

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



GROSSMONT-CUYAMACA COMMUNITY  
COLLEGE DISTRICT,

Employer,

and

GROSSMONT-CUYAMACA COMMUNITY  
COLLEGE DISTRICT ADMINISTRATORS'  
ASSOCIATION,

Petitioner.

Case No. LA-RR-1110-E

PERB Decision No. 1958

May 29, 2008

Appearances: Stephenson, Worley, Garratt, Schwartz, Garfield & Praire by Timothy K. Garfield, Attorney, for Grossmont-Cuyamaca Community College District; Gattey, Cooney & Baranic by Michael P. Baranic, Attorney, for Grossmont-Cuyamaca Community College District Administrators' Association.

Before McKeag, Wesley and Rystrom, Members.

DECISION

RYSTROM, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the Grossmont-Cuyamaca Community College District (District)<sup>1</sup> of the Board agent's determination of the Educational Employment Relations Act (EERA)<sup>2</sup> representation petition (petition) filed by the Grossmont-Cuyamaca Community College District Administrators' Association (Association).

The District disputed the appropriateness of the unit on the bases that thirteen of the proposed unit positions were managerial, confidential or both. The Board agent determined that four of the disputed positions should not be included in the unit but that the remaining nine

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<sup>1</sup>The District is made up of two colleges: Cuyamaca College (Cuyamaca) and Grossmont College (Grossmont).

<sup>2</sup>EERA is codified at Government Code section 3540, et seq.

were properly in the unit given they were not managerial or confidential positions. The District appeals the Board agent's finding on eight of these nine positions.<sup>3</sup>

The Board has examined the evidence presented at the hearing de novo to determine if the District has met its burden of proof to show that the positions were managerial.<sup>4</sup> We have determined below that the District has met its burden for four of the eight disputed positions but failed to show that the remaining four positions were managerial employees.

### PROCEDURAL BACKGROUND

On November 22, 2004, the Association filed a petition requesting recognition for a proposed unit of "Management Employees as of November 9, 2004." The petition indicated no agreement was currently in effect.

PERB informed the District and Association on January 3, 2005, that the Association had evidenced majority support of the proposed unit pursuant to the requirements of PERB Regulation 33050(b)<sup>5</sup> and no valid intervention had been filed thus recognition must be granted unless the District doubted the appropriateness of the unit.

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<sup>3</sup>The District's request for oral argument was previously denied pursuant to PERB Regulation 32315. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had an ample opportunity to brief and did, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453; Montgomery County Office of Education (1991) PERB Decision No. 913.)

<sup>4</sup>Because we find that one position the District claims is both a management and confidential employee is a management employee, we do not address the District's exception that the position should also have been determined to be confidential. See Lompoc Unified School District (1977) EERB\* Decision No. 13 (Lompoc) where the Board did not determine whether an employee should be excluded from the negotiating because he was a management employee, given the Board's finding that the employee had supervisory status. In so holding, the Board cited, inter alia, Aeronca, Inc. (1975) 221 NLRB 326 [90 LRRM 1709] which ruled that it need not reach the issues raised as to whether the employees were confidential or supervisory after finding they had managerial status. \*(Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

<sup>5</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

The District filed a response on January 18, 2005, indicating it doubted the appropriateness of the proposed unit and therefore denied recognition. The denial was based, inter alia, on the conclusion that the proposed unit contained positions which were classified as management employees.<sup>6</sup> On January 24, 2005, the District asserted in writing to PERB that some of the positions it claimed were managerial were also confidential.

The District and Association were informed on February 3, 2005, that the proofs of support were sufficient. On February 14, 2005, the District filed a summary statement of the duties performed by the incumbents in the positions the District claimed were qualified for management or confidential status.

A hearing was conducted on November 8 and 9, 2005. The Board agent's proposed decision was issued on April 5, 2006. The District filed a timely appeal on May 1, 2006.

#### BOARD AGENT'S PROPOSED DECISION

Of the thirteen contested positions, the Board agent found one position, the Director of Risk Management, to be managerial and that four positions were confidential. This resulted in five employees being excluded from the proposed bargaining unit: three at the District level (Director of Risk Management, Director of Employment Services, and Senior Director/Controller of District Business Services), and two at the college level (Vice President of Instruction at Grossmont and Vice President of Academic Affairs at Cuyamaca.)

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<sup>6</sup>The denial was also based on the conclusion that the proposed unit contained both certificated employees and classified employees contrary to the requirements of EERA section 3545(b)(3). The request for recognition of classified administrators was issued a separate case number and was informally resolved in May 2005. This decision involves only the District's claims that some of the members of the proposed unit were managerial positions.

Of the remaining nine contested positions found not to be managerial or confidential, two were at the District level<sup>7</sup> and seven were at the college level.<sup>8</sup>

### THE DISTRICT'S EXCEPTIONS

The District filed exceptions to eight of the nine positions which the Board agent found were not managerial or confidential positions.<sup>9</sup> In its exceptions the District notes that pursuant to the Board agent's proposed decision regarding management employees, there would be only six management employees in a two-college district which takes care of 26,000 students. According to the District, this is an insufficient management staff to administer the District in a context where all other District administrators, except those found to be confidential employees, are represented by and have allegiance to an employee organization.

The District contends that the following eight positions are management employees:

(1) Interim Associate District Wide Vice Chancellor of Academic, Student and Planning Services; (2) Senior Director of Intergovernmental Relations, Economic Development and Public Information; (3) Vice President of Student Services; (4) Dean of Administrative Services; (5) Senior Dean of Business and Professional Studies; (6) Dean of Admissions and Records; (7) Dean of Counseling, Student Development and Matriculation; and (8) Academic Deans.<sup>10</sup>

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<sup>7</sup>The two positions at the District level were: Interim Associate District Wide Vice Chancellor of Academic, Student and Planning Services and Senior Director of Intergovernmental Relations.

<sup>8</sup>The seven college level positions were: Vice President of Student and Planning Services, Dean of Administrative Services, Senior Dean of Business and Professional Studies, Dean of Admissions and Records, Dean of Counseling, Student Development and Matriculation, Academic Deans and Assistant Dean of ROP.

<sup>9</sup>The Board agent's findings as to Assistant Dean of ROP were not challenged.

<sup>10</sup>The District argues that the Senior Director of Intergovernmental Relations is also a confidential employee. As is indicated in footnote 4 above, we do not reach this issue having found this position to be managerial.

The District also requests that the Board overrule its Lompoc decision and interpret EERA section 3540.1(g) in the disjunctive.

### DISCUSSION

We first analyze whether or not the District's exceptions to the Board agent's findings regarding the District's eight disputed management positions are valid. Thereafter we discuss the District's request that Lompoc be overruled and the reasons for our denial.

EERA section 3540.1(g) defines a management employee as an "employee in a position having significant responsibilities for formulating district policies or administering district programs." Lompoc held that, notwithstanding the word "or" was used in this definition, the Legislature meant "and" thus EERA requires that a management employee must have significant responsibilities for both formulating district policies and administering district programs.

The determination of whether a position is managerial is a question of law and fact and must be answered in terms of the employees' actual job responsibilities, authority and relationship to the employer. (Hartnell Community College District (1979) PERB Decision No. 81 (Hartnell).)

The facts must establish that the employee is clearly allied with management and that their decisions are made independent of, rather than, under the direction and control of the management team. (Paramout Unified School District (1977) EERB Decision No. 33 .) The definition of a management employee should be interpreted narrowly and the party arguing for exclusion from a supervisory bargaining unit based on managerial status has the burden of proof by a preponderance of evidence. (San Francisco Unified School District (1977) EERB Decision No. 23 (San Francisco).)

EERA's requirement that a management employee position must have "significant responsibilities for formulating district policies" has been held to mean that the position must

entail the discretionary authority to develop or modify institutional goals and priorities.

(Hartnell.)

The requirement that a managerial employee position must have significant responsibility for administering district programs involves the authority to implement district programs through the exercise of independent judgment. (Hartnell.) It contemplates positions where the employee has discretion in the performance of their job beyond that which must conform to an employer's established policy. (Id.)

Before presenting our factual and legal conclusions regarding each of the excepted to positions, we present an overview of the District's organization. In this case, consideration of the District's organization is essential to applying the managerial criteria set forth in EERA section 3540.1(g).<sup>11</sup>

I. The District's Organization

A. District Level Decision Making Process

The District has a Governing Board (District Board) which adopts all the District's policy decisions. The District Board does not develop policy but rather approves recommended policy. The District Chancellor (Chancellor) is the chief executive officer of the District. There are 26,000 students in the District's two colleges: Grossmont has approximately 18,000 students and Cuyamaca has 8,000 students. Each college has a President who is the college's chief executive officer and reports to the Chancellor.

The Chancellor has a cabinet (Chancellor's cabinet) which is composed of five members. They are the two college Presidents and at the District level: two Vice Chancellors

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<sup>11</sup>See the Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California (1983) PERB Decision No. 246b-H (Regents), where PERB held that an overview of the employer's organization was essential to determine whether certain employees were managerial under the Higher Education Employer-Employee Relations Act (HEERA) section 3562(k) which PERB noted was similar to EERA section 3540.1(g). (HEERA is codified at Gov. Code sec. 3560, et seq.)

and the Senior Director for Intergovernmental Relations, Economic Development and Public Information. The Chancellor's cabinet meets once a week and discusses pertinent issues that are effecting the District at any one time. The Chancellor's cabinet will also at times discuss labor negotiating issues.

The Chancellor does not approve policy. Formulation of policy takes place at different levels throughout the District. These policies are recommended to the Chancellor who is responsible for making policy recommendations to the Board. According to the Chancellor, the District Board generally concurs with his policy recommendations. There are five positions which can sign a District Board docket item making a recommendation to the District Board: the Chancellor, two Vice-Chancellors and two college Presidents. The college Vice Presidents and college Deans cannot do this.

The Chancellor's cabinet is occasionally augmented by additional administrators in what he refers to as the "extended cabinet." In addition to the Chancellor's cabinet members, the extended cabinet is comprised of: Interim Associate District-wide Vice Chancellor for Academic Student and Planning Services at the District level and Administrative Services Deans, the Vice Presidents of Instruction and the Vice Presidents of Student Services at the college level. The extended cabinet meets once a month.

Issues discussed at the Chancellor's cabinet are more refined, pertinent issues affecting the District. The Chancellor's cabinet takes a "first shot" at discussion and then it goes to the extended cabinet. The extended cabinet discusses a variety of informational and action items. Sometimes draft policies are brought to the group to be assigned out for further work or discussion. Sometimes policies that have gone through this process are checked by the extended cabinet on their way back to the Chancellor's cabinet.

## B. The Colleges' Decision-Making Processes

### 1. Cuyamaca College

The President of Cuyamaca is in overall charge of the college. Her direct reports are the Vice President of Instruction, the Vice President of Student Services and Development, the Dean of Administrative Services and the Executive Dean of Institutional Advancement. These positions also make up the Cuyamaca President's cabinet which meets once a week. The Cuyamaca President's cabinet formulates and drafts policies which the President takes to the Chancellor.

Issues discussed in the Cuyamaca President's cabinet are things which have a District impact and which are also being discussed at the District level. Issues which come from the Chancellor's cabinet which need review or determination or Cuyamaca direction are taken to the President's cabinet for input. The Cuyamaca President's cabinet also takes up issues relating to Cuyamaca specifically such as anything with regard to funding, facilities, or program development.

### 2. Grossmont College

The President of Grossmont is in overall charge of the college. He has a cabinet which meets once a week and is comprised of the President's direct reports: Vice President of Academic Affairs, Vice President of Student Services, Dean of Administrative Services, and Manager of College & Community Relations. Additionally, the President of the Academic Senate serves on the President's cabinet.

The Grossmont President's cabinet is the main group of individuals that the Grossmont President relies on to help him make decisions and recommendations. When the Grossmont President receives a recommendation from the Vice President of Student Services or Vice President of Academic Affairs, he generally accepts the recommendation without making an independent investigation.

## II. Contested Managerial Positions at the District Level

### A. Senior Director of Intergovernmental Relations, Economic Development and Public Information (Senior Director)

The District's organizational chart indicates the Senior Director reports directly to the Chancellor and is part of the Chancellor's cabinet.<sup>12</sup> As a member of the Chancellor's cabinet, she is one of five managers who the Chancellor relies on to assist him in making decisions and recommendations to the Board. All of the policies that are forwarded to the District Board are reviewed by the Chancellor's cabinet. According to the Chancellor, the Senior Director plays a key role in his administration and her recommendations are routinely accepted.

In addition to her position in the Chancellor's cabinet, the Senior Director has a series of responsibilities. One of her primary duties is to develop legislative initiatives for the District and she represents the District in Sacramento on District initiatives. She is the key individual in developing the annual legislative agenda which has to be adopted by the District Board. To do this she works with a group of individuals from each of the two colleges which, under her leadership and initiative, develop a set of projects and/or programs or legislation that the District should be playing a role in which is then presented to the board after it flows through the District Executive Counsel (DEC).<sup>13</sup> In addition, she is instrumental in developing legislation for people at the state Chancellor's office and other offices to consider and in helping guide legislation in Sacramento based on her recommendations and initiatives as well as her work throughout the state.

The Senior Director is the key contact for the District on all governmental affairs at both the state and national level. She is also the key component of the Economic Development Initiatives between the District and outside entities. This responsibility includes the District's

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<sup>12</sup>There is only one employee in this position.

<sup>13</sup>The DEC is the shared governance body of the District.

effort to generate resources at the federal level and involves working with the college Presidents and their staffs to develop and obtain federal grants.

The Senior Director developed a policy on how the District Board works with the public on presentations and addressing the District Board. She has also recommended approaches regarding how the District might generate more resources. Additionally, she played a key role regarding the “Equalization Initiative” where she helped to develop policies and legislation.

The Board agent found that the Senior Director was not a management employee because she did not have the authority to use independent judgment to determine District policies. We disagree with this finding for several reasons. First, no one in the District other than the District Board members determine District policy, not even the Chancellor. The statutory criteria for a management employee is whether the position has discretionary authority to develop and modify institutional goals and priorities. (Sacramento City Unified School District (2005) PERB Decision No. 1773 (Sacramento)). Applying this criteria under the District’s decision making structure where only the District Board can modify policy results in responsibilities for “developing and modifying institutional goals and priorities” being the development of policies and priorities to recommend to the District Board and recommending modifications.

The District argues that the Senior Director is a management employee based on the incumbent’s policy formulation in setting the District’s legislative initiatives, her cabinet level role in reviewing policies before they go to the District Board, developing the District’s labor negotiation positions, her initiation and development of policies such as public presentations and based on her role in representing the District in its governmental affairs in Sacramento.

The Association contends the Senior Director has no “policy *making* duties” and is essentially the public relations person and intergovernmental liaison. The Association asserts

that the Senior Director's responsibilities regarding developing the District's legislative agenda is not the formulation of policy because it is presented to the shared governance process before it goes to the District Board for approval. Under the facts of this case, we do not find that presenting recommendations to the District's shared governance process for review prohibits such recommendations from being considered as evidence of the originator having significant responsibilities for formulating district policy. If this were true, none of the management positions in the District would have policy formulation responsibilities, including the Chancellor, given that all proposed policies go through the shared governance process of the DEC prior to reaching the District Board for approval.<sup>14</sup>

We find the evidence outlined above which describes the Senior Director's responsibilities indicates that the Senior Director position qualifies as a management position. The Senior Director is one of five members of the Chancellor's cabinet which is charged with the responsibility of reviewing all of the policies which are forwarded to the District Board. This along with the facts that she plays a key role in the Chancellor's administration and that her recommendations are routinely accepted by the Chancellor establish that she has significant responsibilities in formulating district policy and is closely allied with management.

The Senior Director's responsibility for economic development initiatives wherein she works with the college Presidents to develop grants, and with the community to develop initiatives on her own, as well as her work with governmental entities for the same purpose indicate that she also has significant responsibility to administer District programs. The Senior Director administers the District's legislative program by being responsible for tracking all the legislative issues, bringing this information to a group of individuals from the two colleges and

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<sup>14</sup>The DEC has representatives from every organization in the District. The concept of shared governance in community colleges in California is explained as follows: it was a process adopted into law whereby all parties within the institution have a voice in the institution and its management. This includes all constituent groups from management to faculty to students to staff.

taking the lead and initiative in developing the projects and/or programs that the District should be supporting and playing a role in.

B. Interim Associate District-Wide Vice Chancellor of Academic, Student and Planning Services (Associate Vice Chancellor)

The District organizational chart indicates the Associate Vice Chancellor reports directly to the Chancellor.<sup>15</sup> The responsibilities of this position, according to the Chancellor, include initiating discussion issues and policies with regard to all instructional and student services issues in the District, being in charge of the District's institutional research, and playing a key role in planning for the environmental scan of the District's community. The Associate Vice Chancellor, working with the other Vice Chancellors, puts together goals and objectives for the District.

Additionally, this position is responsible for taking the lead in formulating the District's strategic plan and providing recommendations along with the college Presidents from their respective colleges. The Associate Vice Chancellor is tasked with working with both colleges to ensure each has a strategic plan and that there is also one at the District office. The colleges do their separate planning and the Associate Vice Chancellor has to bring them together in order to get a district-wide strategic plan.

The Associate Vice Chancellor works with the college Vice Presidents on student services issues trying to filter through what kinds of policies and program initiatives come through. One policy initiative that the person currently in this position, David Agosto (Agosto), developed was a condensed calendar which, at the time of the hearing, had just been presented to the Chancellor. According to the Chancellor, this "is a very big decision in the District because you are basically changing the whole structure . . . at each of the two campuses." This condensed calendar issue was initiated by Agosto who recommended to the Chancellor that the District might benefit from it. The Chancellor approved looking into the

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<sup>15</sup>There is only one employee in this position.

concept and assigned Agosto the responsibility of developing a policy. Thereafter, Agosto worked with a number of people and developed the report.

Agosto's statements regarding what he actually does in his position contradicted some of the Chancellor's testimony; however, some of Agosto's testimony indicated a bias resulting from his rather strong dissatisfaction with not being returned to his previous position. Prior to becoming Associate Vice Chancellor, Agosto was Vice President of Student Development and Services at Cuyamaca for eight years and served for almost a year as the interim President.

Initially, Agosto testified that even though he had been Associate Vice Chancellor for 1 ½ years, he has never been given a job description. He testified that he reports directly to the Chancellor and gets "assignments here and there" but he doesn't know what his job is because the District Board has not adopted a job description. However, later in the hearing when testifying about the environmental scan project he is responsible for, Agosto stated there is a job description for his position and he does not have the scientific qualifications enunciated in it.

Agosto supervises one person who is the Director of Research. Agosto is in the Chancellor's extended cabinet and is the only direct report to the Chancellor who is not in the Chancellor's cabinet.

According to Agosto, the compressed calendar project is simply a shortened version of a regular semester from 18 weeks to 16 weeks. All he has done is gather information that is available from other districts, the website and talking to people to prepare a report which describes what a condensed calendar looks like and what faculty groups think of it. He claims that it is just a descriptive report with no recommendations on whether to do a condensed calendar. Agosto did not deny that the project was initiated because he had suggested it to the Chancellor.

Regarding the environmental scan he is responsible for, Agosto claims he has no qualifications to do it. The person Agosto replaced, who is on leave from the Associate Vice Chancellor position, had a job description which requires an advanced degree in research or research methodology and statistics. Agosto states he clearly does not have that background. Agosto claims his part of the environmental scan is to supervise the Director of Research who does have the expertise in research and planning.

Agosto has similar comments about his strategic planning responsibilities. He states it is a project he does not have the qualifications to do and that he doesn't know what the Chancellor is talking about when he says Agosto is taking the lead on the strategic plan.

This testimony regarding Agosto's role in strategic planning was contradicted by Dr. Benedict Lastimado (Lastimado) the Vice Chancellor of Human Resources and Labor Relations. According to Lastimado, Agosto was very much involved with the strategic plan. Agosto had appeared at several cabinet meetings and instructed Lastimado and the other Vice Chancellors as well as the two college Presidents and others to provide Agosto with the department goals and objectives because he needed to incorporate them into the strategic plan. Agosto was also scheduled at several DEC meetings to brief those committees on the strategic plan.

Addressing Agosto's testimony regarding his lack of knowledge regarding strategic planning, Lastimado testified he was surprised when he heard Agosto say this. Lastimado, who has a lot of strategic planning experience, at one time offered his strategic plan model to Agosto to help in Agosto's strategic plan and design project. In response, Agosto looked at the offered strategic plan model, informed Lastimado that it was basically the same as the one Agosto was using, and that he was following the same model he had used before.

When Agosto was asked if he would prefer to have his previous job of Vice President of Student Services rather than the Associate Vice Chancellor position, he testified that he

would prefer “to have an assignment that’s recognized by the Board and a job description that’s adopted like everybody else sitting in the this room has a job description.” In the absence of either of those, Agosto would prefer his previous job.

The Board agent found this position was not managerial because Agosto does not have the authority to exercise independent judgment to formulate District policy. According to the Board agent, the evidence only established that the District relied on Agosto to provide recommendations and not to formulate policy.

We disagree with the Board agent’s conclusion. The District Board is responsible for formulating policy and the Chancellor is responsible for recommending policy to the District Board. From the Chancellor on down, policy can only be recommended to the Board, not formulated. Thus, in this case, the most significant role a manager can have with regard to “formulating district policies” is making policy recommendations to the Chancellor. Under the Board agent’s somewhat literal definition of the term “formulating policies,” it could be argued that the District’s Board members are the sole managers of the District because they alone formulate policy. Clearly, such a result is unworkable because it fails to identify the full range of employees who are appropriately characterized as District managers.

Regarding Agosto’s apparent bias, the Board agent found that even if Agosto’s testimony was discredited because of his manifest dissatisfaction with his assignment, the Chancellor’s testimony only established that the District relies on Agosto to provide recommendations and not to formulate policy. However, the Board agent was “not inclined” to discredit Agosto, finding his testimony to be credible despite his dissatisfaction.

On appeal the District argues that the incumbent Associate Vice Chancellor’s responsibilities in formulating the District’s strategic plan, development of policies such as the calendar policy, and development of the District’s goals and objectives establish the position as a management position and finding otherwise is contrary to the weight of the evidence.

The Association responds that the Associate Vice Chancellor is not a management employee based on Agosto's testimony that he has no job description, he is not in the Chancellor's cabinet, he does not recommend changes to the Chancellor,<sup>16</sup> and his role in the condensed calendar project was simply to gather data from the public domain. The Association also cites the Chancellor's testimony that the individual colleges come up with their own strategic plans and that Agosto's office simply "molds" those plans into a District-wide plan also shows the Associate Vice Chancellor position is not managerial.<sup>17</sup>

We disagree with the Board agent's findings regarding this position. First, we do not credit Agosto's testimony which is contrary to that of the Chancellor and Lastimado. Agosto's testimony makes it very clear that he has a strong, negative bias. Most telling is his first claim that he has no job description which is contradicted by his second claim that he does not have the qualifications for the job description for his position. This may be a case where the incumbent feels he does not have the credentials or qualifications required for the position and is therefore unable to carry out the responsibilities delegated to his position. However, we find that such alleged inability does not vitiate the position as being managerial where the incumbent's position has significant responsibilities for formulation and administration of

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<sup>16</sup>We find that the citation to the transcript for this proposition indicates that Agosto testified he never recommended policy to the District Board, not that he never recommended policy to the Chancellor. More specifically, Agosto testified that the District Board is the only one that establishes policy. After that he was asked, "Since you brought up the Board policy, do you ever recommend policy as the interim Vice Chancellor?" Agosto responded, "No." We interpret this as meaning Agosto never recommends policy directly to the District Board. This interpretation is consistent with the Chancellor's testimony regarding recommendations made to him by Agosto.

<sup>17</sup>On direct examination, the Chancellor testified that: (1) Agosto takes the lead in formulating the District's strategic plan and that he works with representatives from both colleges; and (2) the Chancellor looked to Agosto to provide recommendations along with the college Presidents from their respective colleges. Under cross-examination the Chancellor testified that the colleges do their own planning within each college and that Agosto has to bring them together in order to get a District-wide strategic plan. In follow up questions the Chancellor agreed that Agosto "coordinates with the two colleges to create, to mold their plans into one and create a District-wide plan."

District policies and programs. In our holding that the Associate Vice Chancellor's position is managerial we view its responsibilities as if the incumbent was an individual qualified to carry out the assigned duties.

We find that the evidence in this case indicates the position of Associate Vice Chancellor is a management employee of the District having significant responsibilities both for the development of district policy and implementing District programs.

The Associate Vice Chancellor is closely allied with management being one of six positions directly reporting to the Chancellor who is the only direct report to the District's Board.

This position takes the lead in developing the District's strategic plan by working with both colleges to ensure each has a strategic plan and creating a District-wide plan from these individual college plans. The Associate Vice Chancellor works with the college Vice Presidents on student services issues. According to the Chancellor, this responsibility resulted in the incumbent developing a recommendation for a condensed calendar which the Chancellor characterized as a very big decision which changes the whole structure at each campus. The Associate Vice Chancellor also plays a key role in planning for the environmental scan of the District's community which is part of the District's planning process.

### III. Contested Managerial Positions at the College Level

#### A. Vice Presidents of Student Services (Student Services VPs) and Deans of Administrative Services (Administrative Deans)

Cuyamaca and Grossmont both have employees who serve as the Student Service VPs and Administrative Dean at their respective colleges. They are not District level positions but rather are part of the executive management at each college. Each college has one individual who serves as the Student Service VP and one employee who is the Administrative Dean. The District contends that both of these positions for each college are managerial. The Association

argues they are not managerial. For the reasons stated below we agree with the District as to these two positions at each college.

Before we analyze the positions in terms of job functions, we deal with the Association's contention, which is made clear in its response to the District's exceptions, that only district-wide policy recommendations should be considered as "district" policies for purposes of determining if these college level positions have significant responsibility for formulation of district policies under EERA section 3540.1(g).

We disagree and instead find that the Legislature intended the term district policies in EERA section 3540.1(g) to mean policies which are adopted by the District or which are made at the District level regardless of whether they have "district-wide" application.<sup>18</sup> Our legal reasoning for this holding follows.

First, the words of EERA section 3540.1(g) do not indicate that the word "district" is intended to mean "district-wide."<sup>19</sup> "Where the language of a statute is clear and unambiguous, the construction intended by the Legislature is obvious from the language used." (NOCROP and cases cited therein.) Additionally, statutes are to "be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers." (DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722]; Inglewood Unified School District (1991) PERB Order No. Ad-222.)

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<sup>18</sup>In construing a statute, we begin with the fundamental rule that we should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144] (Moyer); North Orange County Regional Occupational Program (1990) PERB Decision No. 857 (NOCROP).

<sup>19</sup>EERA section 3540.1(g) provides:

'Management employee' means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

The reasonable and commonsense interpretation of the word “district” in the terms “district policies” and “district programs” in EERA section 3540.1(g) is that they are policies which have to be approved at the district level and programs which were created with district level approval. Moreover, we find there is no language in EERA which indicates the Legislature intended the words “district policies” to mean “district-wide policies.”

The same is true under another well established cannon of judicial construction, that “every statute should be construed with reference to the whole system of which it is a part so that all may be harmonized and have effect.” (Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (1978) PERB Decision No. 57 citing Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645.) “Where the provisions of a statute are subject to two or more reasonable interpretations, that which will harmonize rather than conflict with other provisions thereof should be adopted.” (San Bernardino City Unified School District (1989) PERB Decision No. 723 (San Bernardino) citing People v. Kuhn (1963) 216 Cal.App.2d 695, 698 [31 Cal.Rptr. 253].)

EERA uses the words “district policies” two times in the Act.<sup>20</sup> EERA section 3540’s use of the term “district policies” cannot be interpreted to mean “district-wide policies” as is shown below but rather must be interpreted to mean policies which need District Board approval regardless of whether the policy is district-wide or applies only to an individual college in the District.

Section 3540 in relevant part provides:

It is the further intention of the Legislature that this chapter shall not restrict, limit, or prohibit the full exercise of the functions of any **academic senate** or **faculty council** established by a school district in a community college to represent the faculty in making recommendations to the administration and governing board of the school district with respect to **district policies** on academic

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<sup>20</sup>EERA sections 3540 and 3540.1(g).

and professional matters, so long as the exercise of the functions does not conflict with lawful collective agreements.  
(Emphasis added.)

An academic senate or faculty council is an organization in a community college formed pursuant to the provisions in the Education Code governing community colleges. The primary functions of an academic senates is to make recommendations to the administration of a college and to the governing board of a district with respect to academic and professional matters. (Cal. Admin. Code tit. 5 sec. 53200.) Education Code section 70902(b)(7) provides that community college district boards shall establish procedures to ensure the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

In multi-college districts, the full-time faculty of the district colleges may vote to have individual college academic senates or a district academic senate. If a multi-college district has individual college academic senates, these senates would not be making “college-wide” policy recommendations to the district board but rather policy recommendations limited to their own individual colleges. Therefore the words “district policies” in EERA section 3540 can not be interpreted as meaning “district-wide.”

As a matter of statutory construction, “a word or phrase repeated in a statute should be given the same meaning throughout. [Citation omitted.]” (People v. Nguyen (1999) 21 Cal.4<sup>th</sup> 197, 205 [87 Cal.Rptr.2d 198].) Giving the same meaning to “district policies” in both EERA sections 3540 and 3540.1(g), we find that the Legislature intended the term “district policies” in EERA section 3540.1(g) to mean any policy decisions by community college district boards whether the policies apply district-wide or to individual colleges.

We note that if the word “district” is interpreted too narrowly, a district is left without a sufficient core of managers to make management decisions. In this regard we reference the Board’s conclusion in Regents that an employer “has an interest in being assured of a cadre of

employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate wages, hours and terms and conditions of employment.” At the same time we take cognizance that applying this criteria too broadly results in wrongly depriving school employees of their collective bargaining rights under EERA. We have therefore endeavored to approach our above task very conservatively.

We next review the specific job duties of the Student Services VPs and Administrative Deans to determine if the District has shown they meet the criteria for managerial employees. The following facts are common to both positions.

These positions are part of the Presidents’ cabinet at both Cuyamaca and Grossmont which cabinets are made up of only four or five employees, respectively, in addition to the Presidents.<sup>21</sup> At both colleges, the Presidents’ cabinets meet weekly and the members have significant responsibilities in formulating the policy recommendations which the college Presidents take to the Chancellor.

The President of Cuyamaca testified that his cabinet meets after he has attended the weekly Chancellor’s cabinet meeting. Issues which come from the District which need review or determination or Cuyamaca direction are dealt with in his cabinet meetings. His cabinet recommends and may formulate policy which he takes to the Chancellor as their recommendation.

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<sup>21</sup>Based on the facts of this case, we find that the college Presidents’ cabinets are distinguished from the “management team” in Franklin-McKinley School District (1979) PERB Decision No. 108 (Franklin-McKinley) where the PERB held that membership on the management team standing alone was not sufficient to qualify a position as managerial. In Franklin-McKinley the management team functioned informally, meeting twice monthly. PERB found that the role played by the management team in policy development was to review policies provided to the team with an opportunity for input. This input was found to be no different than that from other sources such as employee organizations and the administrative staff whose input was given the same weight as that of the management team. These facts are not analogous to the President’s cabinet members responsibilities outlined below.

According to Grossmont's President, the four people in his cabinet are the main group of individuals he relies on to help make recommendations and decisions.

1. Student Services VPs at Cuyamaca and Grossmont

The District argues that this position is managerial because these Vice Presidents plan, organize and direct the college student service programs and prepare and implement budgets for their areas.

The Association responds that the Vice Presidents exercise of authority is not district-wide but rather at the college level. Additionally, any policy recommendations by these Vice Presidents regarding changes to district-wide policy are subject to a multi-level review process.

The evidence on these individual positions establishes the following facts.

Jointly, the Cuyamaca and Grossmont Student Services VPs developed a recent policy change which was the draft for a District Board docket recommendation to change the District Board policy from charging high school students a fee to not charging part-time students a fee.

The Student Services VP at Cuyamaca was responsible for Cuyamaca's equity plan for the District.<sup>22</sup> He wrote it and chaired the committee which looked into research the District provided on student equity. He presented this plan to the various shared governance groups for possible omissions. He determined to edit the plan to include suggestions coming out of this governance process. His equity plan then went to the District Board. There were no changes between the Student Services VP's recommendation and District Board's adoption.

At Grossmont, the job description for its Student Services VP provides that he is to advise the college President on management issues involving programs and services of the college including issuance and/or revision of policies in addition to participating in strategic and long-range planning for college activities and programs.

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<sup>22</sup>The State requires each community college to have a student equity plan to ensure that all students are treated in an equitable way and provided equal ability to succeed at college.

Several years ago the Grossmont Student Services VP was responsible for reviewing policies propounded by the Community College League of California (CCLC) and determining changes which needed to be made to Cuyamaca's student services policies to conform to the CCLC policies. He was also responsible for determining whether anything needed to be added to any of the CCLC policies to make them more compatible with Cuyamaca's policies. These policies were given to the District's Vice-Chancellor for approval by the District Board.

We find that the foregoing facts establish that the Student Services VPs at both Cuyamaca and Grossmont are closely allied with management as required for a position to be classified as managerial. Additionally, the facts show that these positions have significant responsibility for formulating district policy given the policy-making function which both positions serve in the college Presidents' cabinets and the individual policies which the incumbents have recommended.

We note that all of the policies which are approved by the District Board are subject to several reviews. The Chancellor testified that the college Vice Presidents take the lead on developing policies which come to the Chancellor and his cabinet through the individual college Presidents. From the Chancellor's cabinet it would go to his extended cabinet then through the DEC.

We do not find that this review by the Chancellor's extended cabinet or the governance groups vitiates the policies recommended by the Student Services VPs from being considered as showing their managerial status. There is no evidence that either the extended cabinet or DEC review policies for the purpose of approving or disapproving them. As is indicated above from the testimony about the governance groups and the Chancellor's cabinet, the review by these bodies is to keep them informed and allow them to have input. This review process

without approval or disapproval authority does not reduce a managerial employee to a non-managerial status if other managerial criteria is shown.<sup>23</sup>

We next consider whether these positions have significant responsibilities for implementing a District program.

The job duties of the Student Services VP at Cuyamaca basically entail keeping access open to students, assisting them in maintaining their status as students at the college and assisting them in achieving their educational objectives. These job duties encompass working with all of the different student services programs to make sure the college is offering the best service it can give on the available funding.

The Cuyamaca Student Services VP is also responsible for managing the budget for his division within the bottom line. He has authority to authorize transfers of funds between categories such as equipment to hourly or to supplies.

At Grossmont the functions of the Student Services VP are described as ensuring that students interested in attending Grossmont College have easy access to the college and, once there, good services. On a day-to-day basis he works with the six student services managers to insure all student services programs are well designed, planned, implemented, and that they are well coordinated among themselves.

Pursuant to our above interpretation of the word “district” in EERA section 3540.1(g) we find that the student services programs at both Cuyamaca and Grossmont are District programs for purposes Section 3540.1(g).<sup>24</sup> The above facts show that the Student Services

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<sup>23</sup>We make this determination bearing in mind that we should not lightly deprive an employee of collective bargaining rights afforded under EERA nor should we deprive a community college district of its need for a cadre of management employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate terms and conditions of employment. (See Regents.)

<sup>24</sup>Cal. Admin. Code, tit 5, sec. 51018 provides that each community college district board shall provide an organized and functioning counseling program “in **each college** within the district” which shall include: academic counseling in which the student is assisted in

VP positions at both Grossmont and Cuyamaca have significant responsibilities for implementing a district program.<sup>25</sup>

## 2. Administrative Deans

The District argues that the Administrative Deans are managerial because they are Program Managers who effectively recommend policies operating similarly to the Bistro Manager in Sacramento City Unified School District (2005) PERB Decision No. 1773 (Sacramento).

The Association responds that Sacramento is not applicable to this case because the Administrative Deans do not have complete autonomy over their operations, do not interact with the Chancellor directly and do not have the authority to accept or reject bids.

We conclude that the following evidence establishes facts which show that this position at both Cuyamaca and Grossmont is managerial.

We have discussed the fact that these positions report directly to the college Presidents and are members of the Presidents' cabinets. Of significance is the fact referenced above that the President's cabinet members at each college are responsible for working with the college President in developing recommendations for District policies. The President of Cuyamaca testified that she depends on the Administrative Dean (as well as the other cabinet level positions) to develop the policies that they take to the District Board. The Grossmont

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assessing, planning and implementing his or her immediate long range academic goals; career counseling in which the student is assisted in assessing his or her aptitudes, abilities and interest and is advised concerning current and future employment trends; personal counseling; and coordination with the counseling aspects of other services to students which may exist on the campus including those services provided in programs for students with special needs.” (Emphasis added.)

<sup>25</sup>In San Francisco, PERB found the fact that the Directors were responsible for the overall administration of their particular departments clearly implies that the Directors are responsible for carrying out and implementing the District's policies and programs. The same is true in the instant case as to the Student Services VPs.

President stated his cabinet is the main group of individuals he relies on to help him make recommendations.

According to Cuyamaca's President, her Administrative Dean has a very broad area of responsibility. First and foremost she oversees all aspects of the college's \$23 million budget. This includes having the authority in moving funds between the departments within her division, deciding not to fund a department as highly and determining to increase funding to other departments.

The Cuyamaca President also testified that the Cuyamaca Administrative Dean has responsibility for all college facilities which includes construction of new buildings and maintenance of the facilities. Additionally she has oversight for the college bookstore, the college cafeteria, college cashiering, and money transactions. She recommends policies in her area to the college President which she has usually implemented already and the college President generally accepts them.

At Grossmont, the Administrative Dean is responsible for administering the operational side of the college which includes the business office, printing services, mailroom, maintenance facilities and custodial on-grounds. She is responsible for implementing policies approved by the District Board at the college level.

The Grossmont Administrative Dean reviews all expenditures for the college. If a cut is proposed involving a matching funds grant she can stop the cut.

Importantly, the District's job description for the Administrative Deans at both colleges provides that one of their essential duties and responsibilities is to "Serve as acting President when required in the absence of the College President."

We find that the above facts establish that the Administrative Deans at both Grossmont and Cuyamaca have significant responsibilities for formulating district policy and for implementing district programs.

B. Senior Dean of Business and Professional Studies (Senior Deans)

The District excepts to the Board agent's finding that the Senior Deans are not managerial but offers no argument in support of this exception. The Senior Deans are not addressed by the Association.

Our review of the record leads us to agree with the Board agent and find that the Senior Deans do not have significant responsibility to formulate District policy. We adopt the Board agent's factual findings as reproduced below:

“Neither party called a Senior Dean of Business and Professional Studies to testify about the position. According to the District's Organizational Chart, the Senior Dean of Business and Professional Studies reports directly to the Vice President of Academic Affairs. The job description of Senior Dean of Business and Professional Studies states the following Job Purpose of the position:

The Senior Dean, under the direction of the Vice President provides the administration and direction for attainment of the goals for the Department of Business and Professional Studies.”

C. Dean of Admissions and Records (Admission Deans)

The District provides no argument in support of its exception to the Admission Deans being found not to be managerial employees. The Association does not address this position.

Our review of the record indicates the Board agent's finding that the Admission Deans do not have significant responsibility to formulate District policy is correct. We adopt the Board agent's factual findings as reproduced below:

“Brad Tiffany (Tiffany) has been the Dean of Admissions and Records and Disabled Student Programs and Services at Grossmont College for twelve years. He reports directly to the Vice President of Student Services and he supervises about 18 fulltime staff and 60 to 70 hourly employees.

Tiffany chairs the Student Petitions Committee which adjudicates students' requests for exceptions to processes, procedures or policies. He makes recommendations to the committee which usually, but not always, follows his recommendation. He has drafted language for changes in District Board policy but on at least [sic] occasion the District Board did not accept it. Tiffany also sits on the District Executive Council on behalf of the Association.

Tiffany is responsible for providing students access to the educational programs offered. This includes applications, registration, veterans' affairs, student record evaluation, transcripts, accommodation and residency and immigration determinations. Tiffany testified that he has the authority to make admissions decisions that go beyond the written criteria of the college as well as difficult residency determinations and enrollment decisions. He testified that if he were to be involved in formulating District policy he would solicit input or recommendations from his staff and then advise the Vice President of Student Services who would in turn formulate advice for the college President and then it would go to the Chancellor's cabinet and then to the Board.

Beth Appenzeller (Appenzeller) has been the Dean of Admissions and Records at Cuyamaca College for five years. She reports to the Vice President of Student Development and Services. She supervises approximately 25 to 30 staff.

Appenzeller also serves on a District-wide Registration Committee and she makes sure the services at Cuyamaca are aligned with those of Grossmont so that students have access to services at both campuses. She is also on the Innovation and Planning Council.

Appenzeller chairs a committee that reviews student petitions for exceptions to policies. She testified she never individually makes admissions decisions without following the petition process.

Appenzeller's responsibilities include admissions, records, veteran's affairs, international students, evaluations, grading, attendance and accounting. She is also responsible for making sure federal, state and local policies are followed in her department. She was also involved with a revision of District policies that occurred about five years ago and she met with the Vice Presidents and Deans to review the admissions and records policies and determined no changes were needed.

Appenzeller also prepares the budget for the Admissions and Records Department and she typically starts with the previous year's budget and then follows a process for requesting additional funds. She testified she does not have much discretion in terms of the budget because the output of her department is mandated for the most part. She stated that if she needed funds for a computer or similar equipment, she would request funds through different committees. She makes recommendations regarding her department to the Vice President and her recommendations are followed."

D. Dean of Counseling, Student Development and Matriculation  
(Counseling Deans)

No arguments by either the District or Association are provided regarding the District's exception to the Board agent's finding that the Counseling Deans are not managerial.

We have reviewed the record as to this position and agree with the Board agent. We find that these positions do not have significant responsibility for the formulation of District policy. The Board agent's factual findings on this position are adopted as reproduced below:

“Jim Fenningham (Fenningham) is the Dean of Counseling, Student Development and Matriculation. He works at the Grossmont campus and reports directly to the Vice President of Student Services. Fenningham supervises 18 counselors.

Fenningham serves on the Staffing Committee, Equipment and Technology Committee, Student Success Committee, Student Services Council and the Facilities, Planning and Budget Committee. All of the committees are voting committees and each committee member, including Fenningham, has one vote.

Fenningham is responsible for counseling, transfers, assessment, the career center, job placement and adult reentry. Two supervisors and a Department Chair that report directly to Fenningham are responsible for much of the day-to-day business since he spends half his time supervising his staff and the other half of the time attending meetings.

Fenningham testified he does not have the authority to recommend an idea of his own directly to the governing board without going through intervening steps of review. Fenningham has the authority to decide how to spend his budget within certain limits as long as it does not exceed his allocation. The final authority over the amount of funding in his budget belongs to the Planning and Budget Committee which reviews the College Budget Proposal and then makes a recommendation to the college President.”

E. Academic Deans

The District contends that the Academic Deans are managerial employees because they oversee an academic division such as math and science at their respective colleges. The District argues that the Academic Deans administer their individual division’s budget and

create a first draft of the budget which involves establishing priorities and determining what their divisions' goals and directions are. The District admits that the policies set by the Academic Deans are limited to their respective divisions.

The Association responds that the record indicates that the Academic Deans are essentially the first line supervisors for the faculty and many of the classified staff. Regarding policy recommendations, the Association contends that such recommendations are subject to input and review by a myriad of shared governance committees and constituent groups.

Our review of the record indicates that the Board agent's finding that the Academic Deans do not have significant responsibilities for formulating district policies is correct. We adopt the Board agent's factual findings on this position as reproduced below:

“The Academic Deans<sup>26</sup> at Cuyamaca College report to the Vice President of Instruction and the Academic Deans at Grossmont College report to the Vice President of Academic Affairs. The Academic Deans supervise several employees, for example, the Dean of Mathematics, Natural Sciences, Exercise Science and Wellness at Grossmont College, Bill Bradley (Bradley), supervises between 180 and 200 employees and Shannon O'Dunn (O'Dunn), former Dean of Communication and Fine Arts at Grossmont for five years, supervised about 90 to 115 faculty and classified staff.

The Academic Deans prepare and submit budgets for approval. The Deans have discretion to use funds within the limits provided to their division and the Deans determine program priorities in their areas. Academic Deans recommend which classes should be kept open and which should be cancelled and they help establish overall program goals and objectives. Bradley testified that there is an unwritten law that

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<sup>26</sup>For the purposes of this decision, “Academic Dean” refers to all Deans that are not otherwise defined herein.

Science classes are protected from cancellation where there is only one class. Also, due to time constraints, Academic Deans are empowered to make equivalency decisions regarding new instructor qualifications during their first semester of employment. After the first semester, only the Vice President has the authority to make equivalency decisions.

Albert Taccone (Taccone) is the Division II Dean of Instruction at Cuyamaca and he represents Cuyamaca at the Regional Occupational Deans meetings which is a group that approves Community College Occupational Programs for the region. The Division III Dean of Instruction at Cuyamaca initiated a homeland security program of instruction. The Division I Dean of Instruction at Cuyamaca, Madelaine Wolf (Wolf), worked with faculty to design and propose a telecommunications program and she developed a campus policy for late course additions. Wolf also represents the College in a County-wide Internship Program. Bradley sets teacher protocols at Grossmont such as the requirement that teachers schedule classes more than two days per week. O'Dunn obtained extra funds for the art gallery by submitting a report to the Vice President of Academic Affairs who in turn delivered the report to the Grossmont College President.”

#### IV. Should Lompoc’s interpretation of EERA section 3540.1(g) be overruled?

The District contends that the Board should overrule PERB’s interpretation of EERA section 3540.1(g) in Lompoc which required positions to have significant responsibilities for both formulating District policies and implementing District programs in order to be classified as managerial.

PERB's decision in Lompoc which determined that the "or" in Section 3540.1(g) should mean "and" is best summarized in San Francisco which states:

The Board considered, in Lompoc Unified School District, EERB Decision No. 13 (March 17, 1977), a decision in which each Board member wrote an opinion, the EERA's unique definition of 'management employee', and for different reasons, gave little, if any, significance to the Legislature's use of the disjunctive in Section 3540.1(g). Chairman Alleyne, who wrote the lead opinion, followed National Labor Relations Board precedent in finding that management employees are those 'who are in a position to formulate, determine and effectuate management policies.' (citation omitted). Member Gonzales, in concurrence, stated that he would consider NLRB and federal case law as 'supplemental only' inasmuch as the National Labor Relations Act, as amended, does not define 'management employee'. He reaches the same conclusion as the Chairman however, by relying on 'commonly accepted rules of statutory construction'. Member Gonzales stated: "No controlling significance can be ascribed to the Legislature's use of the disjunctive in Section 3540.1(g). The reference to 'significant responsibilities' in that section modifies both the 'formulating [of] district policies' and the administering [of] district programs!" (emphasis in original). Member Cossack concurred with Member Gonzales' rationale concerning the construction of 'management employee' as set forth in Section 3540.1(g).

PERB questioned this interpretation in Cottonwood Union School District (1988)

PERB Decision No. 687 (Cottonwood) when it wrote in footnote 3 of that decision:

We question, however, the propriety of continuing to interpret subdivision (g) of section 3540.1-which provides the statutory definition of a management employee-in the conjunctive, despite that the statute is expressly written in the disjunctive language. [Citation omitted.] We find it unnecessary to reach this issue, however, in light of the District's failure to file cross-exceptions, as well as the fact that the evidence clearly demonstrated Leonard's supervisory status.

Unlike Cottonwood, in this case the District has raised the issue regarding Lompoc's interpretation and arguably some of the positions found not to be managerial might have met

EERA section 3540.1(g)'s management employee criteria if the disjunctive rather than conjunctive definition were used.<sup>27</sup>

The District first argues that the word “or” should be interpreted in accordance with the ordinary meaning of the language and thus in the disjunctive. The District next argues that the case used by PERB to justify its conjunctive interpretation of the word “or” was a misapplication. Finally, the District points out the flaws in the logic that the requirement in EERA section 3540.1(g) that a management employee must have significant responsibility to implement district programs is the same as Section 3540.1(m)'s definition of supervisory employees. We do not reach the merits of these arguments for the reasons stated below.

We decline to reevaluate the conjunctive versus disjunctive issue regarding EERA section 3540.1(g) because the Legislature has indicated that it agrees with Lompoc's interpretation. In so doing we are guided by the fundamental rule in construing a statute that the court (or PERB) should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (NOCROP citing Moyer.)

In Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal.App.3d 689, 700 [163 Cal.Rptr 464] (Sonoma) the reviewing court was tasked with interpreting the scope of a statute where the meaning and effect had earlier been analyzed in an opinion of the Attorney General. Relevant to this case, the Sonoma court held that “the failure of the Legislature to amend the statute following publication of the Attorney General’s opinion supports an inference that the legislative intent therein was correctly construed [citations omitted] . . .”

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<sup>27</sup>Given our decision not to revisit Lompoc's interpretation, we do not further analyze these potential management positions because we have found they do not meet EERA section 3540.1(g)'s first criteria of having significant responsibilities for the formulation of district policy.

For the same reason we find that there is an inference that the Legislature's intent is properly expressed in Lompoc as to EERA section 3540.1(g).<sup>28</sup> The language of Section 3540.1(g) is the same today as it was when enacted in 1975. (Stats 1975, ch. 961, sec. 2, p. 2248.) The Legislature has not amended it to have a meaning different than that articulated in Lompoc in 1977.

This inference becomes even stronger with the Legislature's use of the same disjunctive word, "or", in its definition of management employee in HEERA.<sup>29</sup> Notably, HEERA's statutory provision defining "management employee" was enacted after PERB interpreted EERA section 3540.1(g) in Lompoc.<sup>30</sup>

#### ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case:

The ALJ's finding that the Assistant Dean of ROP position is appropriate for inclusion into the certificated administrators' unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association, was not excepted to by either of the parties and is therefore final.

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<sup>28</sup>The Sonoma court noted with regard to opinions of the Attorney General that such an official interpretation is not controlling but it is nevertheless entitled to great weight. (Sonoma, at p. 699.) We opine that the same is true, if not more so, of PERB opinions given courts have uniformly held that PERB's construction is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous. (San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 856 [191 Cal.Rptr. 800].) We therefore find that the same inference can be drawn from the Legislature's failure to amend a statute after PERB has interpreted the Legislature's intent as to such statutory language.

<sup>29</sup>HEERA section 3562(k) provides, in pertinent part:

'Managerial employee' means any employee having significant responsibilities for formulating or administering policies and programs. . . .

<sup>30</sup>The Lompoc decision is dated March 17, 1977. (San Francisco.) HEERA section 3562(k) was enacted the following year. (Stats. 1978, ch. 744, sec. 3, pp. 2312-2333).

The ALJ's findings that the following positions are not appropriate for inclusion into the certificated administrators' unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association, were not excepted to by either of the parties and are therefore final:

- (1) Director of Risk Management;
- (2) Director of Employment Services
- (3) Senior Director/Controller of District Business Services;
- (4) Vice President of Instruction (Grossmont); and
- (5) Vice President of Academic Affairs (Cuyamaca).

Those portions of the petition which seek to include in the bargaining unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association the following positions are hereby GRANTED:

- (1) Senior Dean of Business and Professional Studies;
- (2) Dean of Admissions and Records;
- (3) Dean of Counseling, Student Development and Matriculation; and
- (4) Academic Deans.

Those portions of the petition which seek to include in the bargaining unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association the following positions all found to be managerial are hereby DENIED:

- (1) Interim Associate District Wide Vice Chancellor of Academic, Student and Planning Services;
- (2) Senior Director of Intergovernmental Relations, Economic Development and Public Information;
- (3) Vice President of Student Services; and
- (4) Dean of Administrative Services.

Pursuant to California Code of Regulations, title 8, section 33450, within 10 days following issuance of this decision, the Grossmont-Cuyamaca Community College District shall post on all employee bulletin boards a copy of the Notice of Decision attached hereto as an Appendix. The Notice of Decision shall remain posted for a minimum of fifteen (15) working days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

The Board hereby ORDERS that Case No. LA-RR-1110-E be REMANDED to the Office of the General Counsel for proceedings consistent with this decision.

Members McKeag and Wesley joined in this Decision.





**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**

CASE: Grossmont-Cuyamaca Community College District and Grossmont-Cuyamaca  
Community College District Administrators' Association  
Case No. LA-RR-1110-E  
PERB Decision No. 1958

EMPLOYER: Grossmont-Cuyamaca CCD  
8800 Grossmont College Drive  
El Cajon, CA 92020

**EMPLOYEE ORGANIZATION**

PARTY TO PROCEEDING: Grossmont-Cuyamaca Community College  
District Administrator's Association  
8800 Grossmont College Drive  
El Cajon, CA 92020

**FINDINGS:**

The Board finds that in addition to the uncontested positions which both parties agree are appropriate for inclusion into the proposed certificated administrators' unit, the following disputed positions are also appropriate for inclusion into the unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association:

- (1) Senior Dean of Business and Professional Studies;
- (2) Dean of Admissions and Records;
- (3) Dean of Counseling, Student Development and Matriculation;
- (4) Academic Deans; and
- (5) Assistant Dean of ROP.

The Board finds that the following disputed positions are not appropriate for inclusion into the certificated administrators' unit proposed by the Grossmont-Cuyamaca Community College District Administrators' Association:

- (1) Interim Associate District Wide Vice Chancellor of Academic, Student and Planning Services;



- (2) Senior Director of Intergovernmental Relations, Economic Development and Public Information;
- (3) Vice President of Student Services;
- (4) Dean of Administrative Services;
- (5) Director of Risk Management;
- (6) Director of Employment Services;
- (7) Senior Director/Controller of District Business Services;
- (8) Vice President of Instruction (Grossmont); and
- (9) Vice President of Academic Affairs (Cuyamaca).

Pursuant to California Code of Regulations, title 8, section 33450, within 10 days following issuance of this decision, the Grossmont-Cuyamaca Community College District shall post on all employee bulletin boards a copy of the Notice of Decision attached hereto as an Appendix. The Notice of Decision shall remain posted for a minimum of fifteen (15) working days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

Dated: \_\_\_\_\_

GROSSMONT-CUYAMACA COMMUNITY  
COLLEGE DISTRICT

By \_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR A MINIMUM OF FIFTEEN (15) WORKDAYS. REASONABLE STEPS SHALL BE TAKEN TO ENSURE THAT THIS NOTICE IS NOT REDUCED IN SIZE, ALTERED, DEFACED OR COVERED WITH ANY OTHER MATERIAL.