EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Administrative Appeal TURLOCK SCHOOL DISTRICTS, Employers, Appellant, and TURLOCK SCHOOL COUNSELORS ASSOCIATION, Employee Organization, and TURLOCK TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and TURLOCK PROFESSIONAL EDUCATORS GROUP, Employee Organization, and TURLOCK AMERICAN FEDERATION OF TEACHERS, Employee Organization, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 110, AFL-CIO, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION TURLOCK CHAPTER 56, Employee Organization, Appellant.	Case Nos. S-R-4 S-R-7 S-R-61 S-R-97 EERB Order No. Ad-18 October 26, 1977

Appearances: Joseph E. Herman, Attorney (Seyfarth, Shaw, Fairweather & Geraldson) for Turlock School Districts;

Dr. Thomas C. Agin, Director, California Pupil Services Labor Relations, for Turlock School Counselors Association; Ernest A. Tuttle, III, Attorney and Nicholas L. Lucich, Attorney (Rowell, Lamberson, Thomas & Hiber) for Turlock Teachers Association, CTA/NEA; Robert J. Sullivan, Attorney (Turner and Sullivan) for Turlock Professional Educators Group; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg, Williams and Roger) for Turlock American Federation of Teachers and Service Employees International Union, Local 110; Ron Haugen, Field Representative for California School Employees Association.

Before Alleyne, Chairman, Gonzales and Cossack, Members.

I

This is an appeal of an administrative decision of the Regional Director of the Sacramento Regional Office of the Educational Employment Relations Board (EERB) in which the sole issue is:

> Whether or not the Turlock Joint Union High School District and Turlock Joint Union District, separate legal entities operating under a common administration, are to be considered one employer or two employers for purposes of collective negotiations under the Educational Employment Relations Act (EERA or Act), Government Code Section 3540 et seq.

The issues of whether or not these districts constitute an appropriate multi-employer negotiating unit or whether or not these districts may engage in multi-employer negotiations, have not been raised by the parties and are not before us. These questions presuppose a recognition or identification of the individual employers to be involved in such an arrangement,

whereas here, the very issue to be determined is the relevant employer under our Act.[1]

In order to determine whether or not the various employee organizations,[2] parties to this matter, have provided adequate showings of support as required by Government Code Section 3544,

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[1] Senco, Inc., 177 NLRB 882 (1969) provides an excellent illustration of these two concepts. In that case, Senco, Inc. was a member of a multi-employer association. Four other corporations, not members of the association, were found to constitute a single employer together with Senco, Inc. The NLRB found that, therefore, the four corporations were obligated to bargain along with Senco, Inc. in the multi-employer association.

In general, NLRB precedent requires the following before a multi-employer unit is found to be appropriate: unequivocal intent of the employers to be bound by group rather than individual action (Kroger Co., 148 NLRB 569 (1964), Morgan Linen Service, Inc., 131 NLRB 420 (1961)), either closely related ownership and control or a history of collective bargaining (Cab Operating Corp., 153 NLRB 478 (1965); Bennett Stone Company, 139 NLRB 1422 (1962); Chicago Metropolitan Home Builders Association, 119 NLRB 1184 (1957)), and express or implied consent of the employees to be represented in common with the employees of the employer members (Pepsi-Cola Bottling Co., 55 NLRB 1183, 1187 (1944); Dancker and Sellew, Inc., 140 NLRB 824 (1963); Mohawk Business Machines, 116 NLRB 248 (1956); Lamson Bros. Co., 59 NLRB 1561 (1945).

If a multi-employer relationship is created, then neither an employer nor a union may effectively withdraw from a duly established multi-employer bargaining unit except upon timely prior notice (Retail Associates, Inc., 120 NLRB 388 (1958)).

For a thorough discussion of multi-employer bargaining in the public sector see: L.B. Kimmelman, "The Multi-Employer Concept in the Public Sector," 29 Rutgers L. Rev. 110 (1975).

[2] Six employee organizations, certificated and classified, filed with either both districts or one district. Turlock School Counselors Association (TSCA), Turlock Professional Educators Group (TGEG), California School Employees Association, Turlock Chapter #56 (CSEA), all filed a single petition with both districts. Turlock Teachers Association, CTA/NEA (TTA) and Service Employees International Union, Local 110, AFL-CIO (SEIU) filed separate petitions with each district. Turlock American Federation of Teachers (TAFT) filed a petition only with the high school district.

in requesting recognition from either or both the Turlock Joint Union School District and Turlock Joint Union High School District (hereinafter Turlock School Districts), it was necessary for the Regional Director to ascertain whether or not these districts are one or two employers within the meaning of Government Code Section 3540.1(k). That section reads:

> 'Public school employer' or 'employer' means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

Acting on behalf of the Regional Director, a hearing officer conducted a hearing on January 25, 1977. At the hearing, three of the employee organizations, TSCA, CSEA and TTA, asserted that these districts constitute a single employer. The other three employee organizations, TPEG, TAFT and SEIU, all contended that the Turlock School Districts are separate employers. Neither of the districts took a position.

Subsequently, on March 30, 1977, the Regional Director determined that the Turlock School Districts are two employers within the meaning of Government Code Section 3540.1(k) and that all the employee organizations provided the requisite showing of interest for the units in which they sought recognition.

The analysis of the hearing officer as adopted by the Regional Director looked first to the language of Section 3540.1(k). Secondly, it considered the application and effect of numerous Education Code provisions on this issue given Government Code Section 3540.[3] The Executive Director referred this case to

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[3]Gov. Code Sec. 3540(a) reads in pertinent part: "... Nothing contained herein shall be deemed to supersede other provisions of the Education Code..."

the Board itself, neither sustaining nor overruling the Regional Director.

Exceptions have been filed pursuant to the EERB's rules and regulations by the Turlock School Districts and CSEA regarding the conclusion of the Regional Director that these districts are separate employers. An informational brief was filed by TTA.

Both districts argue that the hearing officer's decision, adopted by the Regional Director, was incorrect in assuming (1) that the Legislature consciously excluded "common administration districts" such as the Turlock School Districts, from its definition of the public school employer, and (2) that each district must be treated separately because to do otherwise would infringe on its sovereignty. The districts also point out that the criteria of community of interest and established practices found in Government Code Section 3545(a), although not expressly relevant to this determination, should be considered since the districts have met and conferred jointly with the Certificated Employees Council over the past several years pursuant to the Winton Act,[4] and as such, have demonstrated that there exists a community of interest among the employees of both districts. Lastly, the districts claim the Regional Director's decision ignores the substantial additional costs to each of them and to the employee organizations and the possibility of "whipsawing" by competing organizations as a

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[4]Former Ed. Code Sec. 13080, et seq., repealed July 1, 1976.

result of finding that the districts constitute two separate employers.

California School Employees Association agrees that the record and findings of fact, alone, support a "single employer" determination and further argues that two sections of the Education Code, 88014 and 88050,[5] also require such a result.

Turlock Teachers Association takes issue with the Regional Director's analysis of National Labor Relations Board (NLRB) case law in resolving the "single employer" question, arguing first that NLRB criteria are appropriate and second, that it requires a "single employer" finding. Furthermore, TTA asserts that a "single employer" determination is necessary in order to achieve the improvement of personnel management and relations in the state's public school system, a stated purpose of the Act.

The Board itself has considered the decision of the Regional Director, the exceptions and briefs filed by the parties, and the entire record in this case. The hearing officer's determination is sustained subject to modification in analysis as discussed hereinafter.

II

No one disputes the Regional Director's findings of fact. Accordingly, those findings are adopted and repeated here in part for convenience of the parties.

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[5]Ed. Code Sec. 88014 reads:

> Notwithstanding the provisions of Section 88013, the governing board may lay off and reemploy classified employees only in accordance with procedures provided by Sections 88117 and 88127, except the term 'personnel commission' therein shall be construed to mean the governing board.

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Turlock Joint Union High School District is located in Stanislaus and Merced counties. There are three elementary school districts within the boundaries of the high school district, only one of which is a party to this action. They are Turlock Joint Union School District, Chatom Union Elementary School District and Keyes Union Elementary District. The boundaries of the high school district are different from those of the Turlock Joint Union School District.

The average daily attendance of the high school district is approximately 2,050. The ADA of the Turlock elementary district is approximately 3,350. The ADA of Chatom is 705 and the ADA of Keyes is 516.[6]

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> 'Governing board' as used in this section shall include districts governed by a common board or by different boards but with a common administration. Employees in common board or common administration districts shall, for the purpose of layoff for lack of work or funds, be considered as having been employed in a single district.

Ed. Code Sec. 88050(a) reads:

> 'Common board' as used in this article means a board with identical members that governs more than one school district. 'Common administration' as used in this section means the administration by a person employed by governing boards of more than one district or a common board to act as chief executive officer for more than one school district.

These sections perhaps were cited inadvertently by CSEA since in fact, they apply only to post-secondary education. On the other hand, Ed. Code Secs. 45114 and 45220, discussed infra at 14 and 15, contain almost identical language, respectively, and apply to Kindergarten through 12 grade levels.

Hereinafter, unless otherwise noted, all section references are to the Reorganized Education Code added by Statutes 1976, Chapter 1010, amended by Statutes 1976, Chapter 1011, operative April 30, 1977.

[6]ADA figures for Chatom and Keyes are for the 74-75 school

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Since July 1, 1966, the Turlock School Districts have operated as a common administration school district. Under this system of administration, the two districts share a certain number of personnel and certain facilities.

Currently the elementary district has 169 certificated employees and 142 classified employees. The high school district has 122 certificated employees and 91 classified employees. Since 1966, the districts have shared seven high level employees who are paid separately by each district: a superintendent, associate superintendent, assistant superintendent, curriculum consultant, curriculum coordinator, manager of business services and curriculum supervisor.[7]

Additionally, there are four classified employees who work for both of the districts. They are the secretary I/curriculum, a bus driver/mechanic, a custodian/bus driver and the console attendant. These employees split their work time about evenly between the two districts and receive two separate paychecks, one from each district.

In addition to the persons who are employed by both districts, there are at least two secretaries who do work for both districts while drawing a salary from only one. The elementary district

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year and are drawn from a report entitled "Ratios of California Public School Nonteaching Employees to Classroom Teachers" published by the State Bureau of Schools Apportionments and Reports of September 1976.

[7]It should be noted from the record that these individuals have all been designated "management" by both school boards.

employs a secretary to the superintendent and pays her salary. The high school district employs a secretary to the associate superintendent and pays her salary. In 1967, two teachers in the elementary district each taught two high school classes as part of their regular duties and were paid only by the elementary district.

Matters pertaining to several employee terms and conditions of employment appear to be common to employees of both districts.[8] For example, there are common salary schedules covering the Turlock School Districts for classified, certificated and administrative employees. Certificated employees in both districts are covered by the same fringe benefit programs except that the certificated employees of the high school district have dental insurance coverage for dependents while elementary employees do not. The districts have established a mutual policy of giving hiring preference to employees of the other district over outsiders when job openings occur. This policy facilitates interdistrict hiring for certificated staff. When openings occur in either district, they are posted at the other district.[9] Also the

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[8]The term "common" requires amplification. It may be that the more appropriate term is "identical" since the record shows that each district's governing board separately adopted such items relating to employee terms and conditions of employment. Thus, while the term "common" is used herein, it is done so with the recognition that each district has separately adopted the same personnel package and that each district applies such policies separately to its respective employees.

[9]Documentary evidence submitted by TTA states:

> Any certificated employee having permanent classification in one district who is approved for a transfer from one district to the other

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Turlock School Districts have common policies for professional career patterns, controversial issues, academic freedom, grievances, sabbatical leave, affirmative action and evaluation of the certificated employees. Employees from both districts serve on the same committees for the development of curriculum, the implementation of educational goals and objectives, and the promotion of health and safety.

It is the practice that one board sometimes adopts a policy contingent upon the approval of that policy by the other board.

The Turlock School Districts also share certain facilities and equipment.[10] In 1966, they jointly leased a portion of Turlock City Hall for use as administrative offices. In 1968, they jointly entered into an agreement whereby they continue to share the Turlock high school building for administrative offices including certain joint expenses for utilities and janitorial services. This agreement was supplemented in 1974 by the deeding of certain real property by the elementary school district to the high school district in consideration for which the high school district made certain commitments to the elementary district to provide office space to it for the conduct of

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> will be granted a leave of absence and will acquire permanent classification in the district to which he is transferred if he is employed for a second year in that district. At that time, his permanent classification in the district from which he transferred shall expire. The employee shall retain his continuous years in the districts for pay purposes.

[10]Not reflected in the Regional Director's decision is the fact that each district purchases and inventories its own property.

elementary school business. All of these agreements were separately approved and signed by the individual governing boards of the respective districts, some of them pursuant to Government Code Section 6502.[11]

The Turlock School Districts have also been parties to an agreement for the transportation of students. Under this agreement, the high school district provides 12 school buses and the elementary district provides four. Each district continues to own its separate buses, but the high school district operates and maintains them. All bus personnel are employed by the high school district including the director of transportation. The elementary district reimburses the high school district for the cost of operating its portion of this bus system.

Each district has a separate five-member governing board of trustees. The members are elected separately by the voters within the boundaries of each district. There have never been any members common to both boards nor is there now. Each board uses the same meeting room. The two boards generally meet on separate days of the month although they have made a practice in recent years to hold about six meetings together each year.

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[11]Gov. Code Sec. 6502 states in relevant part:

> If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties...

When this is done, the boards usually vote separately on matters before them. On at least one occasion, the joint meeting of July 11, 1968, a member of the elementary school board made a motion which was seconded by a member of the high school board.[12]

Each district establishes its own budget and levies its own taxes. The budgets for both districts are prepared under the supervision of one person, the assistant superintendent, who is employed jointly by both districts. Each district maintains a separate account in the county treasurer's office and each has its own federal employer identification number. All employee wage and fringe benefit costs are paid separately by each district.

The Turlock School Districts have a common telephone number and all incoming calls are received at a central location by a joint employee of the two districts. They also have a common letterhead which contains the names of the three common administrators and the names of the two separate boards of trustees. They publish a common newsletter and share a common post office box.

In the past, the boards have acted in concert regarding personnel relations under the Winton Act. The districts had a single management representative in the meet and confer sessions. However, any agreement reached was adopted, voted upon, and ratified separately by each board.

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[12] It also appears from an examination of documentary evidence submitted jointly by TAFT-SEIU that there was a similar occurrence at the joint meeting of June 28, 1966.

The voters have rejected unification elections of the districts on two occasions since the formation of a common administration in 1966.[13]

III

This case warrants the EERB's consideration of a system of personnel management that, it is argued, would favor a holding that the Turlock School Districts are one employer. Yet by simply applying controlling language found in Government Code Section 3540.1(k) as the Regional Director did, the Turlock School Districts cannot be viewed as one employer. As noted above, that section states:

> 'Public school employer' or 'employer' means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

That section clearly and unambiguously delineates the meaning of "public school employer." The EERB need go no further in determining its meaning except to consider whether or not any provisions of the Education Code might allow a broader interpretation of the definition of a "public school employer" as found in the EERA. Examining that Code, there is no perceptible inconsistency with a finding that Government Code Section 3540.1(k) means nothing more than what it plainly states. In fact, Education Code Section 78 which defines a "governing board" as, among other things, a "board of school trustees" fosters this

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[13] Sections 4200 through 4419, inclusive, describe the process utilized in school district reorganization.

conclusion. Each of the districts involved in this case is governed by a board of trustees as listed in their common letterhead.

Thus it is obvious that both the Turlock Joint Union High School District and the Turlock Joint Union School District must be viewed as separate employers under the plain meaning of the Act. Where the language of a statute is clear, there is no room for interpretation; it must be followed and effect must be given its plain meaning.[14] The Turlock School Districts are clearly separate legal entities with separate governing boards. The fact that they have chosen to share some administrators and a small number of certificated and classified personnel can hardly lead one to conclude that they are one employer. In fact, since the certificated and classified employees customarily receive separate checks from each school district, that is evidence of the separate status of each governing board. Any other arrangements made mutually and cooperatively by the two boards seem more a matter of convenience than the result of any compelling legal authority to do so.

One party's argument that certain provisions of the Education Code, 88050(a) and 88014 (supra note 5), require a

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[14] Estate of Sharp, 257 Cal.App.2d 851, 855 (1968). See also Urban Renewal Agency v. California Coastal Zone Conservation Commission 15 Cal.3d 577 (1975) and People v. Western Airlines 42 Cal.2d 621, 638 (1954) in which cases the California Supreme Court stated, "When a statute prescribes the meaning to be given to particular terms used by it, the meaning is generally binding on the courts."

a one-employer finding is untenable. These sections, while reflecting the Legislature's intention to treat districts engaged in a common administration as one entity, are far too limited in applicability to be dispositive of the issue herein. They concern only community college districts and are furthermore limited in applicability to classified employees. Similarly, Education Code sections 45220(a) and 45114, provisions not argued by CSEA but analogous to sections 88050 and 88014, are of questionable applicability. Section 45220(a) falls under the heading "merit inclusion" and the subsequent provisions of this section set up the requirements that a district must meet if it seeks to establish a merit system. Neither of the two districts in this case are, nor is there any evidence that they seek to become merit districts. Moreover, this provision falls under an article of the Code that deals solely with classified employees.

Section 45114, which covers both merit and nonmerit districts, also only affects classified employees. The issue in the present case concerns both certificated and classified personnel of the districts. Reliance on any of these sections or an attempt to construe them together would be faulty; they are not <u>in pari materia</u>.

But even leaving aside the definition in the statute and viewing the facts themselves, the operations of the Turlock School Districts are not so interrelated as to warrant a finding that they constitute one employer. Drawing upon NLRB precedent as urged by one of the parties and applying those

precedents to the facts of this case is not persuasive. Under NLRB case law the test is whether two or more employers are so integrated that they should be considered a single employer. The NLRB looks to four criteria, stressing the first three, in evaluating whether or not for jurisdictional purposes more than one enterprise should be viewed as a single employer:

(1) interrelation of operation
(2) centralized control of labor relations
(3) common management
(4) common ownership or financial control

These criteria have been cited with approval by the United States Supreme Court. Radio and T.V. Local 1264 v. Broadcast Service, 380 U.S. 255, 256 (1965). See also NLRB Twenty-first Ann. REP. 14-15 (1956); NLRB Outline of its Jurisdictional Standards, 39 LRRM 44 at 49-50 (1957), and California Commericial and Professional Exchange Inc. d/b/a Standard Business and Professional Exchange, 209 NLRB 104 (1974).

A related concept is the joint employer doctrine wherein joint control over labor relations is a primary consideration. For example, in The Greyhound Corp. and Floors, Inc., 153 NLRB 1488 (1965) and Manpower Inc., and Armory Grocery Products Co., 164 NLRB 287 (1967), the NLRB considered such facts as which employer exercised control over work assignments and which employer exercised control over wages. If more than one employer determined those matters governing the essential terms and conditions of employment of the same employees, then a joint employer relationship was found to exist.[15]

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[15] See also Disco Fair Stories, Inc., 189 NLRB 456, 459, (continued)

This opportunity is taken to distinguish between both concepts because it is evident from both the Regional Director's decision and from one of the briefs that the two terms have been used interchangeably, making it somewhat unclear as to whether both theories are being asserted as avenues of resolution for the issue at hand, or whether reliance is solely on the "single employer" doctrine. In any event, applying the standards of either doctrine to the facts of this case would not render the Turlock School Districts one employer.

Here, while both districts share a common administration at the top level, there is nothing in the record to indicate that the Turlock School Districts have actually pooled their authority as employers in the area of labor relations so that it can be said that control over the employees is jointly exercised by them. Control over the employees remains a separate function of each district.[16]

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(1971), S.A.G.E. Inc. of Houston, 146 NLRB 325 (1964), and Bab-Rand Co., 147 NLRB 247 (1964). A further consideration is whether or not meaningful collective bargaining for employees would require the participation of the employers in question. Clayton B. Metcalf, 223 NLRB 642 (1976); County of Ulster, 67 LC, para. 52,699 (1971).

[16]Under NLRB case law, though no one of the criteria set forth above is controlling, the degree of common control of labor relations has been significant. Gerace Construction, Inc., 193 NLRB 645, 650 (1971); Condenser Corp. of America, 22 NLRB 347 (1940), modified and enforced sub nom. NLRB v. Condenser Corp. of America, 128 F.2d 67 (3rd Cir. 1942); NLRB v. National Shoes, Inc., 208 F2d 688 (2nd Cir., 1953).

For example, there has been no showing that the high school district shares or can share in the decision of the elementary district to hire or fire an individual in that district or vice versa. Nor has there been any showing that the elementary district has the right to direct both the work to be done and the manner in which the work shall be done in the high school district or vice versa. All employee wage and fringe benefit costs are paid separately by each district.

As stated in the Regional Director's decision:

> The governing board of the elementary school district has the statutory power to select, discharge and control the manner of work for persons employed in the elementary schools. The governing board of the high school district has the same statutory power over the high school district employees.[17]

Regarding the sharing of top level personnel by the districts as a grounds for arguing that indeed there is a common control of labor relations (because the same people are making the decisions for both districts), it should be remembered that the superintendent and other top level personnel are the employees

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[17] Regional Director's decision at 16. Provisions of the Education Code referred to by the Regional Director, not intended to be an exhaustive list, included the following: Power to fix and prescribe duties of all persons in public school service in the district (Section 35020), power to fix and order paid the compensation of certificated personnel (Section 45022), power to fix and prescribe duties of noncertificated personnel (Section 45109), power to determine the extent and manner in which overtime shall be compensated (Section 45128), power to establish a four-day week for all of certain classes of its employees (Section 45132), power to fix and order paid the compensation of classified staff (Section 45160).

of the governing boards. They are accountable to each district separately for performance of services regarding each. They do not make the ultimate decisions regarding personnel matters; the governing boards do.[18] As stated in Main v. Claremont Unified School District:

> Examination of Section 1306 /now Education Code Section 35035/ reveals that the superintendent is the chief executive officer of the board, not the district; that he is charged with preparation and submission of the budget at such time as directed by the board unless someone else has been designated by it to perform that function; that the superintendent when he submits the budget must 'revise and take such other action in connection with the budget as the board may desire.' His assignments of teachers are also subject to approval of the board. Under the 1957 amendment his power to enter into contracts (Section 1306, subd. (d)) is limited to those which have been approved or ratified by resolution of the board. In no real sense does the superintendent exercise independent powers. Always he operates under control of the board and hence exercises none of the sovereignty of the state. 19

Further, it is significant that administration of both districts by the same people exists only at the top. Local school administration remains entirely the separate function of each district; it is not a joint venture as in the case of the superintendent and other high level personnel. By way of analogy, a relevant

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[18] Section 35010 states that "every school district shall be under the control of a board of school trustees or a board of education."

[19] 161 Cal.App.2d 189, 204 (1958) /Emphasis added/. Sections of the Ed. Code relating to the powers and duties of the superintendent (and by implication, his assistants) are: Section 7 (delegation of powers by public officer to a deputy); Section 35035 (additional powers and duties of superintendent); Section 35027 (employment of deputy, associate and assistant district superintendents), and Section 35250 (delegated duty of superintendent to keep certain records and reports).

distinction by the NLRB on a related finding, the appropriateness of a single plant unit over an employer-wide unit, is helpful. For example, in Dixie Belle Mills Inc., Etc., after considering that the operations of a parent corporation and its subsidiaries were integrated insofar as they involved executive, managerial, engineering or service activities, the NLRB stated:

> On the other hand, both intermediate and immediate supervision of the Dixie Belle plant are separate from that of other plants of Bell. The day-to-day operations of each are the responsibility of different vice-presidents of Bell, and each plant has its own assistant personnel director who handles such matters as interviewing, hiring, promoting, and firing employees for that plant. 20

It should be noted that the NLRB in considering the criteria of common management only looks to integration at the highest levels of management. In this case, if the facts alone were dispositive, a more thorough unification of the managerial structure would be warranted since the EERB is dealing here with political entities that the Legislature has seen fit to clothe with certain incidences of sovereignty. Thus, the EERB would be justified in setting a higher standard for disregarding their separate legal status.

Regarding the districts' adoption of uniform terms and conditions of employment in some areas, specifically certain personnel policies and a common salary schedule, it should be noted that the areas in which the boards have adopted common policies

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[20] 139 NLRB 629, 630 (1962).

generally pertain only to certificated staff.[21] The EERB's decision today concerns more than just certificated employees. The ultimate question it resolves concerns the proper showing of interest to be required of the petitioning parties. Some petitioning parties seek to represent classified employees. Therefore, while there is some evidence of common management policies with regard to certificated employees, there is little or no evidence of commonality regarding classified employees. The record is lacking. And while it may be fair to assume that because of the common management system at the top, such policies are uniformly implemented, no evidence to this effect was offered. The uncontradicted evidence is that each of the governing boards retains ultimate control over its district's operations and presumably has exercised that control differently at least with respect to classified employees.

On the question of articulation between the school districts by the creation of several joint committees to promote a coordinated academic program, the analysis is the same. The record is devoid of any evidence demonstrating comparable interrelation of activity among classified staff for the purpose of improving the non-instructional services of the districts.

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[21] Two areas of personnel policy, which according to documentary evidence, affect both certificated and classified staff are the affirmative action policy and the grievance policy. However, this is not apparent from the recitation of facts in the Regional Director's decision.

On the other hand, evidence regarding the districts' employment of common personnel should not be discussed without consideration, although its value is questionable. First, the Regional Director's decision and testimony regarding nine of the nonadministrative employees characterized them as being jointly employed. This is an inaccurate characterization. As explained above, under both private and public sector case law a "joint employee" is one who is subject simultaneously to the control of more than one employer. Second, the record does not indicate that these employees are subject to the simultaneous control of both districts for their services. Rather, the limited evidence offered suggests that these employees work part-time for each district[22] in that they receive separate paychecks from each district. Third, no evidence was offered that the districts have entered into an agreement pursuant to Government Code Section 6502 to jointly exercise their control over these employees. And fourth, only 16 of the approximately 525 employees of the districts have an employment relationship of any kind with more than one of the districts.

Finally, NLRB cases emphasize the importance of the interchange of employees between employers because it is indicative of an interrelationship of operations.[23] In the case of the

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[22]Ed. Code Secs. 45024 and 45025 distinguish between full and part-time certificated employees. There is no evidence that any of these employees are temporary instructors.

[23]Central Dairy Products Co., 114 NLRB 1189 (1954); Orkin, "The Rat Man," 112 NLRB 762 (1955); Metco Plating Co., 110 NLRB 615 (1954); National Mattress Co., 111 NLRB 890 (1955).

Turlock districts there appear to be only two employees of whom it can be said there is a modicum of interchange. Two secretaries in the administrative offices are paid by one district while providing major services to the other. No evidence was offered to explain the purpose or nature of this arrangement. There seems to be no evidence of any substantial interrelationship of the districts' operations.

And concerning those persons who have been designated "management" by the districts, although that designation is still subject to challenge by petitioning parties, their inclusion among the 16 "joint" employees is even less significant since they do not appear to be among the employees whose showing of interest is being sought in the case at hand.

In sum, beyond the clear definition of "employer" in the EERA, the record fails to demonstrate that the districts operate as one entity. There is no exercise of common control over the personnel programs of the districts. It is clear that all policies are adopted separately by the boards. The adoption of policies is generally not contingent on the other board's approval.

Furthermore, to the extent that the boards of each district have common policies or coordinated district programs, such action only supports the notion of an interrelationship of operations between the districts with respect to the certificated staff. The record lacks corresponding evidence on the classified personnel in both districts. And while

the significance of the Turlock School Districts' adherance to a common administration cannot be discounted, the fact that such a scheme exists only at the top shows the minimal degree to which these districts operate as one entity. In the final analysis the existence of certain common administrative facilities and equipment, a common salary schedule, a common transportation system, and the employ of 16 common personnel, simply does not compare to the overwhelming number of employees who are not employed by both districts, who are not involved in any interchange or interaction, who are not engaged in joint committees, who perform services in totally separate environments, and who are under separate fringe benefit programs.[24] As stated quite perceptively in the decision below, "The bargaining relationship must be between employees and the employer who has control over them."

The record does not even remotely indicate that the Turlock School Districts are so closely related as to exercise mutual control over the employees of both districts nor can it be said that the terms and conditions of employment are the same for all the employees of both districts.

IV

In the foregoing discussion the facts in this case have been considered in light of three of the general NLRB criteria for sometimes treating multiple employers as a single entity. Such treatment has been found inappropriate for the Turlock School

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[24] California Commercial and Professional Exchange, *supra* note 19, at 103.

Districts. Analogues to the fourth criterion (common ownership or financial control), namely voter contituency and tax base, assume particular significance in the public sector and provide special reasons for rejecting such an arrangement.

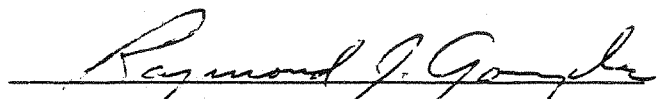
Twice in recent years the districts' voters have been asked to approve a merger of the districts, and twice they voted for the districts to retain their separate legal identities. With the two districts remaining separate, the voters in each district exert a numerically greater influence on educational policy since each voter represents a greater fraction of his respective board of trustees' constituency. Treating these two districts as a single employer would dilute each voter's influence on the district's personnel relations programs. The choice of the voters should not be so lightly disregarded.

Another factor militating against single employer treatment is the incongruence of the two districts' boundaries and the implications of this incongruence for voter participation and the taxation inequities that might occur. Since the high school district contains two additional elementary school districts (Chatom and Keyes) not proposed for inclusion within the single employer, the proposal suggested here would have an unequal effect on the rights of different voters. Residents of the Chatom and Keyes Districts would be given a voice in the personnel policies of the Turlock elementary district in which they do not reside and to which they do not pay taxes by virtue of their influence on the high school district's board of trustees. Thus, the residents of the Turlock elementary district

would have to compete with voters from outside the district for influence over their own district's policies without gaining a complementary voice in the operation of the Chatom and Keyes districts. While the Turlock elementary voters may be gaining a disproportionate influence over the high school district's policy on personnel matters, there is really no way to compare the influence they would gain with the influence they would lose under such an arrangement.

In short, it is unclear which voters reap a windfall of gained influence at the expense of which other voters, but it is virtually certain that the effect would be unequal. Because of the geographical overlap and the fact that the districts provide services at different educational levels, this proposal for treating the two districts as a single employer lacks the symmetry and fairness to the voters that is present when two disjointed districts pool their powers. This situation raises serious questions of the "one man - one vote" concept. Without amplifying on questions of constitutionality, suffice it to say that there may indeed exist some very serious problems in this regard were the EERB to rule in favor of the single employer concept.

For the foregoing reasons, the decision of the Regional Director should be affirmed.



By: Raymond J. Gonzales, Member

Jerilou H. Cossack, Member, concurring:

I concur with the result reached by Member Gonzales. Unlike Member Gonzales, however, I find the facts alone as set forth and

analyzed in the principal opinion provide ample basis for concluding that the Turlock Joint Union High School District and the Turlock Union District are separate employers.

I do not agree with Member Gonzales that this case turns on a literal reading of Government Code Section 3540.1(k). It is inadvisable at this early stage in the EERB's history to preclude the Board from finding, in an appropriate case, that two discrete entities may constitute a public school employer within the meaning of the EERA. Statutes are construed according to the intent of the Legislature.[1] To maintain that Section 3540.1(k) covers only "the governing board of a school district, a county board of education or a county superintendent of schools" may in the long run impede the peaceful employer-employee relations which the EERA seeks to promote.

With regard to the one man-one vote concept discussed by Member Gonzales, I think the voters' decision to retain separate school districts reinforces our finding of separate employers. The EERB, especially in cases such as this one, should take care to avoid depriving governing boards of their vested authority or diluting their responsibility to their constituents.

Finally, my decision in this case that these two school districts are separate employers is not intended to preclude the

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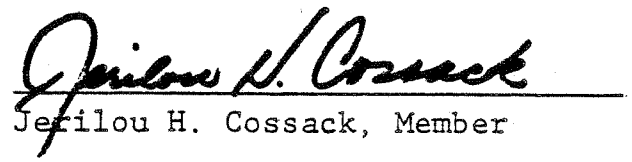
[1] Clean Air Constituency et al. v. California State Air Resources Board, 11 Cal.3d 801, 114 Cal.Rptr. 577 (1974); County of Los Angeles v. Frisbee, 19 Cal.2d 634, (1942); Richie v. Tate Motors, Inc., 22 Cal.App.3d 238, 99 Cal.Rptr. 223 (1971).

voluntary establishment of multi-employer negotiating units.[2]



Jerilou H. Cossack, Member

Reginald Alleyne, Chairman, dissenting:

I dissent from the Board order finding that the Turlock Joint Union High School District and the Turlock Joint Union District may not be a single employer for the purposes of collective negotiations.

I

The sole issue before the Board is whether the facts illustrate that the Districts in question have combined their employer-employee relations functions in such a fashion that the purposes of the Act can best be served by treating the Districts as a single employer solely for collective negotiations purposes. I

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[2]The joint exercise of power is consistent with the functions and authority of a public agency. Gov. Code Sec. 6502 provides:

> "If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting agencies may be located outside this State."

This section has been viewed as merely establishing a procedure for the exercise of existing powers. See The City of Oakland v. Williams, 15 Cal.2d 542 (1940), in which the court stated:

> "[T]he legislature recognizes that there are certain situations and problems that can best be met and solved by several government agencies acting jointly and permitting one of their number to act for all." 15 Cal.2d at 549.

do not agree with my colleague, Member Gonzales, that Government Code Section 3540.1(k) controls this issue. Section 3540.1(k) is a jurisdictional definition. It limits the types of employer entities over which the Board can properly exercise authority. Here no one disputes the fact that the EERB has jurisdiction over both Districts as "employers" under the Act. By defining "employer" as it did, the Legislature did not intend that Section 3540.1(k) should preclude this Board from determining that employees of two districts that function as one for collective negotiations purposes can appropriately be in units covering two districts.[1]

Member Gonzales has confused the issue by stating that "[t]he issues of whether or not these districts constitute an appropriate multi-employer negotiating unit or whether or not these districts may engage in multi-employer negotiations, have not been raised by the parties and are not before us." That statement conflicts with his statement, on the same page of his opinion, that the sole issue is whether "the two districts are to be considered one employer or two employers <u>for the purposes of collective negotiations.</u>" [Emphasis added.] I agree with the latter framing of the issue. Why is this case before us if the District and other parties urging the single-employer argument are not interested in multi-employer negotiations and multi-district units?

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[1]Under the merit system, the Legislature recognizes that in certain instances districts which are by authority separate entities may for reasons of efficiency operate their employer-employee relations as a single employer. See Ed. Code Sec. 45220.

Even if Gov. Code Sec. 3540.1(k) were controlling, I would not find, as does Member Gonzales, that Sec. 3540.1(k) supports the Board's result. There is no single definition in the Education Code or the Government Code for the term "a district". "District" may comprise one district or more than one. See Ed. Code Sec. 80, 45220(b) See also Ed. Code Sec. 45114 giving an expansive definition to the term "governing board". Indeed, Ed. Code Sec. 45220(b) defines two districts with a common administration (the type that is before us in this case) as "a district". Significantly, that section concerns employer-employee relations, albeit under the merit system.

"[F]or the purposes of collective negotiations . . ." suggests that the issue is not whether the two Districts are employers--certainly they are--but whether these two employers within the meaning of Government Code Section 3540.1(k), may join as one for purposes of collective negotiations. On the basis of the facts described in the principal opinion, I have little difficulty concluding that they may.

The two Districts' jointly operative functions, as noted in the principal opinion, meet the test for multi-employer negotiations. Presumably, the two employers think it will prove to their advantage to join as one negotiating entity, as their joint position in this case makes clear; they believe they would save time, money and other resources. It is unfortunate that the Board's out-of-context interpretation of an inapposite section of the Act will prevent the two Districts from achieving that objective.

The EERA neither expressly permits nor expressly bars multi-employer negotiations and multi-employer units. Similarly, the National Labor Relations Act neither expressly permits nor expressly bars multi-employer negotiations and multi-employer units. The United States Supreme Court nonetheless interprets the NLRA to permit multi-employer negotiations in a multi-employer unit because multi-employer negotiations are

> a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.[2]

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[2] NLRB v. Truck Drivers Local No. 449, 353 U.S. 87, 39 LRRM 2603, 2606-7 (1957).

I disagree with the Board's application of the one-man-one-vote concept. I think that is all irrelevant. Policy matters of that nature, whether validly or invalidly considered, are for the Legislature and not this Board to consider. Here, the policy consideration invoked by the Board is not even valid. Voting by the Districts' residents is only one method of ordering the structure of school districts. The absence of a vote by district residents rather than their elected representatives, does not preclude joint or combined operations. For example, two districts on their own volition may form a common administration district;[3] the classified employees of a common administration district may decide by a majority vote of the employees of both districts to be included under a merit system.[4] There is no requirement of a ratification vote by the residents of such districts. Districts may engage in joint powers agreements without the involvement of a vote of the two districts' residents.[5]

III

The opinion of my colleague, Member Cossack, is very hard for me to understand. She agrees, as I do, and as Member Gonzales apparently does not, that multi-employer negotiations are allowed by the Act. Yet, she concludes that the hearing officer correctly decided that the two Districts may not be considered one for purposes of collective negotiations. Not a word in her opinion suggests why the facts in this case do not permit the multi-employer negotiations she concedes the Act does not preclude. If she

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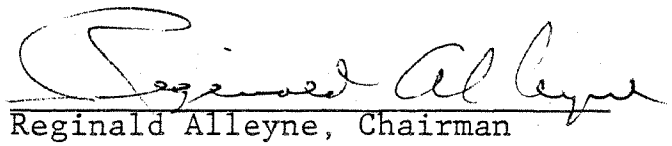
[3] Ed. Code Sec. 45220(a).

[4] Ed. Code Sec. 45221.

[5] Gov. Code Sec. 6502.

means that the EERA allows multi-district negotiations but not multi-district units, my bafflement deepens. If, as in this case, the pertinent facts permit multi-employer negotiations, it follows that the geographical scope of an appropriate unit must be multi-district.[6] With that, the showing of interest required to satisfy the unit-filing requirements under the EERA must necessarily cover both Districts. It follows that the hearing officer's decision should be reversed.



Reginald Alleyne, Chairman

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[6]See NLRB v. Truck Drivers Local No. 449, supra note 2, treating multi-employer bargaining and multi-employer units as a single integrated issue by reversing the Court of Appeal's refusal to recognize the "preservation of the integrity of the multi-employer bargaining unit as a justification for an employer lockout." 353 U.S. at 93-4; 39 LRRM at 2606.