

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

FREMONT UNIFIED SCHOOL DISTRICT, Employer)	
)	
and)	Case Nos. SF-R-8
)	SF-R-9
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Chapter 204, Employee Organization)	SF-R-10
)	SF-R-385
)	EERB Decision No. 6
and)	
)	December 16, 1976
UNITED PUBLIC EMPLOYEES, LOCAL 390, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Employee Organization)	
)	
)	
)	

Appearances: Arthur J. Krannawitter, Staff Representative, for Fremont Unified School District; William D. Dobson, Attorney, for California School Employees Association, Chapter 204; Stuart Weinberg, Attorney (Vanbourg, Allen, Weinberg and Roger), for United Public Employees, Local 390, Service Employees International Union, AFL-CIO.

Before Alleyne, Chairman, Gonzales and Cossack, Members.

OPINION

PROCEDURAL HISTORY

On April 1, 1976, United Public Employees, Local 390, Service Employees International Union, AFL-CIO (UPE), filed three requests for recognition with the Fremont United School District. The three units requested were a "school operations" unit,¹ a "skilled trades and crafts" unit² and a "transportation" unit.³

¹ The request for recognition for the school operations unit included in the unit the job classifications of: head custodian, custodian I, custodian II, matron, and substitute custodian. At the hearing, UPE amended the request to also include the job classifications of grounds helper, gardener, and gardener foreman. The number of employees in this requested unit is approximately 161.

² The request for recognition for the skilled trades and crafts unit included in the unit the job classifications of: fire safety communications specialist, maintenance electrician,

On April 2, 1976, California School Employees Association, Chapter 204 (CSEA), filed an intervention to the three units alleging majority support in a unit of all classified employees.

UPE subsequently filed an intervention to the unit sought by CSEA alleging at least 30 percent support in a "food services" unit.⁴ A formal unit determination hearing was held before a hearing officer of the Educational Employment Relations Board on July 29 and 30, 1976.

ISSUES

The first issue presented in this case is the designation of an appropriate negotiating unit or units for the classified employees of the Fremont Unified School District.

The remaining three issues are whether the Classified Personnel Office Assistant, Certificated Personnel Office Assistant and Secretary to the Associate Superintendent are "confidential employees" within the meaning of the Act.

DISCUSSION

Appropriate Units

The Fremont Unified School District has an average daily attendance of approximately 20,971 students in the elementary school and 11,788 students in the high schools, continuation schools and an adult school. There are 48 sites on which are distributed 35 elementary schools, six junior high schools, four

maintenance plumber, equipment mechanic, maintenance carpenter, maintenance glazier, maintenance locksmith, maintenance painter, zomme building maintenance mechanic and grounds equipment mechanic. At the hearing, UPE amended the request to delete the job classifications of grounds equipment mechanic and maintenance glazier, and to include the job classifications of gardening mechanic, equipment operator, and maintenance carpenter-glazier.

The number of employees in this requested unit is approximately 36.

³ The request for recognition for a transportation unit included in the unit the job classifications of: bus driver and substitute bus driver. The number of employees in this requested unit is approximately 46.

⁴ The intervention for a food services unit included in the unit the job classifications of: cook, baker, food service assistant I, food service assistant II, and food service assistant transport. At the hearing, UPE amended the request to delete the job classification of food service assistant transport and include the job classification of food service assistant I - transport. The number of employees in this requested unit is approximately 103.

high schools, two continuation schools and one adult school.⁵

Regarding the unit determination issue, both CSEA and the district urge the establishment of a single comprehensive negotiating unit for the classified employees. CSEA emphasizes that the bargaining proposals of CSEA and UPE in past years have represented all classified employees and generally contained provisions broadly applicable to all classified employees. The district primarily argues that the efficient operation of the school district demands a single unit.

UPE opposes a single unit and asserts that the four units for which it petitioned are each appropriate based upon a separate and distinct community of interest. In addition to representing evidence regarding community of interest factors for the employees in these four units, UPE submitted evidence regarding community of interest factors for the remaining classified employees who can be generally identified as "instructional aide" employees and "office-technical and business services" employees.

With regard to the determination of appropriate negotiating units, Government Code section 3545(a) provides:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit of the efficient operation of the school district.

Applying the statutory criteria to the facts of this case, we conclude, as we did in Sweetwater Union High School District,⁶ that the following units are appropriate: (1) a unit, which for ease of reference we shall describe as an operations-support services unit, consisting of the job classifications for which UPE petitioned in its school operations unit, skilled trades and crafts unit, transportation unit and food services unit, (2) an instructional aides (paraprofessional) unit, and (3) an office-technical and business services unit. None of these units shall include noon-duty supervisors, for which neither party petitioned, nor managerial, supervisory or confidential employees.

I

⁵ While the record presents no evidence with respect to these facts, we take official notice of the information reported in the Annual Apportionments Report, California State Department of Education, Form J-19 (July, 1976).

⁶ EERB Decision No. 4, November 23, 1976.

We first address the criterion of the community of interest between and among the employees.

With regard to the community of interest of the comprehensive unit, the district noted that it is a merit system district with a Personnel Commission established according to the scheme set forth in Education Code sections 13701 et seq. The district argues that the merit system renders unnecessary separate units because the Personnel Commission promulgates rules which apply to all classified employees while recognizing the special interest and needs of certain employees.

We find that the existence of the merit system in this district does not mandate the establishment of a comprehensive classified employee unit. The merit system was developed to assist directors in personnel matters prior to the time when employees were able to select or reject an exclusive representative. The procedures under the merit system do not control the development of the new meeting and negotiating system implemented by Government Code section 3540 et seq.

The four units for which UPE petitioned are a school operations unit, a skilled trades and crafts unit, a transportation unit, and a food services unit. None of these four requested units has a separate and distinct community of interest, even though each of the four groups has some characteristics which distinguish it from the other classified employees.

The school operations employees are different from the other classified employees in that approximately half of these employees work the swing or graveyard shifts rather than the day shift. They generally report to work at the maintenance or custodial offices at particular school sites, a location separate from the reporting sites of the other classified employees, with the exception of 11 employees who report to the grounds department. Eighty of these employees receive either a paid half-hour lunch or a five percent shift differential as a result of working odd shifts.

The skilled trades and crafts employees are also different in some respects from the other classified employees. For these employees, a general qualification for employment, in addition to the equivalent of an eighth grade education, is a year of journeyman work experience. Each of the crafts and trades have a separate and distinct seniority list which is not interchangeable with other employees either within or without the requested unit.

The transportation employees are distinguished from the other classified employees in that they are all required to possess a class II driver's license, a first-aid certificate and a California Highway Patrol bus driver's certificate. Approximately half of their compensation is from the state transportation reimbursement fund. Additionally, they are assigned their choice of total work hours and bus routes based

upon their seniority as a bus driver.

The food service employees are required to wear uniform dress. They work in the kitchen at the school site to which they are assigned. They receive educational incentive pay for taking certain work-related courses at the local community college. They are compensated through the meals for the Needy Program which is funded through a local property tax override, income from cafeteria sales processed through the general fund, and a federal government commodities reimbursement program.

With regard to each of the four units requested by UPE, we find that the distinguishing characteristics, taken together, are not sufficient to establish a separate community of interest and therefore a separate appropriate unit because the distinguishing characteristics do not substantially distinguish the employees in the requested unit from the other classified employees.

An appropriate negotiating unit in this case, based upon a community of interest, is a combination of the four units in a single unit which we shall term an operations-support services unit.

The primary work functions of the operations-support services employees all involve providing a proper physical environment and support services for students. They drive and repair school and other district equipment, prepare meals for students, and perform janitorial, gardening and general maintenance work at the district facilities. As a prerequisite to employment, they are all required to have the equivalent to completion of the eighth grade educational level. Most of these employees work "full-time", defined by the district as four or more hours daily employment, which entitles them to employer-paid insurance benefits, and most work the day shift. Generally the school operations-support services employees report to work at a central locatin at a school site or the corporation yard from which they are dispatched to various other locations for the actual performance of their work duties. Except as noted above, these employees are compensated through work duties. Except as noted above, these employees are compensated through the district's general fund.

The school operations, skilled trades and crafts, and transportation employees have overlapping lines of supervision. Some school operations employees are supervised by the school Principal and Administrative Assistant and some by the Grounds Supervisor and Administrative Assistant. Of the skilled trades and crafts employees, most are supervised by the Director of Maintenance and Administrative Assistant, while others are supervised by the Assistant Superintendent of Transportation and Transportation Supervisor or the Grounds Supervisor and Administrative Assistant. All of the transportation employees report to the Assistant Superintendent of Transportation and Transportation Supervisor. The food service employees are

supervised by the Cafeteria Manager and Director of Food Service.

The positions of Director of Food Service, Transportation Supervisor and Administrative Assistant, are parallel in authority and all three report to the Business Manager who in turn reports to the Superintendent and Board of Trustees.

The school operations, skilled trades and crafts, transportation and food services employees have similar characteristics relating to work function, educational requirements, work hours, roving work location, compensation and supervision which combine to establish to a combined unit is appropriate.

In finding appropriate an operations-support services unit consisting of a combination of the four units requested by UPE, we note that several job classifications petitioned for by CSEA in its intervention for a comprehensive unit were not included in any request for recognition filed by UPE, yet they appear by job title to possibly be appropriately included in the combined unit.

These are the job classifications of utilityman, delivery driver, supply clerk-utilityman, warehouseman, instructional materials deliveryman-technician, bus dispatcher-driver, bus driver pep., delivery driver- driver-utilityman, and maintenance glazier. The evidence did not include job descriptions or other information regarding community of interest factors of these employees and we do not by this decision include them in the combined unit. They may vote subject to challenge in the elections.

The classified employees who remain after the establishment of the operations-support services unit are the subject of the petition filed by CSEA for a comprehensive classified unit.

Based upon the community of interest criterion, these employees are appropriately grouped into two negotiating units which we shall term an instructional aides unit⁷ and an office-technical and business services unit.⁸ See Pittsburgh Unified

⁷ From the employer's salary schedule, we include the following job classifications: instructional aide, bilingual aide, and community aide-adult school, totaling approximately 238 employees.

⁸ The following job classifications are also from the employer's salary schedule: duplicating services clerk, typist clerk I, instructional materials clerk I, telephone operator, telephone operator-typist clerk, typist clerk II, career education clerk, instructional materials clerk II, key punch operator, account clerk I, data processing clerk, personnel clerk I, school clerk-range A, school secretary I-range A, staff secretary I, instructional materials clerk III, offset duplicating machine operator, school clerk-range B, typist clerk III, account clerk II, accounts payable clerk, purchasing clerk, staff secretary II, lead key punch operator, personnel clerk II,

School District⁹ and Sweetwater Union High School District,
supra.

In the present case, the duties of the instructional aide employees involve assisting the certificated staff with the supervision and training of students. The primary duties of other classified employees do not involve direct interaction with students and their education development. Additionally, instructional aides are required to have an education equivalent to the completion of the tenth grade plus some applicable education, experience or training in the care and supervision of children. Instructional aide employees are compensated by non-district state and federal categorical funds. Their retention as an employee depends upon the continuation of categorical funding.

Aides have little contact with other classified employees. Customarily aides are assigned for a full school year to the classroom of a particular teacher or teaching team. They have a line of supervision distinct from other classified employees in that they are directly supervised by a classroom teacher or teachers, and ultimately by the Principal and the Business Manager, Superintendent and Board of Trustees.

The distinguishing characteristics of the instructional aide employees relating to work function, education and experience requirements, compensation, lack of interaction with other classified employees, work location, and supervision combined to establish that a separate instructional aides unit, consisting of the job classifications listed in footnote 7, supra, is appropriate.

As in Sweetwater, supra, the office-technical and business services employees constitute a separate appropriate unit based upon a separate and distinct community of interest. The functions of these employees are generally to perform clerical and recordkeeping work. They are required to type, operate business machines, maintain files and keep records. They are required to have an education equivalent to the completion of the twelfth grade, sometimes supplemented with an associate of arts degree in a particular subject area. All of these employees work in assigned offices in district facilities. There are several lines of supervision for these employees. Generally, they report to a person in the district office, a department head, the Transportation Supervisor, Director of Maintenance or Warehouse Supervisor, who each in turn reports to the Business

school secretary I-range B, school secretary II, staff secretary III, account clerk III, computer operator I, payroll bookkeeper, duplications technician, staff secretary IV, computer operator II, programmer, programmer analyst I, programmer analyst II, library clerk I, library clerk FII, totaling approximately 247 employees.

⁹ EERB Decision No. 3, October 14, 1976.

Manager, Superintendent and Board of Trustees. Others report to the school Principal who in turn reports to the Associate Superintendent, Superintendent and Board of Trustees.

The distinguishing characteristics of the office-technical and business services employees relating to work function, educational requirements, work location and supervision combine to establish that a separate office-technical and business services unit, consisting of the job classifications listed in footnote 8, supra, is appropriate.

II

On the evidence presented in this case, the two criteria of established practices and the efficient operation of the school district do not alter the unit determination suggested by the community of interest criterion.

Regarding established practices, the evidence showed that for eight years both CSEA and UPE have represented employees in the district. In the years 1973/74 through 1976/77, both CSEA and UPE presented to the employer salary and other proposals which represented all the classified employees under the authority of the Winton Act.¹⁰ Generally these proposals related broadly to all classified employees; however, in the 1975/76 UPE proposal, 18 of 38 items pertained to specific groups of employees.

It is the position of CSEA that the established practice of Winton Act proposals which generally benefited all classified employees should persuade the Board to determine that a comprehensive classified unit is appropriate. As we stated in Sweetwater, supra, where the record, as in this case, does not indicate whether the employer required an employee organization to represent all classified employees as a precondition to becoming a designated representative under the Winton Act, We give little weight to established practices as they relate to the composition of the unit represented under the authority of the Winton Act.

CSEA also presented evidence that it has approximately 350 or 375 of a possible 800 members among the classified employees. CSEA apparently argues that since CSEA "has serviced the needs of all of the various positions in the classified service", and since CSEA has a substantial number of members, therefore a comprehensive unit should be established. We find that evidence of the number of members of an employee organization is alone not sufficient evidence of "the extent to which...employees belong to the same organization". We do not know from the raw number whether the comprehensive unit naturally evolved in this district or whether it was mandated by the employer's rule and regulations relating to recognition of employee organizations under the

¹⁰ Education Code sections 13080-13090.

Winton Act. It was not shown whether the member employees are representative of a cross-section of job classifications in the district or whether they may be concentrated in certain job classifications. A concentration of employees in instructional aide classifications, for example, could indicate support for a separate instructional aides unit rather than a comprehensive unit. Further, we do not know how many of the member employees are managerial, supervisory or confidential employees and thus not eligible to be included in the rank and file unit determined by this decision. Therefore, in this case we do not consider the number of employees who are members of CSEA.

The criterion of established practices does not in this case alter the units suggested by the community of interest criterion.

III

The district presented three witnesses regarding the criterion of "the effect of the size of the unit on the efficient operation of the school district." The Assistant Superintendent for Personnel gave his opinion that he would be better able to administer the provisions of the Education Code relating to classified employees if a single classified unit is established.

The Director of Maintenance testified that in the past neither he nor any of his employees have used release time in the Winton Act meet and confer process. It was his opinion that if "numbers" of his employees "are off on bargaining", it would be a "hardship" on his department and he would not be able to render the same amount of service that he has in the past. However, he agreed that he has no idea of what would constitute a reasonable number of employees to be released to negotiate with the employer. The Principal of a junior high school stated that he efficiently operates his school under the present rules governing all classified employees, he fears that negotiations with multiple units would cause him to spend much time away from his building because he is involved with the negotiating team, and he believes that it would be difficult for him to operate his school if his employees took time off from work for negotiating. However, he had no knowledge of how many meetings it would take to conclude agreements for one unit as opposed to multiple units.

The three district witnesses thus expressed opinions and fears regarding the impact of multiple units as opposed to a single unit on the efficient operation of the school district. However, none of these witnesses had any experience with multiple units. And no concrete facts were presented by the person in charge of negotiations regarding projected time requirements for district personnel dealing with negotiations matters or regarding the projected number of employees required to be released during working hours for negotiations with single as opposed to multiple units. We know that the opinion of the district regarding the projected efficiency of operations with multiple units or past experience with multiple as opposed to single units.

In spite of the limited nature of the evidence regarding the efficient operation of the school district, as the Sweetwater, supra, we have been mindful of this criterion with regard to the unit determination in this case. We conclude that in this case the criterion of the efficient operation of the employee should not preclude the establishment of the three units suggested by the community of interest criterion.

Confidential Employee Issues

In Sierra Sands Unified School District,¹¹ the Board set forth its general commentary on Government Code section 3540.1(c) which defines the term "confidential employee" as "any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations." In summary, the Board's position on the question of confidentiality is that, in nucleus of individuals to assist the employer in its employer-employee relations. Further, the employees who are designated as "confidential employees" are not to be considered "public school employees" within the meaning of the Act. Finally, the Board believes that the employer's right to the undivided loyalty of a nucleus of staff designated as "confidential" outweighs the inherent denial of representation rights of those employees designated as "confidential".

The three alleged confidential employees in the present case are the Classified Personnel Office Assistant, the Certificated Personnel Office Assistant and the Secretary to the Associate Superintendent.

Classified Personnel Office Assistant

We conclude that the Classified Personnel Office Assistant is a confidential employee. She is secretary to the district administrator who serves in the dual capacities of Assistant Superintendent of Personnel and Secretary to the Personnel Commission. In her role as secretary to the Assistant Superintendent of Personnel she has a close association with the employer's employer-employee relations. She stated that for negotiating purposes she gathers data regarding classified employees such as number of employees and sources of funding. On other occasions she see memoranda requesting other persons to gather data for negotiating. She is involved in classified employee grievances under the direction of the Assistant Superintendent, including the typing of correspondence regarding grievances.

On the basis of these activities, we conclude that the Classified Personnel Office Assistant in the regular course of her duties, has access to, or possesses information relating to, her employer's employer-employee relations. "Employer-employee

¹¹ EERB Decision No. 2, October 14, 1976.

relations" includes, at the least, employer-employee negotiations and the processing of employee grievances. This employee is involved in both the gathering of data for negotiations and the processing of employee grievances.

Other activities of the Classified Personnel Office Assistant in her role as secretary to the Secretary of the Personnel Commission are not a factor in our determination that the Classified Personnel Office Assistant is a confidential employee. They include secretarial, supervisory and technical personnel work concerning the implementation of the Education Code and district rules and regulations as they pertain to classified personnel. She participates in the testing procedure for classified employees under the direction of the Assistant Superintendent. She prepares examination announcements, determines the types of test to be given, administers tests, tabulates and results and establishes the employment eligibility list. She also occasionally serves as an oral board member on classified employee interview panels. The activities relate to non-confidential personnel matters and not to the employer's employer-employee relations.

In her role as secretary to the Secretary of the Personnel Commission the Classified Personnel Office Assistant types the minutes of the meetings of the Personnel Commission including the minutes of occasional executive sessions. No evidence was offered with regard to the confidentiality of the matters which are the subject of the executive sessions. We note that among the subjects of the executive sessions could be appeals by permanent classified employees and commission investigations regarding the suspension, demotion or dismissal of such employees as authorized by Education Code section 13743 and 13744 and Government Code section 54957. While in a future case we may find that such matters relate to the employer's employer-employee relations, we do not so find on the limited evidence in this case.

Certificated Personnel Office Assistant

We conclude that the Certificated Personnel Office Assistant is a confidential employee. She, like the Classified Personnel Office Assistant, works under the immediate supervision of the Assistant Superintendent of Personnel. Her duties regarding certificated employees parallel those of the Classified Personnel Office Assistant; however, she is not involved in the functions of the Personnel Commission and does not work relating to classified employees.

The Certificated Personnel Office Assistant handles data relating to certificated employee negotiations and sometimes sees proposals relating to such negotiations. She sees minutes of the certificated negotiation meetings. She has gathered data regarding the salaries of teacher substitutes, hourly and part-time wages in other districts, and the plans of other districts

concerning salary increases.

While the duties of the Certificated Personnel Office Assistant relate only to certificated negotiations and presumably certificated personnel matters, her immediate supervisor has functions relating to both certificated and classified negotiations and personnel matters.

Even though the activities of the Certificated Personnel Office Assistant relate only to certificated employees, we conclude that she is a confidential employee. The language of Government Code section 3540.1(c) does not distinguish between information relating to certificated employees and information relating to classified employees. The employer cannot be expected to rigidly segregate negotiating information so that it is applied in only one negotiating arena. Information or data pertinent to one series of negotiations will often be applied in the other series, especially in the area of the budget. Segregation would be especially difficult in the present case where the same supervisor, the Assistant Superintendent of Personnel, is responsible for overall policies in both the certificated and classified negotiations and personnel matters. We believe the employer has the right to expect loyalty from a nucleus of employees in matters of employer-employee relations without regard to whether the classified employee works with information relating apparently only to certificated or classified negotiations.

Secretary to the Associate Superintendent

We conclude the Secretary to the Associate Superintendent is not a confidential employee. The duties of the Associate Superintendent include instructional services, curriculum and instructional support services. He has no responsibilities relating to employee negotiations. He has no role in the grievance procedure of classified employees. Further, he is not involved in "any kind" of "personnel functions".

The secretary to the Associate Superintendent stated that she has never had occasion to review any documents having to do with proposals the district might be making to classified employees. She also stated that although she has received calls from the Superintendent's office summoning the Associate Superintendent to caucuses of the employer's bargaining team, she has never seen any of the material he brought back.

In view of the absence of any facts demonstrating that this employee, in the regular course of her duties, has access to, or possesses information relating to, her employer's employer-employee relations, we find that the Secretary to the Associate Superintendent is not a confidential employee.

ORDER

The Educational Employment Relations Board directs that:

1. The following units are appropriate for the purpose of meeting and negotiating, providing an employee organization becomes the exclusive representative:

Operations-support services unit

Included: head custodian, custodian I, custodian II, matron, substitute custodian, grounds helper, gardener, gardener foreman, fire safety communications specialist, maintenance electrician, maintenance plumber, equipment mechanic, maintenance carpenter, maintenance locksmith, maintenance painter, zone building maintenance mechanic, gardening mechanic, equipment operator, maintenance carpenter-glazier, bus driver, substitute bus driver, cook, baker, food service assistant I, food service assistant II, and food service assistant I - transport.

Excluded: All other employees, including managerial, supervisory and confidential employees.

Instructional aides (paraprofessional) unit

Included: instructional aide, bilingual aide, and community aide-adult school.

Excluded: All other employees, including noon-duty supervisors, managerial, supervisory, and confidential employees.

Office-technical and business services unit

Included: duplicating services clerk, typist clerk I, instructional materials clerk I, telephone operator, telephone operator-typist clerk, typist clerk II, career education clerk, instructional materials clerk II, key punch operator, account clerk I, data processing clerk, personnel clerk I, school clerk-range A, school secretary I-range A, staff secretary I, instructional materials clerk III, offsetduplicating machine operator, school clerk-range B, typist clerk III, account clerk II, accounts payable clerk, purchasing clerk, staff secretary II, lead key punch operator, personnel clerk II, school secretary I-range B, school secretary II, staff secretary III, account clerk III, computer operator I, payroll bookkeeper, duplications technician, staff secretary IV, computer operator II, programmer, programmer analyst I, programmer analyst II, library clerk I, and library clerk II.

Excluded: All other employees, including managerial, supervisory and confidential employees.

2. The job classifications of utilityman, delivery driver, supply clerk-utilityman, warehouseman, instructional materials deliveryman-technician, bus dispatcher-driver, bus driver pep., delivery driver utilityman, and maintenance glazier are not

included in any unit. The employees in these job classifications may vote subject to challenge in the elections.

3. The following employees are "confidential" within the meaning of Section 3540.1(c) of the Act:

Classified Personnel Office Assistant
Certificated Personnel Office Assistant

4. The following employee is not "confidential" within the meaning of Section 3540.1(c) of the Act:

Secretary to the Associate Superintendent

5. The employee organizations have the 10 workday posting period of the Notice of Decision in which to demonstrate to the Regional Director at least 30 percent support in the above units. The Regional Director shall conduct an election in each unit at the end of the posting period if (1) more than one employee organization qualifies for the ballot, or (2) only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

By: Raymond J. Gonzales, Member Jerilou H. Cossack, Member

Reginald Alleyne, Chairman, concurring in part, dissenting in part.

I agree with the majority result on the appropriate units for bargaining. The facts in this case do not differ materially from those in Sweetwater Union High School District,¹² where we reached a similar conclusion on the appropriate unit issue. Cases with similar facts must be decided in a similar manner. I also agree with the majority decision that the Secretary to the Associate Superintendent is not a confidential employee within the meaning of the Act.

I do not agree with the conclusion of the majority that on this record we can properly find that the Classified Personnel Office Assistant and the Certificated Personnel Office Assistant are confidential employees within the meaning of Government Code Section 3540.1(c). Government Code Section 3540.1(j) provides that a confidential employee is not a "public school employee", or an "employee". Thus confidential employees, as defined in the Act, along with "persons appointed by the Governor", "persons elected by popular vote" and "management employees", are totally removed from the Act's coverage in respect to both eligibility

¹² EERB Decision No. 4, November 23, 1976.

for inclusion in negotiating units of any kind of protection from unfair practices as defined in Section 3543.5 of the Act.

With that, I would require a more stringent standard of proof of a confidential status than that apparently required by my colleagues. The party alleging a confidential status has the burden of proving it with a preponderance of evidence. Also, I believe that the standard proof required of the District should be applied to determine whether a person is confidential within the meaning of our decision in Sierra Sands Unified School District.¹³ In that decision, we said:

Presumably, the Legislature denied certain rights to confidential employees for the sole purpose of guaranteeing orderly and equitable progress in the development of the employer-employee relations.

The assumption is that the employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purposes of employer-employee relations. It is further assumed that this nucleus of individuals would be required to keep confidential those matters that it made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture. (Emphasis added.)

Without question, that statement relates to the labor-management relations activities of the parties and necessarily limits confidential information to labor-management relations matters. It does not extend confidentiality to other personnel matters.

On reading this record, I find that the District has not established by a preponderance of the evidence that the Certificated Personnel Office Assistant and the Classified Personnel Office Assistant had access to matters that "if made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture."

The Classified Personnel Office Assistant

The Classified Personnel Office Assistant described her duties as "secretarial, supervisory and technical personnel work concerning the implementation of the Education Code and rules and regulations as they pertain to classified personnel." When asked whether she handled any materials concerning "classified personnel salary or employee negotiations", she answered, "No". She also testified that the District's Employee Relations Staff

¹³ EERB Decision No. 2, October 14, 1976.

Representative and his Secretary handle all employee negotiations documents. At the hearing in this case, the Employee Relations Staff Representative conducted the direct examination of the Classified Personnel Office Assistant, and he agreed with her testimony that he and his secretary handled classified employee negotiations.

The Classified Personnel Office Assistant testified that she typed minutes of Personnel Commission meetings and typed correspondence concerning employee grievances and that she gathered data on numbers of classified employees for bargaining.

I believe that these duties do not provide Classified Personnel Office Assistant with information that "if made public prematurely might jeopardize the employer's ability to negotiate with employees."

I agree with the reasoning of the majority that in this case the role of secretary for the Secretary of the Personnel Commission and the typing of minutes of Personnel Commission executive sessions does not make this person a confidential employee as defined in the Act. Despite that conclusion by the majority, they also conclude that the employee's access to information on the number of employees and how they are funded, and the typing of grievance correspondence make her a confidential employee.

I think this is not consistent reasoning. If the Personnel Commission matters are not confidential, I fail to see how the collection of data on the number of classified employees and how they are funded can possibly lead to a confidential status. The number of classified employees is easily obtainable by anyone, and once obtained by an employee organization that data could not possibly jeopardize the District's ability to negotiate; likewise, data on the source of classified employee funding. This is all public information under the California Public Disclosure Act.¹⁴ Every citizen is entitled to see it on proper demand.

Evidence of involvement with grievances is limited to a single statement concerning correspondence on employee grievances. There was no evidence to show that the typed correspondence dealt with anything more than routine information on routine procedural matters; there was no testimony suggested that the District's ability to handle grievances might be jeopardized by the information she typed.¹⁵

¹⁴ Government Code Section 6250 et. seq.

¹⁵ The NLRB has taken the position that involvement in grievance procedures does not make an employee confidential within the meaning of the National Labor Relations Act. B.F. Goodrich Company, 115 NLRB No. 103, 37 LRRM 1383 (1956). In B.F. Goodrich Company, the NLRB limited the term "Confidential" to

The Certificated Personnel Office Assistant

The Certificated Personnel Office Assistant testified that she is a member of the California School Employees Association and has held every elected office in the local CSEA chapter, as well as some CSEA committee chairman positions by appointment. She served on a CSEA salary committee and was a chairman of that committee for two years. In that capacity she made wage proposals to the District. As a member of the CSEA's negotiating team, she signed a 1975-76 strike settlement agreement between CSEA and the District School Board.

My colleagues find that this active member of CSEA, whose negotiating activities for her local CSEA chapter had to be well known to the District's employee relations management personnel, has been placed in a position giving her access to information "that if made public prematurely might jeopardize the employer's ability to negotiate with employees." I think it is most unlikely that the District would place her in such a position. And the evidence fails to demonstrate that she was so placed.

The Certificated Personnel Office Assistant testified that occasionally she saw certificated employee organization proposals but that she did not see proposals or counterproposals of management. She said that she occasionally had access to negotiation meetings minutes, and that she had access to the District budget. She testified further that she once gathered data on salaries and raises in other districts; and that she planned to gather data on the number of certificated employees and how many of them are categorically funded.

Surely these duties do not provide the Certificated Personnel Office Assistant with access to material which, "if made public prematurely might jeopardize the employer's ability to negotiate". All of it was either known to the employee organization with which the District negotiated or was easily and legitimately ascertained by an employee organization. The employee organizations know of their own proposals; minutes of negotiations would reveal nothing not known to the employee

those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. I equate employer-employee relations, as used in our Act, with labor relations, as used in the NLRA context.

The majority opinion states: "She is involved in classified employee grievances under the direction of the Assistant Superintendent, including the typing of correspondence regarding grievances. Actually, the only evidence on the record of her involvement in grievances relates to the typing of correspondence regarding grievances."

organization participating in the negotiations; the District budget is a public document available to any citizen; salaries and raises in other school districts are often listed in daily newspapers, and the data from which the total number of certificated employees may be ascertained is available to the general public under the California Public Disclosure Act.¹⁶

The majority decision, in making the Certificated Personnel Assistant a confidential employee, and, as a result, a nonemployee under the Act, has a paradoxical consequence. Without violating the unfair practice provisions contained in Section 3543.5 of the Act, the District could discharge the Certificated Personnel Office Assistant because of her prominent role in negotiations and other activities for the CSEA. Given the constitutional and other statutory protection that school and other public employees have from arbitrary employment discrimination, it is unlikely that this will happen. And nothing in this case suggests that the District would take that action. I mention what to me is that unsettling theoretical possibility merely to highlight its corollary; namely, that despite her well-known involvement in negotiations and other activities for CSEA, she maintained the Certificated Personnel Office position now regarding by this Board as confidential within the meaning of the Act.¹⁷

Reginald Alleyne,
Chairman

¹⁶ Government Code Section 6250 et. seq.

¹⁷ The employer's brief contains no argument on confidential employees.

