift of employees.

Education

The Department of Education maintains six schools at which food services are provided. The California Schools for the Deaf in Riverside and Fremont are larger facilities with student capacities of over 500. Each of these schools has a kitchen with two SCIs, each working on a different shift.

The California School for the Blind in Fremont with just over 100 students has one SCI. Three diagnostic centers in San Francisco, Fresno and Los Angeles each have one SCI on staff.

Each of the schools for the Deaf used to employ a Supervising Cook II but those positions were downgraded to SCI. The downgrading was completed as the result of a 1981 study to determine what improvements, if any, were needed in the food services arrangement area at the six schools. Since 1982-1983 no SCIs have been employed at any of the six schools.

Exhaustive testimony and documentary evidence indicates that SCIs effectively recommend for hiring, promotion and probationary status, Cooks I and II and Food Services Workers. SCIs approve overtime, CTO, and sick leave usage; monitor time sheets; conduct employee orientation and training; organize and call staff meetings; and monitor and occasionally assist in the preparation of meals. Recommendations of SCIs relating to employee counseling and discipline are substantially followed although occasional written memos are altered for style or tone. The amount of time spent in "hands-on" food preparation varies from site to site and is largely a matter of individual style and personality. The differences in style are well evidenced by the testimony of Gloria Lee Cody and Faye Randolph.

Ms. Cody, a SCI at the School for the Blind, and a witness called by DPA, evidenced her method of correcting and/or pointing out problems to employees in her charge, through counseling session memos.⁵ Ms. Randolph, a witness for CSEA and a SCI at the School for the Deaf, indicated her method for dealing with on-the-job problems with the employees assigned to her kitchen was through informal meetings at the end of the workday.⁶ The methods of the two SCIs differ but their reasons for meeting with employees to review work progress is the same: to correct mistakes, improve work performance and guarantee a safe and healthy environment.

⁵TR Vol. V, pp. 53-54 and Employer exhibits 66 A, B C.

⁶TR Vol. IX, pp. 31-32.

Developmental Services and Mental Health

An Interagency agreement between these two departments creates a functional administration and supervision of both food services programs by Ms. Lucille Peterson. Ms. Peterson is employed as the departmental food administrator and has been in her position for twelve years. Her testimony and the testimony of SCIs who work for each department reflect a similar description of duties for the SCIs. There are seven developmental centers/state hospitals where SCIs work. At each facility there are approximately three SCIs, each working either an a.m. assignment, p.m. assignment or a weekend and relief assignment. The SCIs report to a SCII who works mid-shift, Monday - Friday. Approximately 10 to 15 production cooks and food service workers report to the SCI on any given shift. The SCII does not have hands-on supervision of meals. That responsibility lies with the Cook Is or IIs. Each facility has a central kitchen which services and prepares food for the clients for the entire center/hospital and several have satellite kitchens.

Again, there is conflicting testimony regarding the amount of time actually spent by SCIs overseeing the food production workers versus actual involvement in food production. SCIs expend substantial time completing time sheets, reviewing assignments, attempting to locate substitutes for employees who are absent and processing work orders for daily menu preparation.

SCIs vary in their roles as disciplinary agents. Michael Hedgpeth, a SCI at Lanterman Developmental Center, testified on behalf of CSEA that he did not concur with all the disciplinary decisions made by the management of Developmental Services, but indeed instigated action on his own, to improve employee work habits. He further conceded that as a SCI, he had effectively made recommendations that an employee be rejected prior to passing probation.

Conservation Corps

There are 16 SCIs working for the California Conservation Corps (CCC or Corps). Each is in charge of a kitchen at one of 17 centers throughout California. Each center may have satellite centers at which, if there is a functioning kitchen being operated, it is run either by Corps members, or a Cook CCC. Each center has an area manager, who acts as the site administrator, and either a Business Services Officer (BSO) or Business Services Assistant (BSA), as an administrative assistant, and a SCI as kitchen supervisor. A Cook CCC may also be assigned each center. The number of Corps members at each center varies depending on the season and nature of assignments, but runs at approximately 100.

Corps members may serve as cook specialists or on KP duty as part of their assignment. Corps members are non-civil service employees who are on one year training and educational contracts

with CCC.⁷ Corps members can be and have been promoted into civil service positions including, Cook CCC. The Cook CCC position is used at various centers as an assistant kitchen manager. Often times the Cook CCC works an independent schedule from the SCI in order to provide shift relief and cover vacation, holiday and other absence periods for the SCI. In the absence of the SCI the Cook CCC is the kitchen's on-site manager, subject to the review of either the BSO, BSA or area manager. The official duties statements of Cook CCC, SCI Siskiyou and Cook are nearly identical. The testimony elicited by DPA witnesses confirms the duties assigned Cook CCC and SCI are substantially the same but for the role of SCI in serving on interview panels, and completing yearly evaluations and monthly time sheets.

The SCI is responsible for ordering and storing food supplies, preparing meals, maintaining a safe and clean work environment, and serving nutritious meals to the staff assigned the center. SCIs do prepare meals and set menus as part of their regular duties. CCC SCIs, unlike those in other departments, spend a greater portion of the day in hands-on food preparation.

Food Services Supervisor I

Developmental Services and Mental Health

The 46 FSSIs assigned these two departments use the lion's share of the FSSI classifications statewide. Again, these two

⁷At the time of the hearing, the employee status of Corps member was not at issue. In light of the recent decision in State of California (1990) PERB Decision No. 787-S, Corps members are treated for purposes of this decision as employees within the meaning of the Dills Act.

departments operate their food services through an interagency agreement.

The principal duties of a FSSI are to schedule and maintain adequate personnel for daily cafeteria food service, assuring quality and quantity control of food portions in the cafeteria, assuring special dietary needs of clients are met, maintaining a safe and sanitary serving and dining area and monitoring the functioning of serving staff assigned to a particular work area. In addition, attending and calling staff meetings, completing personnel forms and providing staff training take up a portion of the FSSI's day.

Meals are prepared at the center's and hospital's kitchens, and shipped to serving cafeterias throughout various buildings and floors on the grounds. FSSIs must guarantee that food has arrived and is ready to be served according to a very strict schedule. In order to guarantee adequate staffing for the service of meals, FSSIs create and maintain work schedules to assure sufficient staff coverage for all meal times. FSSIs have used their authority to call for substitute help if a FSWI or FSWII is absent unexpectedly.

Between roughly 12-20 FSWIs and IIs work under the direction of the FSSI. The FSSIs cover various shift changes needed to provide 3 meals per day 7 days per week. The FSSIs report to a FSSII who works a straight 8:00 a.m. - 5:00 p.m. shift, Monday - Friday. The FSSII reports to a director of dietetics who is the on-site food services manager at each center-hospital.

The FSSI approves monthly time sheets for FSWs assigned their shift. Merit Salary Adjustments (MSAs) are completed by the FSSIs for employees on their shift. In addition, FSWs' probationary reports and annual evaluations are reviewed and prepared by the FSSIs on their shifts. FSSIs have effectively recommended that employees not be passed while on probationary status.

Veterans Affairs

The four FSSIs assigned to the veterans home work at three different work sites. Two work in the hospital kitchen where food trays are prepared in an assembly line style for shipment throughout the 13 wards of the hospital. One works in the main dining room cafeteria and the other FSSI works at an annex within a ten minute walk of the hospital. They report to one of two FSSIs who in turn report to an assistant director of dietetics.

The assembly line food tray preparation in the hospital employs seven or eight Food Service Workers. As part of the FSSIs' duties, they act as inspectors of the quantity and quality of portions served. Based on their evaluations of the work performed by the FSWs and IIs, the FSSIs complete probationary reports, merit salary adjustment reviews, annual performance evaluations and disciplinary notices if needed. The FSSI is responsible for creating and maintaining work schedules to insure FSWs and IIs cover the seven-day, three-meals-per-day food service to the hundreds of patients at the facility.

Complaints by nursing staff, medical staff and patients relating to timeliness, temperature, portions or quality of food are handled by FSSIs. Only if problems are not resolved at this stage would a FSSII, or the director or assistant director of dietetics be contacted. FSSII's have no day-to-day contact with the FSWIs and IIs as it relates to the assignment of duties or problems on the job. FSSIs are given broad authority to resolve problems with staffing, assignments, and complaints.

FSSIs also serve on screening committees for hiring and promotional exams. Their role is that as an equal participant with two other employees, generally a FSSII and the director or assistant director of dietetics. The testimony of Inez Crouse, a FSSI, indicates that decisions on hiring were made by consensus with her role being no more or less influential than that of two other panel members in the interview and hiring process. Ms. Crouse advised that she had effectively recommended the promotion of at least one employee and had been asked for her opinions and advice on others.

Education

As a result of the aforementioned reclassification study in the department conducted in 1981-1982, the department created FSSI positions at the two larger schools; the schools for the deaf in Fremont and Riverside.⁸ Each school employs two FSSIs. Each FSSI works a separate shift in the 5-day school week. They report to a director of dietetics. The FSSI works with between

⁸See pp. 6 - 7 relating to SCI in Education.

11-15 FSWs in the presentation, serving and clean-up ,of meals at the schools.

Christine Gonzales, a FSSI at the Fremont school, estimated that between 75-80% of her workday is spent overseeing and supervising the FSWs on her shift. In this time, she assigns duties, makes schedules, orders supplies, maintains order in the cafeteria and food serving areas, approves leave requests and CTO, participates in interviewing FSW candidates, reports time keeping problems to her personnel office, and completes necessary personnel forms. She estimates that approximately 20-30% of her day is relief help in the food serving and cleanup area.

The FSWs have no other daily contact with supervisors or managers but when the director of dietetics may visit. FSSIs are responsible for assuring meals are ready to be served in a timely, clean and orderly manner. FSSIs respond to initial complaints or grievances which FSWs or students may raise. In the absence of the FSSI, the SCI may act as a supervisor in assuring food is served properly by the FSW.

DISCUSSION

The Board, in its initial consideration of supervisory exclusions under the Dills Act,⁹ approved a disjunctive interpretation of the language of section 3522.1; that is, an employee found to meet even one of the criteria for exclusion would be held to be exercising supervisory duties. The Board

⁹Unit Determination for the State of California, supra, PERB Decision No. 110c-S.

also considered, however, the necessary interrelationship of the disjunctive interpretation with the statutory directive that employees "whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees." (Emphasis added.) The Board reasoned that its "burden" was the determination of an employee's status "where the evidence indicates that that employee performs one or more supervisory duties with some regularity but also performs duties of his/her subordinates."¹⁰ The Board determined to meet its "burden" by first holding that an employee must be engaged in the "regular and continuous performance of subordinate duties" in order for the "substantially similar" test to be arguably met, and then weighing another measure: "the point at which the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees."¹¹ The Board rejected the notion that this measure could be arrived at through quantitative analysis, rather holding that the regular performance of supervisory functions could itself preclude a finding that the disputed employee's duties are "substantially similar" to that of subordinates.

Within this framework, the Board reviewed and applied the statutory criteria; namely, use of independent judgment, hiring, authority to transfer, power to suspend, discharge, reward or discipline, authority to lay off, authority to promote,

¹⁰Id., p. 6.

¹¹Id., pp. 7 - 8 .

preparation of personnel evaluations, vacations and sick leave, merit increases and "other factors" (e.g., the disputed employee's self-perception of role). In considering the use of independent judgment, the Board distinguished between the mere exercise of supervisory functions, which would not justify an exclusion, and the exercise of supervisory functions with independent judgment, which would. The Board also emphasized that the potential for conflict between a "supervisor's" duty to the employer and the same employee's rights under the Act lies in the "authority to 'control' or influence personnel decisions . . .," not the mere "demonstration of control over work processes . . ." (Emphasis in original.)² This analysis is reviewed and applied to each Department as follows.

Departments of Developmental Services and Mental Health

Due to the unique arrangement for food services between these two departments, they are analyzed together. In reviewing the criteria established for determining supervisory status of FSSIs and SCIs in these departments, there is no indication of supervisory status in the area of hiring, authority to lay off, approval of vacations and sick leave, and authority to transfer. The evidence indicates that SCIs and FSSIs sit on interview panels of 2 or 3, make recommendations which to a large extent

¹² **Id. pp. 9-10**

are followed, but the ultimate decision to hire remains with the site manager, or director of dietetics.¹³

Layoffs have not occurred. Sick leave and vacation scheduling is an essentially ministerial function based on established seniority and other defined policies. FSSIs and SCIs were not demonstrated to have any additional authority to adjust these procedures, be they contractual or administrative. Likewise for transfers, the disputed classes may suggest a different shift or building but do not possess authority to independently transfer an employee to another facility.

In Sanger Unified School District (1989) PERB Decision No. 752, the Board held that food services supervisors who are involved in the selection of substitute employees to cover normal work assignments evidence a degree of supervisory status due to the fact that some independent judgement must be used in determining which potential substitute employee to contact. Additionally, the Board found that the completion of kitchen employees evaluations and work performance forms by a food service supervisor, even though reviewed by a manager, established further indicia of supervisory status.

The FSSIs and SCIs in these two departments have similar responsibilities as those in Sanger Unified School District, supra. The FSSIs and SCIs at Developmental Services and Mental Health are responsible for arranging for substitute employees in

¹³See Foothill-DeAnza Community College District (1977) EERB Decision No. 10 and San Rafael City Schools (1977) EERB Decision No. 32 for discussion.

case of absence and appear to have broad discretion in whom they may call. They are also given latitude in the preparation of probationary and yearly evaluation forms and merit salary adjustment forms. Certain FSSIs' and SCIs' evaluations are reviewed for writing style and grammar, but the content of the evaluations remains the responsibility of the FSSI or SCI assigned the shift of the FSW or Cook I or II.

As to the authority to promote, suspend, discipline, discharge or reward, the Employer and Union witnesses each testified to their self-perceived authority. Even SCI Michael Hedgpeth, a CSEA witness, reluctantly acknowledged the authority he might and did exercise to recommend the continued service of individual employees.¹⁴ All the evidence presented indicated that FSSIs and SCIs in these two departments effectively complete all personnel documents for employees who work on the shifts for which they are responsible. The personnel forms to a large extent are perfunctory and routine but employee promotional opportunities, continued employment and merit salary adjustments are determined to a large extent by the decision of the SCI or FSSI that works with them.

As to the other factors mentioned by the Board, several FSSIs and SCIs testified that they viewed their placement in the bargaining unit as detrimental to the smooth functioning of their assignment. Grievances which might arise between a FSWI or II, a Cook I or II and the FSSI might not be resolved due to their

¹⁴TR Vol. IX pp. 119-121, 134-135 and 151-152.

inclusion in the same unit. Several of the FSSIs and SCIs advised that their loyalties did not lie with the Union but rather with the Employer. Training in supervisory skills has been provided to all FSSIs and SCIs through the Department of Personnel Administration. SCIs and FSSIs attend regular facility management meetings to discuss department-wide and site-wide problems. The evidence indicates that the SCIs and FSSIs do sporadically perform unit work but not to the extent necessary to find that the "line" has been crossed. Most of the regular duties performed are supervisory.

Department of Education

When applying the supervisory criteria to the FSSIs and SCIs working for Education, the record established is similar to that of Developmental Services/Mental Health. There is no evidence to show layoffs have ever been implemented. Vacation and sick leave requests and the requisite search for substitutes are handled similarly through a simple ministerial function, although due to the fact that the schools are on a 10-month schedule, vacations are not normally scheduled during the school year. There was no indication that either FSSIs or SCIs could or did make effective transfers of employees or had made independent decisions or recommendations on any employee to be hired. FSSIs and SCIs have sat on panels for hire and promotional lists and acted as equal participants with one or two other department employees. Judy Pinegar, departmental Food Administrator, testified that in the over ten years she has worked in the department, she has afforded

the SCI and FSSI great latitude in hiring whomever they feel most competent; Ms. Pinegar stated that she was aware of an instance where a SCI at the Diagnostic School in Los Angeles actually hired a cook in an emergency situation to fill a vacancy without going through a normal second stage interview in which she or a school-site manager would serve as a panelist along with a SCI.¹⁵

As to the other factors, the evidence established that SCI and FSSI review of individual employee performance was not second-guessed or over-ridden. FSSIs and SCIs used their judgement in authorizing extra hours or selection of employees for particular chores. Their judgement, and the personnel forms which they complete, has significant impact on the continued employment status of employees assigned their shift. Training is provided to FSSIs and SCIs in supervisory skills and they attend school site management meetings. Witnesses Christine Gonzales and Gloria Lee Cody evidenced a sympathy for their roles as team leaders and demonstrated a kinship with supervisors. Faye Randolph downplayed her functions but the credible testimony of Lisa McGregor, Ms. Randolph's supervisor, the director of dietetics, demonstrated the extent to which she relied upon Ms. Randolph's decisions to permit employees to pass probation, be granted merit adjustments, work overtime and interview candidates

¹⁵The filling of this vacancy was actually completed by allowing an employee hired as an emergency fill-in to become a permanent employee. (TR Vol. IV P. 49)

for hire or promotion.¹⁶ Again, the FSSIs and SCIs demonstrated that they do perform supervisory duties on a regular basis and only perform unit work on an irregular basis. Therefore, these positions must be held to fall within the definition of supervisory employees whose exclusion from the unit is required by the Act.

Veterans Affairs

Transfer, layoff, hiring and authority to grant vacation or sick leave remain either non-issues or of such a nature to require no use of independent judgement by the FSSIs or SCIs at the Yountville Veterans Home.¹⁷ Independent judgement had been and is regularly exercised in making assignments, approving overtime, reviewing employee evaluations, approving merit adjustments, and recommending promotion and discipline.

Robert Anderson, a SCI, testified that he had effectively recommended the dismissal of at least one employee, and that he initiated the documentation necessary for both formal and informal reprimands of his co-workers.¹⁸ Inez Crouse, a FSSI, advised that she completes employee time sheets, rates potential employees, signs accident report forms, drafts reprimand notices, and counsels employees on work related problems. She does not

¹⁶TR Vol. X pp. 27-31.

¹⁷The veterans home is the only facility maintained by the department that provides food services.

¹⁸TR Vol. VI pp. 11-13.

consult with higher ranking supervisors or managers to complete other duties.

The additional factors which may demonstrate supervisory status, such as training in resolving employee grievances, conducting staff meetings, attending supervisory staff meetings, and self perception, are all present here, as testified to by Anderson, Crouse and the director of dietetics, Jean Tolentino. The presence of SCIs and FSSIs as shift leaders at the different work stations effectively limits the roles of the assistant director of dietetics and the two FSSIs to more administrative functions at other locations. The day-to-day assignments are issued by FSSIs and SCIs, and these assignments do vary based on menu, skill, time and number of staff. Normally 10 employees per shift report to a SCI, and 12 to 14 work with a FSSI's shift, thus creating a significant role in monitoring the hours worked and assuring the quality and speed of food service is adequate. The percentage of time performing unit work is not substantial or on a regular or continual basis compared to the time expended performing supervisory duties. The balance of duties performed and loyalties toward management dictate a finding that these employees be excluded.

Department of Rehabilitation

The sole SCI at the Orientation Center for the Blind has full responsibility for the food services operation. Ms. Hightower's direct supervisor is the business services officer who has no direct contact with the five food service workers who

work at the center. The SCI has the day-to-day responsibility of assuring a functioning and orderly kitchen and cafeteria for the center. Ms. Hightower's over 20 years of service at the center have given her an expertise in being able to run the kitchen and food services section without the normal training and development a new employee might need.

Several of the supervisory criteria do not apply in Ms. Hightower's assignment. There are no opportunities to transfer employees since it is a single site facility. No layoffs have occurred. Vacation and sick leave usage are perfunctory duties which the SCI monitors. Hightower's testimony indicated that she effectively chose for hire one of her current co-workers, a Cook II, Eddie Manio. Manio acts as the lead worker for the remainder of a p.m. shift after Hightower's shift is over. Hightower, in addition to her recommendation to hire Manio, exercises independent judgement in the completion of performance evaluations, probationary reports, letters of commendation and decisions to call substitutes for absent employees. She also authorizes the use of CTO and approves overtime hours if needed. The assignments of FSWs and cooks are fairly routine but adjusting schedules to accommodate leave requests requires Hightower to make decisions on who would act as a replacement worker. Although Hightower estimates that 25% of her assignment involves actual kitchen work, she suggests that oversight and training of employees occurs on these hours she spends in the kitchen. So, she does not remove herself from her role as a

loyal supervisor even as she performs bargaining unit work. There is no basis for finding her duties "substantially similar" to her subordinates, and her position must be excluded from the unit.

Conservation Corps

The statutory criteria and relevant case law expounded upon in Unit Determination for The State of California, supra, PERB Decision No. 110c-S, when applied to the evidence of SCI duties at CCC, reveals that a number of the criteria are not met and others are quite limited as they relate to CCC staff. This is due in part to the nature of the assignment, at remote facilities with a seasonal influx of employees. The evidence demonstrates that at CCC kitchen facilities there may be at most one other permanent civil service employee who reports to the SCI for assignments. However, Corps members are assigned KP and certain Corps members are assigned positions as cook specialists. CCC also employs Cooks I and II who work with the SCI but they are often on relief shift for the SCI so no "hands-on" supervision occurs during these extended times. SCIs work a regular kitchen shift in addition to performing some supervisory duties.

The SCI does prepare work schedules, probationary reports and merit adjustments; signs time sheets and accident reports; and sits on QAP panels and hiring committees, but these are all sporadic assignments that evidence limited use of independent

judgement.¹⁹ The chief assignment is as the lead cook of Corps members and, at most, one other cook. The evidence that does point to use of independent judgement centers around the SCI's ability to have Corps members reassigned, transferred, or relieved. The Corps members' lack of civil service status might have impaired a finding that the SCI, is a supervisor prior to the Board's recent decision (See f.n. 7, above). Now, however, we must look upon the Corps members as employees and, based on the SCI's role in transferring, demoting and recommending for permanent status these Corps members, the SCI must be found to be supervisors based on their roles in controlling personnel and not just work processes.

CONCLUSION

Based on a review of the evidence and case law discussed above, the Employer has established that the following positions are supervisory:

Supervising Cook I	Developmental Services
	Mental Health
	Education
	Veterans Affairs
	Rehabilitation
	Conservation Corps

and all current Food Services Supervisor Is.

The Employer presented no evidence as it relates to the SCI classification at California Highway Patrol, Forestry or the Maritime Academy. No inferences can be drawn by the testimony of

¹⁹Commercial Fleet Wash. Inc. (1971) 190 NLRB 326 [77 LRRM 1156]; Indiana Refrigerator Times. Inc. (1966) 157 NLRB 539 [61 LRRM 1401]; Meijer Supermarkets. Inc. (1963) 142 NLRB 513 [53 LRRM 1081].

witnesses from other departments as it relates to these classifications. The Board has held that the burden of proving an exclusionary claim is on the party asserting it.²⁰ Therefore, SCI positions in those three departments remain in the unit.

PROPOSED ORDER

Based upon the record, it is hereby ORDERED that:

The positions of Supervising Cook I in the departments of:

Developmental Services
Mental Health
Education
Veterans Affairs
Rehabilitation
Conservation Corps

and the positions of Food Services Supervisor I in the departments of:

Developmental Services
Mental Health
Education
Veterans Affairs

are excluded from Unit 15, and that the petition is denied with regard to all remaining positions.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final, unless a party files a timely statement of exceptions with the board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page

²⁰Unit Determination for the State of California, supra. PERB Decision No. 110c-S, citing In Re: The State Employer-Employee Act Phase III, Unit Determination Proceeding (1979) PERB Order No. Ad-79-S.

citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing " . . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the board itself. See California Administrative Code., title 8, sections 32300, 32305, and 32140.

Dated: February 2, 1990

Roger Smith
Hearing Officer