STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GILROY UNIFIED SCHOOL DISTRICT, Employer, and GILROY TEACHERS' ASSOCIATION, CTA/NEA, Employee Organization, and GILROY FEDERATION OF TEACHERS, AFT LOCAL 1921, AFL-CIO, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS GILROY CHAPTER #69, Employee Organization.	)	Case No. SF-UC-30 PERB Decision No. 98 July 20, 1979

Appearances: Daniel C. Cassidy, Attorney (Paterson & Taggart) for Gilroy Unified School District; Duane Beeson, Attorney (Brundage, Beeson, Tayer & Kovach) for Gilroy Teachers' Association, CTA/NEA; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Gilroy Federation of Teachers, AFT Local 1921, AFL-CIO; Patrick McGovern, Attorney for California School Employees Association and its Gilroy Chapter #69.

Before Gluck, Chairperson; Gonzales and Moore, Members.

FACTS

On April 1, 1976, the Gilroy Teachers' Association, CTA/NEA (hereafter Association) filed with the Gilroy Unified School District (hereafter District) a request for recognition,

alleging majority support in a unit of "all certificated employees", encompassing approximately 335 employees. The Gilroy Federation of Teachers, AFT Local 1921, AFL-CIO (hereafter Federation) thereafter filed an intervention, claiming more than 30 percent support in a unit of approximately 300 nonmanagement certificated employees.[1] On April 1, 1976, California School Employees Association and its Gilroy Chapter #69 (hereafter CSEA) requested recognition in a unit comprised of the District's approximately 250 classified employees. On April 28, 1976, the Federation filed an intervention to CSEA's request for recognition, together with more than 30 percent proof of support in a unit of approximately 100 nonmanagement classified instructional

---

[1]Government Code section 3544.1(b) states:

> The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:
>
> . . . . . .
>
> (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Section 3544.7, unless subdivisions (c) or (d) of this section apply . . . .

employees, which included preschool and children's center teachers.

On August 11, 1976, a hearing was conducted by the Public Employment Relations Board (formerly the Educational Employment Relations Board and hereafter PERB or Board)[2] to determine an appropriate unit of certificated employees in the District. Because the parties had previously reached agreement regarding the regular certificated teacher unit, the only remaining issue dealt with the placement of children's center and preschool teachers. During the course of this hearing, CSEA appeared and argued that it should be a party to the proceeding because an issue existed as to whether children's center teachers were classified or certificated employees. The certificated (No. SF-R-215) and classified (No. SF-R-384) cases were thereafter consolidated and a hearing was conducted on September 8, 1976. Pursuant to EERB Resolution #10,[3] on

---

[2]The Educational Employment Relations Board was renamed the Public Employment Relations Board (hereafter PERB or Board) on 1/1/78.

[3]Board Resolution #10, adopted by the Board at a public meeting on January 25, 1977, states in pertinent part:

> Hearing officers shall, in cases heard after this date, draft a proposed decision pursuant to Rule 33370 in each representation case affecting classified employees unless the Board orders the record to be forwarded without such a decision. The General Counsel is instructed to review each such case and to recommend to the Board whether or not the Board itself should decide the case.
>
> The Board hereby remands to the General Counsel the classified cases listed in Attachment A heard prior to this date to be

January 25, 1977, this case was removed from the docket of cases to be decided by the Board itself, and remanded to the general counsel for decision.

All other classified questions were resolved through consent agreements between the parties. In order to expedite an election to select an exclusive representative, all parties on May 6, 1977, agreed to withdraw their representation requests and jointly requested a unit clarification pursuant to Board Resolution #6.[4] The issues raised by the unit clarification petition were (1) whether children's center teachers (hereafter referred to as "permit teachers") and preschool teachers (hereafter referred to as "permit teachers") were classified or certificated employees; (2) whether those teachers should be included in the classified unit, a separate

---

> decided in accordance with the published decisions of the Board itself. The cases remanded include those cases heard by a Board member, Board counsel, regional director or ad hoc hearing officer. The General Counsel is instructed to assign these cases to a hearing officer staff member for a proposed decision.

[4]Board Resolution #6, adopted at a public meeting on July 6, 1976, states:

> Petitions for changes in unit determinations pursuant to Section 3541.3(e) of the Act will be entertained by the Educational Employment Relations Board under the following circumstances:
>
> 1. Where both parties jointly file the petition; or
>
> 2. Where there has been a change in the circumstances which existed at the time of the initial unit determination.

unit, or, if found to be certificated, in the regular certificated teacher unit; and (3) whether the children's center supervisor was a supervisory employee within the meaning of section 3540.1(m).[5]

On April 28, 1978, the hearing officer rendered a proposed decision wherein he found that children's center and preschool permit teachers were certificated employees and were appropriately included in the regular certificated unit. In addition, he found the children's center supervisor to be a nonsupervisory employee. No exceptions were taken to the supervisory issue, and it is therefore not in issue before the Board.

The District excepts to that portion of the hearing officer's proposed decision that includes "permit teachers" in a unit of certificated employees. It is the District's position that permit teachers are classified employees; that qualifications for permits are substantially different from those for certification; that there is a lack of significant

---

[5]Government Code section 3540.1(m) states:

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

community of interest between permit teachers and certificated employees and that permit teachers have historically been treated as classified employees. The District further contends that the provisions of the Education Code relied upon by the hearing officer to find that permit teachers are certificated are designed for retirement eligibility purposes only and are inapplicable for purposes of the Educational Employment Relations Act (hereafter EERA).[6] The District also opposes the establishment of a separate unit of permit teachers and urges their inclusion in the existing classified unit.

The Gilroy Unified School District is located in Santa Clara County and at the time of the hearing had an average daily attendance of approximately 5,743 students. The District includes nine school sites on which are distributed six elementary schools, one intermediate school, one high school and one continuation school. One children's center and two preschools are also included in the District's operations. At the date of the hearing herein, a total of 262 classified employees, 314 certificated employees, and three children's center and three preschool permit teachers were employed by the District.

The children's center provides care for 50 children, between the ages of two and twelve. The purpose of the center

---

[6]The Educational Employment Relations Act is codified at Government Code sections 3540 et seq. Hereafter, all references are to the Government Code unless otherwise indicated.

is to provide education and care for children whose parents are either working or taking vocational courses.

The preschool program consists of three classes at each of two school sites, of which each class has 15 students. The children range in age from three years, nine months to four years, nine months. The preschool program is designed to prepare children who are economically, educationally, socially and developmentally deprived for entrance into regular classroom education. The programs seek to improve motor development skills and to increase social development. The teachers work with small groups of children in such activities as preparation of meals, cleaning, playing games, art, music and story-telling. The preschool classes are conducted 3 1/2 hours per day. The teaching approach at the children's center is similar to that of the preschool programs.

DISCUSSION

In this case the Board must determine the appropriate placement of the preschool and children's center permit teachers. In order to address this issue the Board must determine whether permit teachers are classified or certificated employees within the meaning of EERA, section 3545(b). This section states in pertinent part:

> In all cases:
> . . . . . .
> (3) Classified employees and certificated employees shall not be included in the same negotiating unit.

If permit teachers are classified employees, the hearing officer must be reversed. On the other hand, if they are

certificated employees they cannot be placed in the CSEA classified unit or in the instructional aide unit represented by AFT since aides are indisputedly classified employees.[7]

Permit teachers have historically been treated as classified employees. They are paid on a classified salary schedule except that they earn certain increments based on the acquisition of additional educational credits for which other classified employees are not eligible. They also qualify for classified employee longevity increments. They are subject to the classified employee disciplinary procedures in the District and have a probationary period which differs from that of regular certificated teachers. In addition, while regular teachers in the existing certificated unit may not be laid off for lack of funds, permit teachers may be. Further, while the District does not dispute that the permit teachers do engage in instruction of the preschool children, it points out that such duties are relatively marginal and that the primary function of the subject employees is custodial day care in nature and essentially similar to the functions of the instructional aides. Based on the foregoing, the District contends that the permittees share a community of interest with the classified employees and are appropriately included in the classified unit.

---

[7]Education Code section 45347(b) states, in relevant part:

> Instructional aides shall be classified employees of the district, and shall be subject to all of the rights, benefits, and burdens of the classified service. . . .

The Educational Employment Relations Act does not define the term "certificated employee" or the term "permit teacher". The Education Code is, however, helpful in this regard. Section 8366 reads in pertinent part:

> Each person employed by a public or private agency as defined in Section 8213 in a position requiring a child development permit for the supervision and instruction of children . . . or in the supervision of the child development program, shall be deemed to be employed in a position requiring certification qualifications.
>
> Each other person employed by an agency in a child development program under the provisions of this chapter shall be deemed for all purposes, including retirement, to be a person employed by the agency in a position not requiring certification qualifications.

It is this section which principally led to the hearing officer's conclusion that permit teachers are certificated employees. A close scrutiny of other sections of the Education Code reveals ample support for this proposition.

Education Code section 44006 states:

> The term "certificated person" refers to a person who holds one or more documents <u>such as a certificate</u>, <u>a credential</u>, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents. [Emphasis added.]

Education Code section 44002 defines "credential":

> A "credential" is a <u>document issued by</u> the State Board of Education or <u>the Commission for Teacher Preparation and Licensing</u>, authorizing a person to engage in the service specified in the credential. [Emphasis added.]

And, in stating the personnel qualifications for child development program personnel, Education Code section 8360 states explicitly:

> The governing board of a public agency . . . shall employ in a child development program only such persons who hold permits issued by the Commission for Teacher Preparation and Licensing. Any person holding a teaching credential issued by the State Board of Education or commission is deemed to hold a regular child development permit that will authorize supervision and instruction of children or supervision of a child development program . . . . [Emphasis added]

It is apparent that the "permit teachers" herein must hold either a permit issued by the Commission for Teacher Preparation and Licensing or a teaching credential, in order to meet the [hiring qualifications] set forth in Education Code section 8360. Thus, contrary to the contention of the District, it follows that the required permit or credential is a document encompassed in the definition of a "certificated person" under Education Code section 44006. In addition, since Education Code section 8366 (ante, at p. 9) specifically states that persons employed in a position requiring a child development permit shall be deemed to be employed in a position requiring certification qualifications, such persons are expressly excluded from the classified service. Education Code section 45104 states in pertinent part:

> Every position not defined by this code as a position requiring certification qualifications and not specifically exempted from the classified service . . . shall be a part of the classified service . . . .

Education Code section 45256(a)[8] also specifically excludes from the the classified service positions which require certification qualifications. Since children center positions are deemed to require certification qualifications pursuant to Education Code section 8366 (ante, p. 9) they are clearly not part of the classified service. In conclusion, this Board finds that permit teachers are certificated employees.

The question remains as to whether the permit teachers should be placed in the existing certificated unit or should be granted a unit of their own. The District's fixed position is that a separate unit would cause fragmentation and proliferation of units and impair operational efficiency.

In Oakland Unified School District (3/28/77) EERB Decision No. 15, the Board established a separate unit of children's center teachers, essentially because there was a lack of community of interest between those teachers and the "regular" certificated unit.[9] In that case the children's center unit was comprised of 200 employees in 24 centers. In the absence

---

[8]Education Code section 45256(a) states:

> The commission shall classify all employees and positions within the jurisdiction of the governing board or of the commission, except those which are exempt from the classified service. The employees and positions shall be known as the classified service. Exempt from the classified service shall be:
>
> (a) Positions which require certification qualifications.

[9]One member dissented and would have placed the children's center teachers in their regular certificated unit.

of evidence to the contrary, the Board determined that a unit of 200 permit teachers would not cause undue fragmentation of the bargaining unit, or otherwise impair the efficiency of that district's operations.

In the instant case, the size of the units in question is substantially different than in Oakland. The District herein has 262 classified employees, 314 certificated employees, and only 6 preschool and children's center teachers. The District argued that placing these permit teachers in a separate unit would have a negative effect on the District's operations and cause undue fragmentation of the bargaining unit. The hearing officer was persuaded by this argument. This Board is also persuaded that in this case, a unit of six teachers would not be appropriate, in that it would unduly fragment the bargaining unit and impair the efficiency of the District's operations. Further, there is no evidence that the interests of permit teachers are so disparate with the interests of the other certificated employees as to create disruptions within the bargaining unit or preclude bargaining from taking place.

Thus, having concluded that permit teachers are certificated employees under the EERA, and that a separate unit would be inappropriate in this case, the Board determines that preschool and children's center teachers herein should be included in the unit with the other certificated teachers of the District.[10] For the foregoing reasons we affirm the

---

[10]Since CTA's original petition, which included these employees, was supported by an adequate showing of interest, no new showing of interest is required.

hearing officer's Findings of Fact and Conclusions of Law insofar as they are consistent with this decision. There exists the possibility that, due to voluntary recognitions, there may be bargaining units already in place in other districts which include permit teachers in a classified unit. This decision shall not operate to invalidate any such pre-existing units.

ORDER

Upon the foregoing decision and the entire record in this case the Public Employment Relations Board ORDERS that:

I. The finding of the hearing officer, that the children's center supervisor is not a supervisory employee within the meaning of section 3540.1(m) and is therefore included in the certificated negotiating unit, is hereby affirmed.

II. Persons employed as permit teachers in the District's children's center and preschool programs are certificated employees within the meaning of Government Code section 3545(b)(3).

III. The permit teachers employed in the children's center and preschool programs should be included in the existing certificated negotiating unit. Therefore, the certification for exclusive representative shall be amended to include preschool teachers and children's center teachers, including the classification "supervisor" employed in the children's center and preschool programs, excluding supervisory, management and confidential preschool and children's center employees, as defined by EERA.

By: Harry Gluck, Chairperson

Raymond J. Gonzales, Member

Barbara D. Moore, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GILROY UNIFIED SCHOOL DISTRICT Employer, and GILROY TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, GILROY FEDERATION OF TEACHERS, AFT LOCAL 1921, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, GILROY CHAPTER 69, Employee Organization.	Case No. SF-UC-30 PROPOSED REPRESENTATION DECISION April 27, 1978

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Gilroy Unified School District; Duane Beeson, Attorney (Brundage, Beeson, Tayer and Kovach) for Gilroy Teachers Association, CTA/NEA; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Gilroy Federation of Teachers, AFT Local 1921; Patrick McGovern, Attorney, for California School Employees Association, Gilroy Chapter 69.

Proposed Decision by Joseph E. Wiley, Ad Hoc Hearing Officer

PROCEDURAL HISTORY

The procedural history in this case departs from the ordinary course of events in representation cases: (1) a hearing consolidating both classified and certificated unit determinations was the basis for the record in this case; (2) the case was originally on the docket of the Board itself, but was remanded to the Office of the General Counsel for decision; (3) three of the unit questions originally put in issue were decided by consent agreements between the parties--the unit placement of regular certificated employees, and the appropriate units for classified

employees being one unit of classified instructional aides, and one unit consisting of all other classified employees; (4) the parties' original representation requests were withdrawn and the case was ultimately designated for resolution under the unit clarification procedure, leaving the issues of unit placement of children's center teachers and preschool teachers, and the supervisory status of the children's center supervisor.

On April 1, 1976 the Gilroy Teachers Association, CTA/NEA (hereafter Association) filed with the Gilroy Unified School District (hereafter District) a request for recognition alleging majority support in a unit of "all certificated employees," encompassing approximately 335 employees.[1] The Gilroy Federation of Teachers, AFT Local 1921 (hereafter Federation) filed an intervention to the Association's request for recognition as exclusive representative of a unit of certificated employees on April 28, 1976, claiming more than 30 percent support in a unit of approximately 300 nonmanagement certificated employees.[2]

---

[1]The Association's request specifically excluded the positions of superintendent, assistant superintendent, principal, and administrative assistant.

[2]The petition specifically includes teachers, counselors, language-speech hearing specialists, school nurses, school psychologists, "instructional specialist-math," reading specialist, resource teachers, librarians, "MGM teacher," and "all employees in the above described unit who are currently on district approved leave."

Excluded from the unit of certificated employees in which the Federation alleged support are the positions of superintendent, assistant superintendent, principal, assistant principal, administrative assistant, the coordinators of migrant education, bilingual education, and career education, district psychologist, district nurse, district speech-language therapist, and day-to-day substitute teachers.

Also on April 1, 1976, California School Employees Association and its Gilroy Chapter #69 requested recognition in a unit comprising the District's approximately 250 classified employees.[3] On April 28, 1976 the Federation filed an intervention to CSEA's request for recognition, claiming more than 30 percent support in a unit of approximately 100 nonmanagement classified instructional personnel including preschool and children's center teachers.

On August 11, 1976 a hearing was conducted by an EERB agent to determine the appropriate unit of certificated employees in the District. Because the parties had previously reached agreement regarding the regular certificated teacher unit, the only remaining issues dealt with the unit placement of children's center and preschool teachers. During the course of this hearing, CSEA appeared and argued that it should be a party to the hearing because an issue was presented as to whether children's center teachers and preschool teachers were classified or certificated employees. The certificated (No. SF-R-215) and classified (No. SF-R-384) cases were thereafter consolidated in order to allow CSEA to participate fully. The hearing was continued on September 8, 1976.

---

[3]Including: Food Services, clerical and secretarial operations and maintenance, instructional aides and transportation. Excluding: noon duty supervisor and management, confidential, and supervisory employees.

Pursuant to EERB Resolution #10, on January 25, 1977, this case was removed from the docket of cases to be decided by the Board itself, and remanded to the General Counsel for decision.

All classified questions were resolved through consent agreements between the parties. In order to expedite an election to select an exclusive representative all parties on May 6, 1977 agreed to withdraw their representation requests and jointly requested a unit clarification pursuant to Board Resolution.[4]

ISSUES

The issues are:

(1) Whether children's center permit teachers and preschool teachers are classified employees or certificated employees?

(2) Whether children's center permit teachers and preschool permit teachers are appropriately a separate unit or if found to be certificated, should they be included in the regular certificated teacher unit?

---

[4]Resolution 6 provides that: "Petitions for changes in unit determinations pursuant to Section 3541.3(e) of the Act will be entertained by the EERB under the following circumstances:

1. Where both parties jointly file the petition, or

2. Where there has been a change in the circumstances which existed at the time of the initial unit determination." See also Chapter 3, article 6 of the Board Rules and Regulations.

(3) Whether the children's center supervisor is a supervisory employee within the meaning of Section 3540.1(m).[5]

POSITIONS OF THE PARTIES

The Association claims that children's center permit teachers and preschool permit teachers are certificated employees and, as such, should be included in the certificated teachers' unit agreed to by the parties.[6] Both the District and CSEA argue that these teachers are classified employees and should be included in a negotiating unit with other classified employees. The Federation does not take an unequivocal position on whether it deems these employees to be classified. Claiming that said

---

[5]All section references are to the Government Code, unless otherwise specified. Section 3540.1(m) provides that,

> "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.

[6]The agreed upon unit includes all "regular full-time certificated and part-time certificated...permanent, probationary or temporary teachers including, but not limited to the following: librarians, counselors, school nurse, language-speech-hearing specialists, school psychologists, MGM teacher, reading specialists, reading resource teachers, resource teachers, special education teachers, E.H. teachers, LDG teachers, instructional specialists-math, curriculum associates, teachers on leave, summer school teachers, CETA teachers."

employees should not be included in the regular certificated teachers unit (without asserting that they are not certificated), the Federation in its post-hearing brief seeks their inclusion in either of two units: "a separate preschool/children's center unit," or, alternatively, within a unit of classified instructional aides. It is nowhere specified whether the "separate" unit is to be certificated or classified. The Federation's statement of the position at the hearing is instructive: "we believe they're instructional employees and as such they may be entitled to representation in either the certified unit or the classified unit."

As regards the supervisory employee status of the children's center supervisor, the Association and the Federation contend that this employee is a supervisor within the meaning of the Act, and therefore is subject to exclusion from a unit including other children's center employees. CSEA argues that the employee is not a supervisor within the meaning of the Act. The District did not take a position in the supervisory issue.

DISCUSSION

The Gilroy Unified School District is located in Santa Clara County and has an average daily attendance of approximately 5,743 students.[7] The District includes nine school sites on which are distributed six elementary schools, one intermediate school, one high school and one continuation school.[8] One

---

[7]State Department of Education Annual Apportionment Report, Office of the Controller.

[8]1977 California Public School Directory, State Department of Education.

children's center and two preschools also comprise part of the District's operation.[9] At the date of the hearing conducted in this matter, a total of 262 classified employees and 314 certificated employees were employed by the District. Six teachers are employed in the children's center and preschool programs.

The children's center provides care for 50 children, between the ages of two and twelve. The purpose of the Center is to provide care for children whose parents are either working or taking vocational instruction courses.

With respect to the preschool program, a total of three classes are conducted at the two sites, each of which has 15 students. The children range in age from three years, nine months to four years, nine months. The preschool programs are designed to help prepare children who are economically, educationally, socially, and developmentally deprived for entrance into regular classroom education. The programs seek to improve motor development and skills and to increase social development. The teachers work with small groups of children in such activities as preparation of meals, cleaning, playing games, art, music, and story-telling. The preschool classes are conducted 3 1/2 hours per day. The teaching approach at the children's center is very similar to that of the preschool programs, allowing for differences in age.

---

[9]The children's center and one preschool are located at regular elementary school sites and one preschool is located at a church.

I. Persons employed as permit teachers in the District's children's center and preschool programs are certificated employees within the meaning of Section 3545(b)(3).

Section 3545(b)(3) provides that "classified and certificated employees shall not be included in the same negotiating unit." (Emphasis added.) No definition of "certificated employee" is provided by the Educational Employment Relations Act. However, Education Code Section 44006 defines "certificated person" as a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents."

Of the District's six permit teachers employed in the children's center and two preschools, five are holders of child care permits (one of these holds a "supervision" child care permit), and one holds a general elementary credential instead of a permit. In order to obtain said permits, each of these teachers was required to complete 60 units of college work--the teacher who possesses a general elementary credential has a B.S. degree plus 53-1/3 hours, permit holders have completed varying numbers of units (66 1/3 units, 69 5/6 units, 75 1/3 units, 75 2/3 units, and 93 units).

The Education Code provides ample basis for the conclusion that the six teachers employed in the children's center and preschools are "certificated" and should be excluded from any negotiating unit composed of classified employees. Qualifications

for the required permits are prescribed by the State Commission for Teachers Preparation and Licensing.[10]

Education Code Section 8366 provides as follows:

> Each person employed by a school district or community college district in a position requiring a children's center permit for the supervision and instruction of children...or in the supervision of the children's center program, shall be deemed to be employed in a position requiring certification qualifications.
>
> Each other person employed by a district in a children's center under the provisions of this division shall be deemed for all purposes, including retirement, to be a person employed by the school district or community college district in a position not requiring certification qualifications." [Emphasis added.]

Further, Education Code Section 8360 provides that:

> ...Any person holding a teaching credential issued by the State Board of Education or commission is deemed to hold a regular children's center permit that will authorize supervision and instruction of children or supervision of a children's program. ...

The District urges that these employees should be considered "classified employees" for purposes of collective negotiating because they are not required to have the "level of 'professional' training required of other 'certificated' employees."[11] In support of its argument, the District claims

---

[10]Education Code Sections 8363 and 8370.

[11]The District compares the requirements for the permits required for instruction in the children's centers and preschools with requirements for the teaching credential, the specialist instruction credential and the services credential with a specialization in pupil personnel services.

that Section 3545(b)(3) must be read as analogous to Section 9(b)(1) of the Labor Management Relations Act (LMRA) which section prohibits the National Labor Relations Board from establishing a negotiating unit which includes both professional employees "and employees who are not professional employees."[12] "Professional employee" is defined by Section 2 (12)[13] of the LMRA as,

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Finally, the District argues that the Legislature's intent in prohibiting inclusion of certificated and classified employees in the same negotiating unit, was to "separate the highly trained and educated 'professional' employees from the employees not possessing these qualifications, rather than drawing the line

---

[12] 29 USC 159(b)(1)

[13] 29 USC 152(12)

between those employees who hold any type of credential and those who hold no credential."

The District's view of legislative intent embodied in Section 3545(b) (3) proscription against classified and certificated employees being in the same unit is not borne out. The 1976 amendment of the Education Code, which is the predecessor to Education Code Section 8366, establishes an intent that permit teachers working along side other certificated staff be accorded "certificated" status:

> Each person employed by a public or private agency as defined in Section 16712 in a position requiring a child development permit for the supervision and instruction of children, or for service as a physician, dentist, or nurse, or in the supervision of the child development program, shall be deemed to be employed in a position requiring certification qualifications.
>
> Each other person employed by an agency in a child development program under the provisions of this chapter shall be deemed for all purposes, including retirement, to be a person employed by the agency in a position not requiring certification qualifications. ...[14]

It should be noted that the language "each other person...shall be deemed for all purposes, including retirement, to be a person employed...in a position not requiring certification requirements," was maintained by the Legislature in Education Code Section 8366, supra, which became effective on April 30, 1977. "[F]or all purposes" includes the purpose of collective bargaining.

---

[14]Former Section 16766 of the Education Code.

Permit teachers employed in the District's children's center and preschool programs are certificated as a matter of law and therefore may not be included in a negotiating unit with classified employees.

II. The Permit Teachers Employed in the Children's Center and Preschool Program Should be Included in the Regular Certificated Employees Negotiating Unit.

Permit teachers employed in the District's children's center and preschool programs are not classroom teachers within the meaning of Section 3545(b)(1): "'regular full-time probationary and permanent teachers employed by a district' who comprise 'the core of the certificated staff of the district,' i.e., those who teach full-time in the regular k-12 program."[15] Therefore, the appropriate unit placement of these employees is governed by Section 3545(a) which required the appropriateness of a negotiating unit to be based on the following factors: (1) The community of interest between and among the employees; (2) The established practices of the employees, including the extent to which they belong to the same employee organization; and (3) The effect of the size of the unit on the efficient operation of the school district.

The Board itself has found that there is a separate community of interest between children's center teachers and

---

[15] Oakland Unified School District (3-28-77) EERB Decision No. 15 at page 24.

Section 3545(b)(1) states:

> (b) In all cases:
>
> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

regular classroom teachers.[16] The Board based its decision, in part, upon the following factors: the staffing of the children's centers was separate from the k-12 program, there were separate faculty meetings, different working hours and a different salary schedule.

The factors that distinguish the children's center in Oakland are similar, in many respects, to the present case. Here, the children's center and preschool programs do not share facilities with other District schools. The workday of a children's center teacher is eight hours, all of it contact time. Preschool teachers work five hours with three and one-half hours of contact time, the remainder of their time is spent with preparatory work, meetings with parents and other activities associated with the instructional program. Classroom teachers work a seven and one-half hour day, with five hours of student contact. Children's center teachers work on a 12-month schedule while other teachers work 10 months. The assistant superintendent provides supervision for the children's center and preschool teachers, while the school principal is responsible for the supervision of classroom teachers. Also, children's center and preschool teachers are paid on the classified employees pay schedule, while classroom teachers are paid on the certificated scale.

However, there are some common elements of community of interest which were not present in Oakland. Both children's

---

[16] Oakland Unified School District, supra, (3-28-77) EERB Decision No. 15.

center and preschool teachers are required to attend pre-service, and an in-service training course along with regular classroom teachers. Additionally, there is some degree of interchange between the preschool teachers and the psychologist, speech therapist and kindergarten teachers, all of whom are included in the certificated negotiating unit. Also, there is evidence that the learning activities conducted by children's center and preschool teachers are similar to those of the primary grade classroom teacher.

Although there are some common elements of community of interest shared between the permit teachers and the classroom teachers, the differences are more numerous and in light of the Board's decision in Oakland, it must be concluded that the children's center and preschool teachers' community of interest can be distinguished from that of the existing certificated unit.

Little weight will be given to the past practices criterion because prior to this time, these certificated children's center and preschool teachers were viewed by the parties as classified employees.

The effect of the size of the unit on the efficient operation of the District requires a finding that a separate negotiating unit for children's center and preschool teachers is not appropriate. In Sweetwater[17] and San Diego,[18] the Board

---

[17] Sweetwater Unified School District (11-23-76) EERB Decision No. 4.

[18] San Diego Unified School District (2-18-77) EERB Decision No. 8.

clearly recognized the importance of finding the proper balance between excessive fragmentation of negotiating unit and the employees' right to effective representation in appropriate units. Also, many commentators have voiced their strong opposition to excessive proliferation of bargaining units and the problems it creates.[19]

In the present case, the proposed unit of six employees would cause excessive fragmentation of negotiating units with the District. In Oakland, there were 200 employees in the proposed children's center unit. Also, there were 24 centers and approximately 2,000 students attending the centers. Here, there are only six employees in the proposed unit, one center and fifty students. In balancing the additional time and expense necessarily incurred by the District if it were forced to negotiate with another certificated unit, and that these additional outlays would result from negotiating with a unit of only six employees, against the fact that, while there are some differences in the community of interest, there is no evidence that the dissimilarities are sufficiently substantial as to create a conflict of interest, or discourage any meaningful and

---

[19]"The history of collective bargaining teaches that fragmenting bargaining units are a principal cause of industrial unrest, consequently, in every instance we avoid the creation of fragmenting bargaining units if at all possible." D. Bok, J. Dunlop, Labor and the American Community, p. 325; E. Rock, "The Appropriate Unit Question in the Public Service", 67 Mich. L. Rev. 1011, 1013 (1969).

effective negotiations,[20] it is concluded that the creation of a separate unit for children's center and preschool teachers would cause excessive fragmentation and have a detrimental effect on the efficient operation of the District.

Therefore, after considering both community of interest and efficiency of operation, it is found that the permit teachers employed in the District's children's center and preschool program should be included in the regular certificated employees negotiating unit.

III. The children's center supervisor is not a supervisory position within the meaning of the Educational Employment Relations Act.

Section 3540.1(m) of the EERA defines supervisory employee as "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 to 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."

---

[20]The National Labor Relations Board, in considering the appropriateness of units in the Health Care Industry, has said that a unit may be appropriate if the application of the traditional standards, viewed against strong congressional warnings of excessive fragmentation of units, establishes that the employees have a sufficiently separate community of interest. [Emphasis added.] Jewish Hospital Association of Cincinnati (1976) 223 NLRB 614; Mercy Hospital of Sacramento (1975) 217 NLRB 765.

The Board held in Sweetwater Union High School District[21] that an employee need only perform one of the enumerated actions to be considered a supervisor. The test, however, is a functional one and distinguishes those who actually supervise from those who carry the title but do not perform supervisory duties.[22]

Applying this functional test to the evidence provided in this particular case, the hearing officer determines that Rojean Wilson is not a supervisor within the meaning of the EERA.

Mrs. Wilson's role in hiring is inconclusive according to the evidence presented. After an initial screening by other parties, Mrs. Wilson and her supervisor, Assistant Superintendent Downing, conduct the final interview. They discuss the interview and come to an agreement; however the extent of her influence on hiring cannot be determined from this sparse evidence.

The evidence regarding Mrs. Wilson's role in the preparation of performance evaluations is not conclusive. Although she apparently assists in their preparation, her exact contribution is not clear. Assistant Superintendent Downing, not Mrs. Wilson, signs the completed evaluations. Mrs. Wilson does discuss the results of the evaluation with the individual teachers, however, she does not keep a copy of the evaluation for her files. In addition, there is scant evidence as to what role

---

[21] Sweetwater Union High School District, supra (11-23-76) EERB Decision No. 4.

[22] See D. J. Overmeyer Co. Inc., (1972) 196 NLRB 789, 90 LRRM 1356.

the evaluations have in the District's personnel decisions. Mrs. Wilson did testify that she has not participated in a performance evaluation that resulted in a teacher being fired or demoted, but she did not state whether these evaluations had been utilized for other purposes.

The assignment of work is done on a volunteer basis with teachers choosing which age group they wish to handle. Instructions to the staff are rarely given because there is a posted schedule and set routine. The teachers set their own routines originally and Mr. Downing and Mrs. Wilson went over them.

Vacation requests go through Mrs. Wilson, and she apparently assists in filling out the forms which are sent to the District. She testified that if there were two requests for the same time that she would make the decision but such a situation has never occurred. In reality, the teachers informally discuss vacation plans and settle on dates which do not conflict. Mrs. Wilson does not approve extended absences but does approve absences of less than four days.

The grievance procedure is another area in which the evidence is unclear. Mrs. Wilson testified that she is the first person to go to with grievances, although, in fact, no formal grievances have ever been filed with her. While she was herself once the subject of a grievance, these facts, without further evidence, do not require a finding that she is a supervisory employee. She testified that the staff bring conflicts to her. "It's never been anything that hasn't been minor enough that we couldn't handle because normally we don't get any grievances of

that sort."(p. 159) No job description was placed in evidence and the District Handbook (District exhibit #c) which describes the grievance procedure does not provide information which distinguishes her position in any significant way.

Mrs. Wilson's duties include learning and enforcing state regulations, determining which children are eligible for the program, and checking whether it is time to recertify parents. These duties do not involve independent judgment. Eligibility for the program is based on established criteria. The time spent in these duties requires about one hour of her 8-hour day. The rest of her time is spent in teaching. When asked whether these were really administrative rather than supervisory duties, Mrs. Wilson agreed that they were administrative.

Mrs. Wilson directs the weekly meeting of the children's center teachers. In addition, she is responsible to the administration for accounting for the budget for the children's center.

The Board concluded, in New Haven Unified School District,[23] that high school department heads who account for budgets and who preside at regular department meetings were not supervisors under the EERA. Furthermore, it was held in Oakland Unified School District, supra, that children's center assistant supervisors who had no teaching duties and who spent four hours each day in supervisory activities were not supervisors.

---

[23]New Haven Unified School District (3-22-77) EERB Decision No. 14.

In summary, it is apparent that Mrs. Wilson spends a minimal part of her day in administrative activities. The extent of her influence in hiring, termination, transfer, or promotion is unclear as is the extent to which she acts for management in the grievance procedure. In conclusion, the evidence does not demonstrate that Mrs. Wilson performs any of the activities enumerated in Government Code Section 3540.1(m) and is therefore not a supervisor within the meaning of the EERA.

PROPOSED ORDER

It is the Proposed Decision that:

I. Persons employed as permit teachers in the District's children's center and preschool programs are certificated employees within the meaning of Government Code Section 3545(b)(3).

II. The permit teachers employed in the children's center and preschool programs should be included in the existing certificated negotiating unit. Therefore, the certification for exclusive representative will be amended to read:

> The unit includes the following certificated employees:
>
> Regular full-time certificated and part-time certificated classified as permanent, probationary or temporary teachers including, but not limited to the following:

librarians	language-speech-hearing specialists
counselors	special education teachers
school nurses	E.H. teachers
school pshchologists	L.D.G. teachers
MGM teachers	instructional specialists-math
reading specialists	curriculum associates
reading resource teachers	teachers on leave
resource teachers	summer school teachers
	CETA teachers

and also including permit teachers and children's center supervisors employed in the children's center and preschool programs; and, the unit excludes all management, supervisory and confidential employees.

III. The children's center supervisor is not a supervisory employee within the meaning of Section 3540.1(m) and therefore shall be included in the certificated negotiating unit.

The parties have twenty (20) calendar days after service of this Proposed Decision in which to file exceptions in accordance with California Administrative Code, Title 8, Section 32300.

If no party files timely exceptions, this Proposed Decision will become final on May 22, 1978 and a Notice of Decision will issue from the Board.

Dated: April 27, 1978.

JOSEPH E. WILEY
Ad Hoc Hearing Officer