

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,

Employer,

and

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,
CAMELLIA CHAPTER 560,

Employee Organization,

and

SACRAMENTO-SIERRA'S BUILDING AND
CONSTRUCTION TRADES COUNCIL,

Employee Organization,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 22,
AFL-CIO,

Employee Organization,

and

AMALGAMATED TRANSIT UNION, DIVISION NO. 256,

Employee Organization,

and

SACRAMENTO ASSOCIATION OF CLASSIFIED EDUCATIONAL
EMPLOYEES,

Employee Organization,

and

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL
EMPLOYEES, LOCAL 258,

Employee Organization.

Case Nos. S-R-8
S-R-234
S-R-355
S-R-429

EERB Decision No. 30A

October 19, 1977

Appearances: William E. Brown, Attorney (Brown & Conradi) for Sacramento City Unified School District; William D. Dobson, Attorney, for California School Employees Association, Camellia Chapter 560; R. A. Caples for Sacramento-Sierra's Building and Construction Trades Council; Stewart Weinberg and Robert J. Bezemek, Attorneys (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 22, AFL-CIO; Peter Nussbaum, Attorney (Neyhart & Anderson) for Amalgamated Transit Union, Division No. 256; Wasle McKinty, President, Sacramento Association of Classified Educational Employees; and Hirsch Adell, Attorney (Reich, Adell & Crost) for American Federation of State, County & Municipal Employees, Local 258.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

By requests for recognition and interventions filed by the parties on and after April 1, 1976 with the Sacramento City Unified School District (District), the parties sought at the extremes, a single classified unit and eight distinct classified units. A security unit was requested by the American Federation of State, County and Municipal Employees, Local 258 (AFSCME) and Service Employees International Union Local 22, AFL-CIO (SEIU). A skilled craft and construction unit was sought by SEIU and Sacramento-Sierra's Building and Construction Trades Council (Building Trades Council). The custodial and warehouse employees were claimed by AFSCME and SEIU. The food services employees were sought only by SEIU. A unit of professional/technical/reproduction employees was sought by SEIU. A unit of instructional aides was sought by the Sacramento Association of Classified Educational Employees (SACEE) and SEIU. A clerical unit was sought by SACEE and SEIU. Finally, the transportation workers were sought as a unit by the Amalgamated Transit Union, Division No. 256 (Transit Union) and SEIU. CSEA seeks to represent all classified employees described above in a single unit.

A hearing was held by a hearing officer of the Educational Employment Relations Board (EERB) to resolve the question of the appropriate

unit or units on October 11-15 and 18, 1976. On September 20, 1977 we issued a decision, EERB Decision No. 30, finding the following units to be appropriate: an instructional aide or paraprofessional unit, an operations-support services unit, an office-technical and business services unit, and a security officers unit. That decision did not address numerous issues raised at the hearing regarding the management, supervisory or confidential status of certain employees.

Subsequently, with the aid of an EERB agent, the parties entered into consent election agreements in the instructional aide or paraprofessional unit, the office-technical and business services unit, and the security officers unit. In the office-technical and business services unit¹ and the security officers² unit it was agreed among the

¹The supervisory status of the following classifications is in dispute: accounts payable supervisor, electronic data processing operations supervisor, data control supervisor, general accounting supervisor, key entry supervisor, payroll supervisor, purchasing supervisor, supervisor of electronic data processing systems and programming, and supervisor of special projects and program accounting. The confidential status of the following classifications is in dispute: the elementary school secretary to a member of the certificated negotiating team, the adult education secretary to a member of the certificated negotiating team, the high school secretary to a member of the certificated negotiating team, the junior high school secretary to a member of the certificated negotiating team, the elementary school secretary to a member of the classified negotiating team, the junior high school secretary to a member of the classified negotiating team, the registrar of the adult school, the high school secretary to a member of the classified negotiating team, and the secretary to the administrator of budget and special business services who is a member of the classified negotiating team. The management and/or supervisory status of the budget analyst and research specialist is in dispute.

²The supervisory status of the assistant supervisor of special officers is in dispute.

parties that persons whose supervisory, managerial or confidential status is in dispute would vote subject to challenge. The parties further agreed that if these challenged ballots affect the outcome of the election, their status would be determined by the EERB based on the record developed at the hearing held in this case.

The parties were unable to reach agreement in the operations-support services unit as to those classifications which are supervisory. Thus, we must determine the supervisory status of the following: foremen, assistant foremen, school plant managers I, II and III, and cafeteria managers I, II and III.

DISCUSSION

We have previously held that while the definition of a supervisor contained in Section 3540.1(m)³ of the Educational Employment Relations Act (EERA) is virtually identical to that contained in Section 2(11)

³Gov. Code Sec. 3540.1(m) provides:

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

of the National Labor Relations Act (NLRA), the statutory scheme of the EERA lends itself to a broader construction of the definition of supervisor in this Act than the construction suggested by the NLRA.⁴ Unlike the NLRA, supervisors in California's public school districts may be represented in negotiations with their employer so long as they are represented in a unit separate from the rank and file employees they supervise. We have also held that possession of any one of the enumerated duties or the effective power to recommend such action, if requiring the use of independent judgment, is sufficient to make an employee a supervisor within the meaning of the EERA.⁵ Finally, in applying this standard to other operations-support services employees, we have held that the judgment required of an individual is not rendered routine merely because much of the work performed by subordinate employees is manual labor.⁶ We conclude in the instant case that the foremen, school plant managers I, II and III and food service managers I, II and III are supervisors within the meaning of the EERA. We further conclude that the assistant foremen are not supervisors within the meaning of the EERA.

Skilled Crafts Foremen.

Unlike the employee organizations, the District contends that the skilled crafts foremen are supervisors. We agree.

⁴Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976.

⁵San Diego Unified School District, EERB Decision No. 8, February 18, 1977.

⁶Ibid.

There are ten foremen in the District. The plumber foreman supervises two job plumbers, two heating people, two plumbers, five engineers and an assistant foreman. The electrical foreman supervises five persons. The glazier foreman supervises four glaziers and one apprentice glazier. The painter foreman supervises six painters and one temporary painter. The three carpenter foremen, including the shop foreman, supervise 13 carpenters, three temporary carpenters and two welders. The laborer-gardener foremen supervise approximately 42 laborer-gardeners and between six and eight CETA employees. The foremen report to the coordinator of maintenance and operation, who in turn reports to the director of maintenance, operations and construction.

These foremen possess several of the indicia of supervisory status enumerated in Section 3540.1(m). Most significantly, their recommendations with respect to the hiring of employees are uniformly followed. The director of maintenance, operations and construction testified that he has "never hired a person against the recommendation of the foreman." They assign employees and materials to jobs and transfer employees from one site to another as needed. They schedule vacations. They initiate disciplinary action and counsel the employee in question with the approval of the director. Accordingly, we conclude that skilled crafts foremen are supervisors within the meaning of the EERA.

School Plant Managers I, II and III.

The District contends that plant managers are supervisors; the employee organizations contend that they are not.

There are 63 school plant managers I, 12 school plant managers II and five school plant managers III in dispute. They supervise the 179 full-time and regular part-time custodians, 31 night shift custodians, four swimming pool custodians, nine floor maintenance workers, two utility workers and eight grounds worker-movers. Of the 63 plant managers I, five are employed at high schools and the remaining 58 at elementary schools. Of the 12 plant managers II, 11 are employed at junior high schools and one is employed at the Skilled Center.

Plant managers develop work schedules. Generally, job assignments change every six months or every year because of redistricting, increase in students or moving of portable classrooms.⁷ Plant managers initiate disciplinary actions by initiating adverse disciplinary evaluations. While there is some evidence that recommendations for disciplinary action are independently reviewed, the record as a whole indicates that the recommendations appear to be followed and are rarely, if ever, altered by higher authority. Plant managers participate in the hiring of custodians at individual schools. A custodian is initially hired by the department of maintenance and operations. The custodian is then placed on a floating assignment; thus, the new custodian works at several schools as needed. When a vacancy occurs at a particular school, the plant manager always

⁷The number of custodians assigned to a school is based on five factors: the number of classrooms, the number of teachers, square footage, the number of students and the square acreage of the individual school site. When one factor in the formula changes, resulting in a change in the number of custodians for the school site, the plant manager revises the schedule, and thus the job assignments, of the custodians.

interviews the four or five candidates referred by the department of maintenance and operations from the list of floating custodians; school principals also sometimes participate in the interviews. The plant manager and the principal select one candidate from among those referred. Plant managers also prepare the formal evaluations of employees. Even though they may not always sign the evaluations, the evaluations they they prepare are never changed. Finally, plant managers both initiate and approve transfer of employees from one school site to another. If an employee requests the transfer, the plant managers at both the school from which and into which he seeks to transfer must concur in recommending the transfer. Plant managers may also initiate transfer of employees. Employees are not transferred into the school under the jurisdiction of a plant manager over his objections. Accordingly, we conclude that plant managers are supervisors within the meaning of the EERA.

Food Service Managers I, II and III.

The District contends that food service (cafeteria) managers I, II and III are supervisors; the employee organizations that they are not.

There are 24 cafeteria managers I, one cafeteria manager II, and 15 or 16 cafeteria managers III. Cafeteria managers report to one of four area supervisors. The area supervisors report to the director of food services, who in turn reports to the assistant superintendent of business administration. The four area supervisors are located in the District's administration building; the cafeteria managers are located in the schools with full kitchens. Twenty-four of the 58

elementary schools as well as the 15 junior and senior high schools have their own full kitchens. Cafeteria managers I are employed in the elementary schools; they are responsible solely for the food prepared at the school. Cafeteria managers II and III are employed in the junior and senior high schools and are responsible for the food prepared for their own schools plus the food prepared for the satellite schools. Cafeteria managers II and III are also responsible for snack bars and a la carte services for students. Cafeteria managers supervise 115 food service assistants I, 69 food service assistants II and four children's center cooks.

The work assignment schedule in the secondary schools is changed weekly; the cafeteria manager II or III determines for each week which employee will be assigned which job. Cafeteria managers I, particularly in the larger elementary schools, also change staff assignments weekly. The purpose of this rotation is to make sure that all employees can perform all tasks. Cafeteria managers initiate promotion and discipline by preparing and signing evaluations of employees; no one is permitted to change a signed evaluation. It appears that their recommendations are uniformly followed. Cafeteria managers keep the records of time worked by employees and prepare the monthly payroll. They also determine if substitute employees are needed and if overtime is required. Accordingly, we conclude that cafeteria managers are supervisors within the meaning of the EERA.

Assistant Skilled Crafts Foremen.

The District contends that assistant skilled crafts foremen are supervisors, while the employee organizations would include them in the negotiating unit.

There is one assistant plumber foreman, one assistant carpenter foreman, and two assistant gardener/laborer foremen. The assistant foremen assume the foremen's duties when foremen are on vacation or leave; otherwise, they spend all of their time performing the same work as other unit employees. There was no evidence regarding the extent to which they assumed the foremen's authority. Such temporary assumption is not sufficient to establish that assistant foremen are supervisors within the meaning of the EERA.⁸ All recommendations for disciplinary action or concerning the quality of work are made by the foremen. While assistant foremen are "assumed" to make recommendations to the foremen, there is no evidence that they in fact do so. Assistant foremen do not participate in the hiring of employees, nor do they participate in the written evaluation process.

There was some testimony that the assistant carpenter foremen assign work to two carpenters. However, the record further discloses that the determination as to what work is to be performed and by whom is made by the director of maintenance and operations and that the director reviews the prior day's assignments each morning. Accordingly, since they possess none of the criteria of supervisory status enumerated in Section 3540.1(m), we conclude the assistant skilled crafts foremen are not supervisors within the meaning of the EERA.

⁸See U.S. Gypsum Co., 116 NLRB 1771, 39 LRRM 1091 (1956).

ORDER

The Educational Employment Relations Board finds that:

1. Skilled crafts foremen are supervisors within the meaning of Section 3540.1(m) of the EERA.
2. School plant managers I, II and III are supervisors within the meaning of Section 3540.1(m) of the EERA.
3. Food service managers I, II and III are supervisors within the meaning of Section 3540.1(m) of the EERA.
4. Assistant skilled crafts foremen are not supervisors within the meaning of Section 3540.1(m) of the EERA.

By: Jerilou H. Cossack, Member

Raymond J. Gonzales, concurring in the Order.

Raymond J. Gonzales, Member

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

I dissent from the order finding that skilled crafts foremen, school plant managers and food services managers are supervisors within the meaning of the Act. I concur in the order finding that assistant skilled crafts foremen are not supervisors within the

meaning of the Act. Member Gonzales concurred only in the order and joined in no part of the opinion by Member Cossack, thus providing no Board opinion but only a Board order. This dissenting opinion addresses the result reached by the Board, as reflected in the order, and only incidentally considers the opinion of Member Cossack.

The result reached by the Board in this case, in conjunction with other Board decisions on supervisory issues, places in total disarray the status of the Board's policy on employees alleged to be supervisors. What this opinion and other Board opinions on this issue fail to analyze with any incisiveness are the following words in the Act's definition of supervisor:

. . . if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.¹

As Senator Flanders noted when the National Labor Relations Act was amended to adopt the NLRA Section 2(11) definition of supervisor now found in the EERA:

Such [supervisors] are above the grade of straw bosses, lead men, set-up men, and other minor supervisory employees . . . Their essential managerial duties are best defined by the words 'direct responsibly', which I am suggesting.²

¹Gov. Code Sec. 3540.1(m).

²93 Daily Cong. Rec. 4804 (May 7, 1947). The United States Supreme Court has cited with approval Senator Flanders' statement explaining NLRA Section 2(11). See NLRB v. Textron, Inc., 416 U.S. 267, 85 LRRM 2945 (1974).

In this case, the Board fails to acknowledge and apply the distinction between lead and supervisory functions.

This dissenting opinion might be best understood if the Board's meandrous history on supervisors is traced before the facts in this case are analyzed.

I

Head Custodians in the Sweetwater
Union High School District

In its decision in Sweetwater Union High School District,³ the first on the subject, the Board held that head custodians in that District are supervisors within the meaning of the Act, even though the record in the case revealed that the head custodians perform maintenance and repair work during most of their shift and have no employees to supervise except during the shift's last thirty minutes, at which time assignments are mechanically made from a schedule prepared once a year on the basis of a manual prepared by the District. Apart from quoting the statute verbatim, the opinion of the Board in that case does not use the words "independent judgment."

Members Gonzales and Cossack wrote the decision on head custodians. I dissented.

Building Services Supervisors and Head Gardeners
in the San Diego Unified School District

Building services supervisors in the San Diego Unified School District are like head custodians in the Sweetwater Union High School District, under another name. In its decision in San Diego Unified School District,⁴ the Board held that building services supervisors

³EERB Decision No. 4, November 23, 1976.

⁴EERB Decision No. 8, February 18, 1977.

and head gardeners are supervisors within the meaning of the Act. The decision relies on isolated instances of purported supervisory duties, describes them in conclusory rather than factual terms, and thus makes the isolated instance appear to be the common practice.

The record showed that the building services supervisors do maintenance and custodial work most of the day; that, like the Sweetwater Union High School District head custodians, their shifts and custodians' shifts overlap for a half hour. During that time, the custodians prepare to follow a schedule, described by the building services supervisors' superior as too routine to require any independent judgment in its application. When a building services supervisor was asked whether he had the authority to hire, transfer, suspend, lay off, promote or discharge employees, he answered:

I have no authority to hire or fire,
discipline or what have you.

Evidence of the head gardener's supervisory authority was similarly weak. The head gardener did work such as mowing lawns and clearing papers from lawns. The job qualifications for the head gardener position require, among other things, "stamina and strength sufficient to maintain a rigorous work schedule requiring continuous and heavy physical exertion." The record showed that it is the head gardener's superior, the field supervisor, and not the head gardener who recommends transfers, suspensions and other disciplinary action.

Members Cossack and Gonzales signed this opinion. I dissented.

Custodial Foremen in the
Foothill-DeAnza Community College District

In its decision in Foothill-DeAnza Community College District,⁵

⁵EERB Decision No. 10, March 1, 1977.

the Board found that custodial foremen are not supervisors within the meaning of the Act. Few facts are set out in the Board's opinion, but the record in the case shows that the custodial foremen have duties like the head custodians in the Sweetwater Union High School District. They prepare evaluations; they initiate recommendations for termination; they make out work schedules; they may take what was described as "minor disciplinary action" and issue "letters of reprimand"; they interview applicants for employment.

But in all of these respects, the ostensibly supervisory powers do not require the use of independent judgment. Evaluations are reviewed "by the next level supervisor." There was no evidence that independent evaluations by custodial foremen could lead to disciplinary action. "Minor disciplinary action" was defined, by example, as "making a man who left a spot on the carpet clean it again." The evaluations made out by the custodial foremen may not go into an employee's personnel record without the approval of the custodial foremen's superior, the manager of plant services; the manager of plant services and the custodial foremen jointly interview candidates and together decide who should be hired, but the manager of plant services has a veto power. That it is rarely exercised tells more about the routine nature of custodial work than it does the power of the custodial foremen to make effective recommendations.

Similar "supervisory" powers were revealed in the case of the head custodians in the Sweetwater decision and similar evidence of an absence of the exercise of independent judgment appears in the Sweetwater record.⁶

⁶ See the quotations from the record in the dissenting opinion in Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976, and transcript pages 52, 60, 61, 136, 137, 160-162 in the Foothill-DeAnza record.

The two cases, Foothill-DeAnza and Sweetwater are in this respect barely distinguishable. If anything, Foothill-DeAnza presents a stronger case for finding a supervisory status. In Sweetwater, the areas of apparent supervisory authority (discounting the independent judgment element) were hiring, assigning and directing. In Foothill-DeAnza, the areas of apparent supervisory authority (discounting the independent judgment element) were hiring, terminating, disciplinary action and assigning and directing. The decision that the custodial foremen in Foothill-DeAnza are not supervisors appears to be an unmistakable implied repudiation of the Sweetwater supervisory doctrine. By any objective standard, it was. No attempt was made to distinguish the Sweetwater decision on supervisory employees; Sweetwater was not even cited in the supervisory-issue section of the Foothill-DeAnza opinion.

Foothill-DeAnza is a unanimous decision of the Board on all issues, including supervisory issues.

Department Heads in the New Haven Unified School District

Moving to the supervisory issue for certificated employees, the Board's first decision was New Haven Unified School District,⁷ holding, among other things, that high school department heads are not supervisors within the meaning of the Act. There, the Board for the first time discussed the lead/supervisory distinction it had not discussed in earlier cases involving nonprofessional employees. Citing a standard description of a lead function, the Board stated:

[I]t is clear that department heads are primarily classroom teachers, and in their assignment as department heads function only as an experienced employee

⁷EERB Decision No. 14, March 22, 1977.

giving assistance to those less experienced or as an administrative coordinator within a department. [Emphasis added.]

On the supervisory status of department heads, the Board's opinion is unanimous.

The Maintenance and Operations Field Supervisor
in the San Rafael City High School District

In San Rafael City High School District,⁹ the Board returned to the supervisory issue in a classified employee case. It held that the maintenance and operations field supervisor (to whom head custodians report) is not a supervisor within the meaning of the Act, since the evidence showed that he exercised no supervisory functions with the use of independent judgment, and that he performed maintenance work most of the time. The record disclosed that he occasionally replaced a supervisor but no evidence showed what he did while serving as a temporary replacement for a supervisor. The opinion cites as authority for the lead/supervisory distinction our decisions in New Haven Unified School District¹⁰ and Foothill-DeAnza Community College District.¹¹

⁸The example of an experienced person working with a less experienced person is used by the National Labor Relations Board to distinguish lead and supervisory functions. Teamsters, Local 626 (Quality Meat Packing Co.), 224 NLRB No. 40, 92 LRRM 1295 (1976); House of Mosaics, Inc., 215 NLRB 704, 710, 88 LRRM 1428 (1974), Fuqua Homes (Ohio), Inc., 219 NLRB No. 162, 90 LRRM 1157 (1975). See NLRB v. Monroe Tube Co., 545 F. 2d 1320, 94 LRRM 2020 (C.A. 2, 1976); NLRB v. Dunkirk Motor Inn, 524 F. 2d 663, 90 LRRM 2961 (C.A. 2, 1976).

⁹EERB Decision No. 32, October 3, 1977.

¹⁰EERB Decision No. 14, March 22, 1977.

¹¹EERB Decision No. 10, March 1, 1977.

I authored the San Rafael opinion. Member Cossack wrote a separate concurring opinion agreeing that the maintenance and operations field supervisor is not a supervisor within the meaning of the Act. She said that "it appears from the record that the field supervisor is merely a conduit from the director of maintenance and operations to the employees in the assignment of work and the determination of priorities among work projects" and that "there is no indication that in fact [supervisory] authority has been exercised." The common ground of the two separate opinions is the finding of insufficient evidence that the maintenance and operations field supervisor is a supervisor within the meaning of the Act.¹² On this issue, Member Gonzales dissented.¹³ He acknowledged that the Board is "flip-flopping" on supervisory issues.

¹²At footnote 5 of Member Cossack's concurring opinion in the San Rafael case, she rejects the principal opinion's statement that the District had not met its burden of proving the supervisory status of the maintenance and operations field supervisor. She concludes that "a discussion of burden of proof and its role in representation proceedings is [not] necessary to resolve the issue raised in this case." This conclusion is inconsistent with her finding that the evidence does not support a supervisory status for the maintenance and operations field supervisor. It is not possible to rule against a party on the ground of insufficiency of evidence unless that party has the burden of proving its case in respect to that evidence.

¹³In Member Gonzales' San Rafael dissenting opinion, he stated that evidence that the maintenance and operations field supervisor had the authority to direct and assign work was "not challenged by the other parties to the hearing, nor was contradictory evidence presented on this question." Actually, the conclusory statement that the maintenance and operations field supervisor could assign work was contradicted by no less than the director of personnel for the District, who was asked:

And I take it the maintenance and operations field supervisory has the authority, and would in fact assign maintenance mechanics to do repair work.

(Continued)

Summary of Precedents
on Supervisory Issues

On roughly similar lead/supervisory facts, the Board has found a supervisory status in two cases, not including this one, and a nonsupervisory status in three cases. The result in this case evens out the count at 3-3. Settlement rates in supervisory-issue cases

(Continued)

The response to the question was:

I question whether he actually does that. I think the director [of maintenance and operations] is involved in that.

Based on his erroneous conclusion that evidence of the power to assign work "went unchallenged at the hearing", Member Gonzales impliedly criticized the hearing officer in the case for failing to "inquire fully into all issues and obtain a complete record upon which a decision can be rendered," citing EERB Rule 32170(a) (incorrectly cited in the opinion as 39170(a)). The criticism was not justified. On the issue of the maintenance and operations field supervisor's power to assign, the record became "complete" within the meaning of EERB Rule 32170(a), when the director of personnel admitted that the field supervisor's superior, and not the field supervisor, had the power to assign. The hearing officer did not even have to consider the sometimes subtle distinction between a decision maker's taking steps to supplement a record to clarify ambiguities, correct mistaken testimony, etc., and a decision maker's acting as an advocate for a party. E.g., the National Labor Relations Board's Case-Handling Manual, after stating, as does EERB Rule 32170(a), that it is the hearing officer's primary duty to see that a full record is developed," also provides as follows:

It should be recognized that, occasionally, the hearing officer's responsibility for the development of a complete record may lead to an appearance of undue assistance to a party which does not itself introduce evidence in support of its positions. In discharging his obligation to develop a full record he must also keep constantly in mind that to the parties he is the representative of the Board and that they expect objective and considerate regard both of their interests and responsibilities. He should exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly "taking over." 2 NLRB Case Handling Manual (Representation Proceedings) §1184.1.

(Continued)

should be exceptionally low now, since a losing party on that issue, no matter what the hearing officer's decision, apparently has a 50-50 chance of winning on appeal to the Board. In this case, as the remainder of this opinion notes, the record does not support the Board's order.

II

Skilled Crafts Foremen in the Sacramento City Unified School District

General Duties

Like their counterparts in other districts in the state, the foremen in the Sacramento City Unified School District spend most of their time doing the same work as those they purportedly supervise. To the extent that their work does not parallel that of other rank and file employees, it consists largely of minor recordkeeping. The director of maintenance, operations and construction (director) is in charge of maintenance, operations and construction relating to personnel within the District's maintenance section. He reports to the Assistant Superintendent, Business Services. A coordinator of maintenance and operations reports to the director. The director testified at the hearing and described the duties of the foremen whose supervisory status is in dispute.

(Continued)

The omission of the latter half of the formula, as just quoted, from EERB Rule 32170(a) cannot alter a balancing principle so firmly imbedded in the law and so thoroughly grounded in fairness to all parties that even in civil cases where a party is not represented by counsel, a judge "is not required to act as counsel for a litigant in the presentation of his evidence." Lombardi v. Citizens Nat. Trust and Savings, 137 C.A. 2d 206, 209 (1955). In the San Rafael case, the District, in arguing, among other things, that the building and maintenance field supervisor is a supervisor within the meaning of the Act, was represented by counsel experienced in school labor-management litigation.

The amount and nature of the rank and file work performed by the foremen varies. The director testified, for example, that a foreman in a carpenter unit "does do a great deal of work with his hands, because he is only supervising three men," that the shop foreman who is in essence a carpenter foreman "has four carpenters with him and two welders but he does all of the scheduling for deliveries . . . programs all of the trucks . . . records all of our inventory . . . and takes care of the repairs to all District equipment." The painter foreman, who performs manual labor 60 percent of the time, does all of the "sign work." It may take him a week to paint all of the required signs; "he gets it done when he can," according to the testimony of the director. Similarly, the roofing foreman "spends 90 percent of his time working because he only has one man under him." The director testified that the plumber foreman only spends less than ten percent of his time engaged in "physical labor." But it is clear from the record that the rest of his time is spent on nonsupervisory matters like providing material that has to be requested through the director.

Even in respect to the percentage of time purportedly spent supervising employees, the testimony of the director, while using the conclusory expression "supervise", never really spelled out what supervisory duties are performed by the foremen. For example, he testified that the electrical foreman, who has five individuals under him, spends 25 percent of his time performing manual labor; then he said that the electrical foreman spends the remainder of his time "supervising; ordering materials, answering requests for help from various school principals, maybe getting estimates from me." In an effort to further delineate the working day of the electrical foreman, the witness was asked what percentage of that foreman's time was spent "acquiring

materials and answering requests for help and things of that nature, as opposed to supervision." The answer was, "20 percent." When the interrogator then attempted to zero in on exactly what kind of supervisory duties were performed during the remainder of the time, the testimony was as follows:

A In relation to the plumber -- or the electrician foreman?

Q Yes.

A Well, if he is changing an electrical panel or putting in ten rooms of lights whatever, there are all kinds of things he would be supervising on. He lays out the wiring. He does his own design work.

Q Would he be out on the job site doing these things?

A Oh, yes.

Q And sometimes --

A A great deal of it.

Q -- he would be doing these with other electricians and sometimes on his own?

A Yes.

While the ordering of supplies and the purchasing of supplies is not a supervisory function under the Act's definition of supervisor, not even that function of foremen in the Sacramento City Unified School District is exercised with the use of independent judgment. For example, the director testified that the glazier foreman orders and purchases supplies through the director and not independently. The director determines whether the District can afford the supplies and whether they are really needed.

Hiring Authority

The foremen participate in the hiring process. But mere participation does not answer the question of whether an individual has hiring authority that "requires the use of independent judgment." The director testified that the personnel department of the District certifies a

certain number of applicants to be interviewed jointly by the director and the appropriate foreman. Following the interview, the director and foreman discuss the qualifications of the applicants until they "can agree upon whom they think would be the best candidate." Although the director testified that he had never hired anyone against the recommendation of the foreman, it is clear from the joint nature of the job interview that no foreman is able to hire anyone against the wishes of the director. The joint interview is similar to the interviews conducted by custodial foremen and their supervisors in the Foothill-DeAnza Community College District¹⁴ case, noted earlier.

Authority to Assign

The record makes clear that the effective power to assign is held by the director and not by the foremen. In support of this view, CSEA called as a witness a plumber in the District's maintenance department. He testified that when he arrives at work in the morning, he picks up work orders that had been placed in a mailbox by the foreman and that he (the plumber) makes the decision on what job he will do. The director testified that he and the coordinator each morning evaluate and formulate plans for the day and give them to the foremen for execution. On the record as a whole, it is evident that by the time the director's instructions are filtered through the foremen to the journeymen, the "execution" duties by the foremen are quite routine and nominal. The director explicitly stated

¹⁴Note 5 supra.

that he or the coordinator "shifted men around, moved men back and forth."¹⁵

Vacations

Scheduling of vacations is not a statutory supervisory criterion. At that, vacations in the Sacramento City Unified School District are scheduled "within the framework as defined in the negotiations with the building trades." This means that a foreman really acts as a coordinator in following a vacation schedule agreed upon by the District and the building trades.

Disciplinary Action

The only discipline described in the record consists of oral warnings by foremen. Foremen have no authority to send anyone home and no authority to suspend an employee. If a foreman files an evaluation calling for possible discipline, the evaluation is filed with the director; the director reviews the recommendation and meets with the foreman; next a meeting is held among the director, the foreman and the employee. If the director decides that discipline is warranted, it is

¹⁵When the director of maintenance, operations and construction was asked the question whether foremen regularly and effectively assign work to the group that is under them, the hearing officer sustained an objection to the question on the ground that it was compound, leading and called for a conclusion. This was the correct ruling by the hearing officer, in that the question attempted to elicit from the witness a simple yes or no answer to a question calling for a conclusion on the very issue before the Board.

At hearings, the perennial problem with questions calling for a conclusion is that on the present issue, for example, a witness' understanding of who is a supervisor and the statutory definition of who is a supervisor may be in conflict. Thus, the question, "Is Mr. X a supervisor?" or the response that "I supervise five people," are of no value in attempting to resolve the question of whether one is a supervisor under the Act. At the other extreme, on the supervisory issue, the most valuable question asked at the hearing in this case was a question asked a cafeteria manager: ". . . Would you describe for us your typical day's work?"

handled through his office and not by the foreman. The foremen's recommendations for discipline are evaluated by others at different levels and independently evaluated by the director before discipline is invoked. This fails to demonstrate the exercise of independent judgment by foremen.

Grievance-Handling Authority

On grievance-handling, the director testified as follows:

Q Okay. Do any of the foremen or assistant foremen have any responsibility in the area of resolving formal written grievances?

A We never had any, I don't know. I haven't gone through it yet. Have we? Not in our area.

MR. CAPLES: We don't operate that way.

* * *

School Plant Managers in the Sacramento City Unified School District¹⁶

School plant managers have a custodial function. They are very much like the custodial foremen in the Foothill-DeAnza Community College District, the building and operations maintenance supervisors in the San Rafael City School District, and the head custodians in the Sweetwater Union High School District. The assistant supervisor of operations services described managers I as "working custodians" and said that a manager I primarily performs the same tasks as a regular custodian.¹⁷

¹⁶The proper title of the position is school plant operations manager.

¹⁷Using the figures provided by Member Cossack, if plant managers are supervisors, it would mean that there is one supervisor for every three custodial employees in the District. There are 80 plant managers and approximately 210 custodians and 30 other custodial employees.

As described by the District's assistant supervisor of operations services, a school plant manager I:

is responsible to the administrator in charge. He develops custodial work schedules, performs minor maintenance, orders custodial supplies, warehouses all his supplies, he sets up for special Civic Center permits, school functions, some manager I's in an elementary school supervise children at noontime in the cafeteria.

He writes requisitions for maintenance and repairs. Some plant manager I's also supervise children in the yard.

Hiring Authority

When a vacancy occurs at a school site, the plant manager interviews four or five candidates referred by the department of maintenance and operations. These names are derived from a list of "floating custodians" who operate throughout the District. School principals sometimes participate in the interviews. The plant manager and the principal select one candidate from among those referred. Because of the principal's involvement and the fact that these candidates are already custodial employees of the District, it cannot be said that the plant manager, in making a selection, exercises independent judgment.

Authority to Discipline

Like skilled crafts foremen in the District, plant managers' recommendations for disciplinary action are independently reviewed by higher authority. For example, a custodial manager III testified that the principal makes an independent determination of whether the principal will write a letter of reprimand or take other disciplinary action. Another custodial manager III testified that when a disciplinary problem arises, he contacts the principal or some other superior for guidance. The assistant supervisor of operations services testified that if a custodian performs in an unsatisfactory manner, a manager may give an oral warning followed by a written reprimand and an evaluation recommending

termination, but this authority is performed in conference with the building administrator of the maintenance and operations department.

A manager I stated that if a custodian's work was unsatisfactory, the manager would fill out an evaluation and give it to the principal but that he had no idea what happened to the evaluation after it was given to the principal. The same manager testified that the principal on one occasion changed the manager's evaluation of a custodian against the manager's wishes. Even as used in the promotional rather than the disciplinary context, the evaluation is completed "under the direction and with the approval of the principal," according to a custodial manager II.

Transfer Authority

On cross-examination, the assistant supervisor of operations services admitted that plant managers have no power to transfer. A custodial manager III testified that if a custodian desired a transfer, he, the manager, would talk to the principal if he felt that the transfer request had merit.

Authority to Assign

Like their counterparts in other districts, plant managers' assignment of work is routine and does not require the exercise of independent judgment. Scheduling takes place at the beginning of the school year and involves such matters as how many rooms an individual will clean. The schedule remains basically the same throughout the school year.

Food Service (Cafeteria) Managers in the Sacramento City Unified School District

General Duties

Cafeteria managers work under the supervision of area supervisors who spend "70 percent of their time in the schools," even though their

offices are located at District headquarters. The area supervisors are "responsible for the overall food service work force within their scope . . . about 75 employees to each supervisor." The day of a cafeteria manager I typically begins at a school site at 7:00 a.m. The cafeteria manager works from 7:00 a.m. to about 9:00 a.m., alone, preparing food and otherwise preparing for the day's activities. If the cashier is absent, the cafeteria manager serves as the cashier. At approximately 9:00 a.m., a part-time student employee arrives on the scene to help the cafeteria manager. Later in the day, part-time food service assistants (the number averages three and depends upon the size of the school), who work a four-hour day, report and assist the cafeteria manager. When all meals have been served, the cafeteria manager and the food service assistants clean the kitchen and serving area.¹⁸ Other cafeteria manager duties, like ordering food and preparing reports and the payroll, are purely administrative and are not supervisory within the meaning of the statutory definition.¹⁹

¹⁸In the Sacramento City Unified School District, there are cafeteria managers I, II, and III. Managers II and III have similar duties. The difference between a manager I and managers II and III was described by the food services director as follows:

- A The manager I is responsible for the food preparation in the immediate school for consumption by the students in that school. There are no -- we have one isolated case where we do have a satellite coming out of an elementary school for a preschool, but the other 23 elementary kitchens for the manager I's prepare food solely for that school, the difference being for the manager II's and III's is that they prepare food for their own schools plus their satellite school. Also, the manager II's and III's have snack bars, and they have ala carte services for the students, which they don't have in the elementary schools.

¹⁹In Member Cossack's opinion, she states: "Cafeteria managers keep the records of time worked by employees and prepare the monthly payroll. She apparently believes that these are supervisory functions within the meaning of the Act. But a plain-meaning reading of the statutory definition contained in Gov. Code Sec. 3540.1(m) reveals that these are not supervisory functions, as they are not part of the enumerated criteria.

When asked whether she gave directions, a cafeteria manager testified at the hearing as follows:

I have suggestions and they are at liberty to find their way of doing [it] if it feels comfortable and they are more efficient at it, but I do suggest.

Hiring Authority

Cafeteria managers do not have the authority to hire food service assistants. Instead, the food service assistants are selected from a pool of substitute food service workers. The process used to select food service assistants is based upon a mechanical application of seniority. The director's testimony in that respect was as follows:

Our pool of new employees is from our substitute list where they have worked as a sub in an elementary school, a junior high, a senior high, and to possibly working in ten or 12 different schools for a period of time, and the managers in these schools who have had occasion to have subs make a mental note possibly of the subs that fit in well with their crew and who actually perform well.

And when the manager has, through attrition or retirement, loses a, say a permanent four-hour lady, and the manager will call the area supervisor and say, "The sub that I had about two weeks ago," and possibly give her name, "I thought was an excellent worker. Would there be any chance of getting her to fill this position that I have open?" Then the area supervisor will check the seniority status of the particular sub that the manager requested, and if she in fact, say, is No. 2 or 3 on the seniority list, the area supervisor will say, "I have to contact the other two subs who are ahead of you to see if they would be interested in taking this job."

If the other two subs say they don't care to work permanently, that they just want to stay on the sub list, or if they say that, "Where is the job," and we say it's at a school, say, in the South Area and they live in the East Area, they may say, "No, I'll take my chances on the next school being in my geographic area where I live.

Then the supervisor, the area supervisor has now cleared the way for the sub who has third ranking in seniority as to date of hiring, and she will call the manager and say, "Yes, you can have that sub as a permanent employee, and I will ask her if she is willing to accept the position."

This is how the manager I, II, or III has a voice in the selection of her people.

Member Cossack's opinion states that cafeteria managers "determine if substitute employees are needed . . ." This merely means that the cafeteria manager takes note of a regular food service assistant's absence. The cafeteria manager does not determine what substitute employees to use. In any event, the selection of substitutes is a mechanical process based upon seniority on a list of substitutes. The record does not indicate that cafeteria managers have anything to do with the placement of names on that list.

Authority to Grant Overtime

Member Cossack's opinion states: "[Cafeteria managers] also determine . . . if overtime is required." This gives the impression that a cafeteria manager may unilaterally approve overtime. But the director of food services stated:

The area supervisor are responsible for the menu planning, proper usage of food, the insurance of safety and sanitation programs on their daily visits to the schools. They are to sample the food that is prepared in the schools. They are to assure timely delivery of foodstuffs to the schools. They are responsible for granting overtime to the managers in the schools who may have occasion to need overtime. They must get approval from the area supervisors, because I charge them each with the fiscal integrity of the schools assigned to them. [Emphasis added.]

And later, to clarify whose overtime the field supervisor approved, the director testified:

Q Okay. You testified that the area supervisors have responsibility for granting overtime. Who did you mean that to refer to, to which employees may they grant overtime?

A Any of the FSA-I's or FSA-II's assigned to the manager.²⁰

III

On supervisory issues, EERB decisions in the Sweetwater-San Diego-Sacramento line of cases and the Foothill-DeAnza-San Rafael-New Haven line of cases, are irreconcilable. New Haven applies the National Labor Relations Board's well-established lead/supervisory distinction to professional department heads and concludes that they are not supervisors under the Educational Employment Relations Act. Sweetwater and San Diego and now Sacramento, fail to apply the lead/supervisory distinction in cases concerning nonprofessional employees; ~~they conclude that the~~ disputed employees are supervisors and are thus excluded from the units determined to be appropriate. Nothing in the EERA justifies this dual standard. It strips bare and exposes as a fallacy the reasoning in Sweetwater, and this case, that the EERA "recognizes that public and private sector supervisors differ in the nature of the authority they

²⁰In San Diego Unified School District, EERB Decision No. 8, February 18, 1977, the Board unanimously held that area cafeteria managers and cafeteria managers I are supervisors. The two cases are distinguishable. Unlike San Diego, cafeteria managers in this case do not independently assign overtime, do not have the authority to recommend discipline, and are "responsible" for substantially smaller staffs. Additionally, there is no evidence in this case that cafeteria managers can effectively recommend transfers. In any event, I regard San Diego as a close case on the issue of the supervisory status of area cafeteria managers and cafeteria managers.

possess,"²¹ and that the EERA "lends itself to a broader construction of the definition of supervisor . . . than the construction suggested the National Labor Relations Act."²² For the rejection by the EERB of the California Supreme Court's command of parallel construction for California and federal labor legislation with parallel language is itself a rejection unevenly applied by the EERB.²³ The EERB "broader

²¹Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976.

²²See opinion of Member Cossack in the present case. Member Gonzalez as noted earlier, has neither joined nor written an opinion in this case. But he expressed similar views in Sweetwater and recently in his dissenting opinion in the San Rafael case.

²³This follows from a reading of two decisions of the California Supreme Court, Firefighters Union v. City of Vallejo, 12 Cal. 3d 608, 61 87 LRRM 2453 (1974) holding that it is appropriate to use National Labor Relations Act precedents as a guide in interpreting analogous or identical language in state labor legislation; Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 46 LRRM 3065, 3066 (1960), holding that when a later statute contains language identical to that found in an earlier statute, "it will ordinarily be presumed the Legislature intended that the language as used in the later enactment would be given a like interpretation," and that this rule "is applicable to state statutes which are patterned after federal statutes . . ." In reliance upon this doctrine, California appellate courts have consistently relied on National Labor Relations Board precedents in unit-determination cases arising under the Meyers-Milias-Brown Act, Gov. Code Sec. 3500 et. seq. See Alameda County Assistant Public Defenders Association v. County of Alameda, 33 C.A. 3d 825, 109 Cal.Rptr. 392, 84 LRRM 2237 (1975); Santa Clara County District Attorney Investigators Association v. County of Santa Clara, 51 C.A. 3d 255, 124 Cal.Rptr. 115, 90 LRRM 3129 (1975).

In many EERB unit cases, the use of NLRB precedents is prefaced with the notation that the EERB will consider NLRA precedents where NLRA and EERA language are parallel. See Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976, citing Firefighters Union v. City of Vallejo, supra; Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976, n. 1, and California cases cited therein; Oakland Unified School District, EERB Decision No. 15, March 28, 1977, n. 6, and cases cited therein; San Rafael City High School District, EERB Decision No. 32, October 3, 1977, n. 3, and cases cited therein. In his dissenting opinion in Los Rios Community College District, EERB Decision No. 18, June 9, 1977, Member Gonzalez relied upon approximately a dozen National Labor Relations Board cases in articulating his views in favor of the exclusion of part-time faculty from a unit of full-time faculty in a community college district.

construction" principle did not prevent the EERB from applying the NLRB's lead/supervisory distinction to white-collar professional employees in the New Haven case.

The EERB is also uneven in its acceptance of some interpretations of the National Labor Relations Act, while at the same time rejecting the interpreted NLRA's lead/supervisory dichotomy. The Board cites with approval and applies to EERB cases NLRB and federal cases interpreting the National Labor Relations Act's definition of supervisor to mean that if only one of the enumerated supervisory criteria is applicable, the individual in dispute is a supervisor under the Act.²⁴ Since the two statutes, EERA and NLRA, contain the same supervisory definition,²⁵ the EERB should accept the uniform application of NLRA case precedents on the supervisory issue. The EERB should not follow

²⁴The case consistently cited for this proposition in EERB cases is Ohio Power Co. v. NLRB, 176 F. 2d 385, 24 LRRM 2350 (6th Cir. 1949); cert. denied, 338 U.S. 899 (1949).

²⁵The single difference between the two statutory definitions actually supports an EERB interpretation that should make it slightly harder to find an individual a supervisor under the Educational Employment Relations Act. The EERA definition, n. 3 in Member Cossack's opinion, contains the words "regardless of job description." This does not appear in the National Labor Relations Act definition, 29 U.S.C. §152(11). The California Legislature apparently recognized that many job description are inflated and do not accurately reflect the work actually performed by an individual.

The Board implies that the EERA definition of supervisor should be given a broader meaning than the NLRA's definition because NLRA supervisors may not be included in any bargaining units while EERA supervisors may form supervisory units. This overlooks (1) the narrow circumstances under which supervisors may form units under the EERA (only when no one in the supervisory unit represented by Union X supervises employees in a nonsupervisory unit represented by Union X), and (2) the distinction between coverage and consequences of coverage. The NLRA and EERA differ in respect to the consequences of a supervisory status but not materially in respect to coverage by the definition. Only 11 supervisory units have been formed out of more than 1,000 units set up in EERB proceedings.

NLRA precedents on one aspect of a supervisory issue and, at the same time, reject NLRA precedents bearing on the same issue in the same case. The piecemeal acceptance of federal case law seriously subtracts from a singular advantage provided by the California Legislature in its adoption of National Labor Relations Act language in some--but by no means all--portions of the EERA: parties in disputes arising under the EERA need not attempt to predict in a vacuum what the EERB will do with cases calling for interpretation of EERA sections having parallel language in the National Labor Relations Act. In such cases, parties should be able to predict with some degree of assurance what the EERB will do by noting how, during the last 42 years, the National Labor Relations Board and the federal courts have interpreted the National Labor Relations Act. It is true that the National Labor Relations Board is not always consistent and that some of its decisions and those of the federal courts are and will continue to be subject to differing interpretation. But many will not be. Instead, many will be like decisions describing the lead/supervisory distinction; they will be settled behind years of almost uniformly applied precedents that cause problems of interpretation only in the rare close case falling nearly at mid-spectrum.

The key measure of the EERB's success is the rate of settlement of cases originally filed. In sum, the settlement rate hinges principally on the EERB's degree of decision predictability. With its decisions in the cases noted here and its decision in this case, the Board defeats that objective in respect to the important issue of who is a supervisor within the meaning of the Educational Employment Relations Act.

Reginald Alleyne, Chairman

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

ORDER

In the Matter of:

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,
Employer,

and

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,
CAMELLIA CHAPTER 560,
Employee Organization,

and

SACRAMENTO-SIERRA'S BUILDING AND
CONSTRUCTION TRADES COUNCIL,
Employee Organization,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 22,
AFL-CIO,
Employee Organization,

and

AMALGAMATED TRANSIT UNION, DIVISION NO. 256,
Employee Organization,

and

SACRAMENTO ASSOCIATION OF CLASSIFIED EDUCATIONAL
EMPLOYEES,
Employee Organization,

and

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL
EMPLOYEES
Employee Organization.

Case Nos. S-R-8
S-R-234
S-R-355
S-R-429

EERB Decision No. 30A

October 19, 1977

The Educational Employment Relations Board finds that:

1. Skilled crafts foremen are supervisors within the meaning of Section 3540.1(m) of the EERA.
2. School plant managers I, II and III are supervisors within the meaning of Section 3540.1(m) of the EERA.
3. Food service managers I, II and III are supervisors within the meaning of Section 3540.1(m) of the EERA.
4. Assistant skilled crafts foremen are not supervisors within the meaning of Section 3540.1(m) of the EERA.

Educational Employment Relations Board

by

Stephen Barber
Executive Assistant to the Board

10/19/77