STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA, DEPARTMENT OF PERSONNEL ADMINISTRATION,	)	
Employer,	)	Case No. S-UM-238-S
and	)	PERB Decision No. 727-S
CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	April 3, 1989
Exclusive Representative.	)	

Appearances: Michael P. White, General Counsel for California Union of Safety Employees; Christine A. Bologna, Chief Counsel for State of California, Department of Personnel Administration.

Before Porter, Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California Union of Safety Employees (CAUSE) and the State of California, Department of Personnel Administration (DPA) to the proposed decision (attached hereto) of the PERB hearing officer.[1] The hearing officer found that employees in the classification of State Park Ranger II (Ranger II) who have subordinate employees are properly excluded from the unit as supervisory under section 3522.1 of the Ralph C. Dills Act (Act).[2] Accordingly, the unit

[1]Donald Hoh, Sacramento Regional Director in 1987, conducted the hearing.

[2]The Ralph C. Dills Act is codified at Government Code section 3512, et seq. Government Code section 3522.1 states:

modification petition to add the classification of Ranger II to State Bargaining Unit 7 (Unit 7) was partially dismissed. The hearing officer added employees in Ranger II positions, who did not have subordinate employees, to Unit 7.

The Board, after review of the entire record, adopts the attached findings of facts and conclusions of the hearing officer, and affirms his decision, consistent with the discussion below.

PROCEDURAL HISTORY

In the original state bargaining unit determination made by the Board itself in 1979, the Board accepted a stipulation between the DPA and the employee organizations involved in that proceeding, which stipulation excluded the Ranger II classification from the bargaining unit on the grounds that employees in that classification were "supervisory employees" within the meaning of section 3522.1 of the Act. The Board made no specific findings regarding the "supervisory" duties of the

> "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

classification, but rather merely accepted the parties' stipulation. (State of California (1979) PERB Case No. 110c-S, at p. 32.) CAUSE was not a party to the original unit determination proceeding, nor to the stipulation which excluded this classification from the bargaining unit. CAUSE was certified as the exclusive representative for Unit 7 employees on July 13, 1981, pursuant to a representation election held among unit employees. CAUSE filed the instant petition on May 2, 1984, seeking to add Ranger IIs to Unit 7.

A hearing was held March 26, 27, April 1 and 15, 1986, regarding disputed supervisory elements as defined by statute.

DISCUSSION

CAUSE excepts to the hearing officer's conclusion that Ranger IIs were "supervisory employees" as defined in section 3522.1 of the Act.

DPA excepts on the grounds that the appropriate legal analysis is not one of res judicata but rather the showing required to disturb a factual stipulation previously accepted by the Board. DPA argues that the stipulation submitted by the parties in the original unit determination which excluded the Ranger II classification as "supervisory employees" is conclusive.

The hearing officer, while recognizing that administrative agencies like PERB "should be subject to a qualified or relaxed

set of rules regarding res judicata,"[3] found that the doctrine did not apply to the instant case. The application of the doctrine of res judicata requires that the issue decided in the prior adjudication must be (1) identical with the one presented in the action in question; (2) there must be a final judgment on the merits; and (3) the party against whom the plea is asserted must be a party or in privity with a party to the prior adjudication. (Levy v. Cohen (1977) 19 C.3d 165 [137 Cal.Rptr. 162] cert. den. 434 U.S. 833 [54 L.Ed.2d 94, 98 S.Ct. 119].)

This Board engaged in original unit determination proceedings whereby the original bargaining units were determined, including the exclusion of certain classes of employees from such units. These proceedings did not involve the regular type of civil or administrative action brought against a respondent-defendant party, and the judicial or administrative adjudication of a disputed issue in such an action. The determinations were based on various statutory criteria and submitted information and data, including stipulations and information obtained in unit determination hearings involving various nonexclusive employee organizations. We do not view such administrative proceedings as being similar to or equating with a prior judicial adjudication of a disputed issue in an action between two parties.

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[3] Bank of America v. City of Long Beach (1975) 50 Cal.App.3d. 882 [124 Cal.Rptr. 256].

Furthermore, CAUSE was neither a party nor in privity to a party which was involved in the original stipulation. Accordingly, we affirm the hearing officer's conclusion that the criteria for a finding of res judicata was not met.

Regarding DPA's assertion that the stipulation is conclusive, we note that in determining an appropriate unit, the Board is statutorily obligated to consider the criteria set forth in section 3521(b) of the Act.[4] The stipulation in the original unit determination proceeding, standing alone, did not provide enough information to adequately address CAUSE'S petition for unit modification.

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[4]Section 3521(b)(1) states:

. . . . . .

(b) In determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals; the history of employee representation in state government and in similar employment; the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements; and the extent to which the employees have common supervision.

We affirm the hearing officer's conclusions and supporting analysis that employees in the classification of Ranger II who have subordinate employees are excluded from the unit as supervisory employees pursuant to section 3522.1 of the Act.

ORDER

Based on the foregoing, the unit modification petition is DISMISSED with respect to the addition of those employees classified as State Park Ranger II who have subordinate employees. Any employees in the classification of State Park Ranger II who do not have subordinate employees are hereby added to State Unit 7.

Members Porter and Camilli joined in this Decision.

Member Craib's concurrence and dissent begins on page 7.

Member Craib, concurring and dissenting: I concur in the result reached by my colleagues that the Ranger II classification must be excluded from Unit 7. However, I must dissent from the majority's refusal to apply res judicata principles to this case.

The original bargaining unit determination was made by the Board itself in Unit Determination for the State of California (SEERA) (1980) PERB Decision No. 110c-S. In making its determination to exclude the Ranger II classification, the Board relied on a stipulation filed by the parties to the original unit determination hearings. In the stipulation, the parties agreed that specific classes of employees would be excluded from Unit 7 as either managerial, confidential, or supervisory. The Ranger II classification was specifically excluded as supervisory. In its decision, the Board itself expressly adopted the stipulated exclusions as to all classifications. "[U]ncontested stipulations of fact submitted by the parties are accepted as conclusive." (Ibid. at p. 1) Additionally, in the portion of the decision addressing Unit 7, the Board stated:

> [t]he parties stipulated to facts supporting the exclusion of classifications set forth in Appendix B. The Board accepts the stipulation of the parties and holds that those classifications are properly excluded from the unit.

(Ibid. at p. 32)[1]

[1]In Appendix B to the Board's decision, the Ranger II classification was listed as excluded. (See Appendix B to State of California, supra, at p. B-96.)

Unit 7 employees were represented at the initial unit determination hearings by the State Fire Marshall's Association, the California State Police Association, and the California State Employees' Association. CAUSE did not participate in the original unit determination hearings. However, the California State Police Association, which did participate in the 1980 hearings, was a member organization of the Coalition of Associations and Unions of State Employees (also known as "CAUSE"),[2] which was the current CAUSE'S predecessor in interest. CAUSE was certified as the exclusive representative for Unit 7 in July 1981 pursuant to a representation election.

The threshold issue which must be addressed in this case is whether the Board's adoption of the parties' stipulations regarding the excluded classifications should preclude relitigation of the unit determination absent changed circumstances. The hearing officer and the majority reject the state's res judicata argument.[3] As the majority correctly states, the application of res judicata requires that the issue decided in the prior adjudication be identical to the one

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[2]The Coalition of Associations and Unions of State Employees filed a prior petition to reopen the exclusionary proceedings in Unit 7 in order to present new and additional evidence regarding excluded classifications. The Board rejected the petition and held that "[a]11 parties to this stage of the proceedings were afforded a full and complete opportunity to participate and present their case." (State Park Peace Officers (1980) PERB Decision No. 138-S.)

[3]While the State appears to have retreated from a strict res judicata analysis, the substance of its exceptions is the preclusive effect of the prior Board determination.

presented in the current action; that there be a final judgment on the merits; and that the party against whom the plea is asserted be a party or in privity to a party in the prior adjudication. (Majority decision at p. 4.)

Res judicata has long been utilized by the courts to preclude parties from relitigating the same issues where a final determination has been made. The Board has not previously expressly addressed the preclusive effects of prior Board representation decisions on a subsequent petition for unit modification. However, in a case in which an employer refused to bargain with the certified representative, and defended its actions with a claim that the unit was improperly constituted, the Board held that:

> [i]n the absence of the presentation of newly discovered or previously unavailable evidence or special circumstances relitigation of PERB's unit determination is not warranted. PERB's unit determination is therefore binding precedent.

(Redondo Beach City School District (1980) PERB Decision No. 140, at p. 3.) Cases have also arisen where original unit determinations have not included particular employees and in a subsequent petition for unit modification, the Board has permitted the nonrepresented employees to be added to the unit. In one such case, the Board reasoned that since the employee organization did not originally seek to represent those employees, the unrepresented employees should not be forever barred from representation. To deny such representation would

preclude those employees from exercising statutory rights. (El Centro School District (1979) PERB Order No. Ad-51.)

The Board has also had occasion to grant unit modification petitions where an initial unit determination by the Board placed a particular classification of employees in a larger unit. On a subsequent petition to modify and establish a separate unit, the Board held that:

> [t]he Board's previous decision is binding only to the extent that circumstances and Board precedent remain the same. Unit determinations are not intended to be fixed for all time and where no representative is in place, it is appropriate to consider a claim that circumstances have changed.

(Regents of the University of California (1986) PERB Decision No. 586-H, at p. 6.) The Board, then, concluded that the circumstances had changed and permitted modification.

The "relaxed" res judicata standard applied by the hearing officer and referred to by the majority springs from Hollywood Circle where the California Supreme Court stated:

> The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applied to some administrative action, that the principle should not be applicable to other administrative action, and that such administrative action should be subject to a qualified or relaxed set of rules concerning res judicata.

(Hollywood Circle, Inc. v. Department of Alcohol Beverage Control (1961) 55 Cal. 2d 728, 732, quoting 2 Davis, Administrative Law, 568.) The Hollywood Circle court then addressed specific

instances where agencies should refrain from applying or modify res judicata principles. However, the court fully applied res judicata because the function of the agency in that case was "the purely judicial one of reviewing another agency's decision to determine whether the decision conforms to the law and is supported by substantial evidence." (Ibid.)

The court in Bank of America v. City of Long Beach (1975) 50 Cal.App.3d 882 rejected the application of res judicata principles to an "administrative" decision. However, in that case, the prior "adjudication" was merely the continued renewal of a license over 22 years. There had never been a formal hearing or any "litigation." A more appropriate analysis under those circumstances would have been the application of estoppel to bar a challenge to the license renewal.

Professor Witkin has thoroughly addressed administrative res judicata. His review of California case law indicates the following exceptions to the full application of res judicata principles: 1) where the agency is acting in its regulatory capacity; 2) where the agency acts in excess of its jurisdiction; 3) where the agency has no subject matter jurisdiction; 4) where the agency seeks to apply res judicata to a prior decision; 5) where the agency decision is not intended as a final judgment on the merits; 6) where the agency never had the opportunity to determine the legal issue; and 7) where the agency was not acting in its quasi-judicial capacity and the decision is not a result

of an adjudicatory proceeding. (7 Witkin, California Procedure 3d, Judgments, sec. 209, at 646 (Witkin).)

None of these exceptions are appropriate here. However, the majority appears to be arguing that the Board was not acting in its quasi-judicial, but rather in its regulatory, capacity when it states that

> [t]hese proceedings did not involve the regular type of civil or administrative action brought against a respondent-defendant party, and the judicial or administrative adjudication of a disputed issue in such an action. The determinations were based on various statutory criteria and submitted information and data, including stipulations and information obtained in unit determination hearings involving various nonexclusive representatives. We do not view such administrative proceedings as being similar to or equating with a prior judicial adjudication of a disputed issue in an action between two parties.

(Majority Decision at p. 4.)

This analysis is erroneous in several regards. Most disturbing is the incredible conclusion that unit determinations by the Board after hearings before a hearing officer are not similar to a prior adjudication. Unit determinations are generally hotly contested and require the Board to resolve numerous factual disputes concerning the appropriateness of certain classifications of employees in a particular unit. Indeed, in State of California, supra, PERB Decision No. 110c-S, in a 92 page decision, the Board itself was required to adjudicate numerous disputed classifications in 9 units. Of course the Board applied statutory criteria to information

submitted in hearings, that is this Board's function not only in representation cases but in virtually all matters presented to the Board. The majority's conclusion that these proceedings are not similar to prior adjudications is not supported by any authority whatsoever.

Therefore, we must address the propriety of stipulated exclusions. The issue of stipulations must be analyzed under that prong of the res judicata analysis which focuses on the final judgment on the merits. The hearing officer rejected res judicata because, in his view, the matter had not been fully litigated. This reasoning ignores both the purpose of the parties' stipulations and the Board's precedent on stipulations. First, courts have always held that a judgment entered into voluntarily by consent or stipulation is as conclusive and final as a judgment rendered after trial. (7 Witkin, sec. 219(c), at p. 656.) To do otherwise would seriously undermine the conclusive effects of any judgment where a party consented. If a party stipulates to facts supporting a particular legal conclusion, that party should be barred from relitigating absent a showing of improper conduct.

Furthermore, the Board has expressly delineated when stipulations of fact will be adopted by the Board in support of an order.

> Henceforth, when [the Board] has jurisdiction in a representation case, it will examine stipulations between the parties to determine

> if the stipulations are consistent with the EERA[4] or established Board policies.

(Centinela Valley Union High School District (1978) PERB Decision No. 62, at p. 4.) This policy, which was in effect prior to the unit determination hearings in 1980, reversed prior Board policy of automatically accepting stipulations in order to facilitate representation determinations. (See also Atascadero Unified School District (1981) PERB Decision No. 191 (Board affirms ALJ's acceptance of stipulation as supported by sufficient facts).) Given this charge of responsibility to inquire into the basis for a stipulation to facts regarding appropriate unit determinations and the fact that no evidence was introduced by CAUSE to indicate that the Board neglected its duty, the stipulation as to facts supporting the exclusion of the Ranger II classification should be conclusive. The fact that the parties were willing to stipulate to certain excluded classifications does not change the adversarial nature of the proceedings.

The majority also implies that the decision should not be conclusive because the various employee organizations at the unit determination hearings were nonexclusive representatives. This analysis ignores the statutory and regulatory requirements in effect at the time of the initial unit determinations. There were no certified exclusive representatives at the time of the

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[4]The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq. and is a companion statute to the Ralph C. Dills Act. There is no reason to hold that the Board's policy regarding stipulations should be any different under the Dills Act.

original unit determinations. Elections for representation purposes could not be held until appropriate units were determined by the Board. (See PERB Regulations 41000-41270 (repealed).)[5] There are no longer regulations under the Ralph C. Dills Act for initial unit determinations. Thus, the 20 units approved by the Board itself during the initial unit determinations appear to be all encompassing. Under EERA and the Higher Educational Employer-Employee Relations Act[6], however, unit determinations are still regularly made under regulations similar to those formerly applicable to the Dills Act. (See, e.g., PERB Regulations 33050-33490, 51030-51340.) Under the majority's approach, since there is never an exclusive representative certified at the time of unit determinations, a Board determination would never be binding. Such an analysis would always preclude the application of res judicata to initial unit determinations, even to a subsequently certified exclusive representative which participated in the unit determination process.

In addition, the regulations which were in effect at the time of these unit determinations provided that any employee organization that obtained a 30 percent or more proof of support of a proposed unit could petition for recognition. (See PERB Regulation 41010, subd, (b) (repealed).) By allowing such

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[5]**PERB** Regulations are codified in the California Administrative Code, title 8, section 31001 et seq.

[6]**HEERA** is codified at Government Code section 3560 et seq.

organizations to petition for recognition, subject to the employer's objection, the Board authorized those organizations with 30 percent or more support to represent those unit members for purposes of unit determination proceedings.[7] Thus, the fact that the unit members were represented by nonexclusive organizations is not determinative since the Board expressly provided for such representation. Absent any showing that there were actions which improperly excluded certain classifications, we must assume that the regulations were properly applied. Furthermore, there is nothing in the record to suggest that the interests of those nonexclusive representatives differed from that of CAUSE. In other words, the organizations representing potential unit members at the unit determination hearings would have had the same impetus as CAUSE to represent as many unit members as possible.

Finally, the issue of privity must be addressed. In order to bind CAUSE, it must have been a party or in privity to a party to the initial unit determinations. The majority makes the bald, unsupported statement that "CAUSE was neither a party nor in privity to a party which was involved in the original stipulation." (Majority decision at p. 5.) While CAUSE was not

[7]It is unclear from the regulations whether each organization which sought to be an exclusive representative had to present proofs of support of 30 percent of the proposed unit. It is my belief that a fair reading of the former regulations would so require. The regulations do provide separately for challenges to petitioning organizations. (See PERB Regulation 41071 (repealed).)

a party to the original proceeding, in my estimation, it was in privity with the parties to the unit determination. Professor Witkin is instructive on when a subsequent party should be bound by a prior decision. "In general, it may be said that such privity [to warrant preclusion] involves a person so identified in interest with another that he represents the same legal right." (7 Witkin, sec. 287, at p. 724 (emphasis in original, citations omitted).) In the case before the Board, the employees involved were represented by a number of employee organizations at the unit determination hearings. These organizations had a similar, if not identical, interest in assuring that employee organizations represent the largest number of employees possible. In this sense, they would have represented the "same legal right" as CAUSE in assuring that the Ranger II classification was included. Furthermore, as discussed earlier, member organizations of CAUSE'S predecessor were parties to the original determination. In addition, the term "party" is somewhat inadequate when referring to unit determinations. The "real party in interest" is really the employees affected, not the employee organizations. In this regard, the employees were parties to the original determination.

This is not to say that in all situations where a prior organization represented employees that relitigation of unit determinations will be barred. Due process rights must be protected. The non-party must have had an "identity or community of interest with, and adequate representation by" the party in

the prior litigation. (7 Witkin, sec. 288, at p. 725.) Additionally, the non-party should reasonably have expected to be bound by the prior adjudication. (Ibid.) Nothing in this record suggests that the employee organizations inadequately represented the employees in the Ranger II classification or that CAUSE, when elected exclusive representative, if not earlier, should not have expected to be bound by the Board's unit determination. Indeed, with the Board's rejection of CAUSE'S predecessor's request to reopen the modification hearings, CAUSE was on constructive notice that it would be so bound. (See State Park Peace Officers, supra, PERB Decision No. 138-S and discussion supra at footnote 2.)

Even though a prior determination may be conclusive, unit modification may be specifically allowed by regulation. The Board's regulations expressly deal with the standards to be applied when parties seek unit modification. (See PERB Regulation 32781.) Unfortunately, there is a gap in the regulations. Regulation 32781, subdivision (a)(1) provides that a petition to modify may be filed "[t]o add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit." There is no requirement for changed circumstances to modify the existing unit. Regulation 32781, subdivision (b)(1), on the other hand, provides for the filing of a modification petition "[t]o delete classifications or positions no longer in existence or which by virtue of changes in

circumstances are no longer appropriate to the established unit." (Emphasis added.) Regulation 32781, subdivision (b)(5), which was added later as a limited exception to the requirement of changed circumstances, provides for the filing of a modification petition:

> [t]o delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, or not covered by EERA, HEERA or SEERA provided that:
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> > (A) The petition is filed jointly by the employer and the recognized or certified employee organization, or
> >
> > (B) There is not in effect a lawful written agreement or memorandum of understanding, or
> >
> > (C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding as defined in these regulations . . . .

While Regulation 32781, subdivision (a)(1) contains no express requirement of changed circumstances, such a broad interpretation would permit unit modification petitions to be filed even after express determinations by the Board that the classification at issue should be excluded from the unit. A more appropriate interpretation would be that additions are only possible where the "unrepresented classifications or positions" were not previously the subject of an express exclusion. Therefore, when employees were never subject to consideration for

a particular bargaining unit, they could be added without a showing of changed circumstances. (See, e.g., El Centro, supra, PERB Decision No. Ad-51 and discussion, supra, at p. 9.) But where there has been prior adjudication of a unit determination, and express exclusion of a particular classification, the appropriate standard should be one of changed circumstances, such as that for deleting certain classifications from a unit. (See, supra, Regulation 32781, subd. (b)(1).) PERB Regulation 32781, subdivision (b)(5), the exception to the changed circumstances requirement of Regulation 32781, subdivision (b)(1), is appropriate because inclusion of managerial, supervisory, or confidential employees is improper under the Dills Act. Therefore a lower standard or showing is proper. The converse is also appropriate. To add classifications which have previously been determined to be supervisory potentially conflicts with the Act, absent a changed circumstances standard.[8] Therefore, since CAUSE failed to introduce any evidence that the duties of the Ranger II classification have changed since the original unit determination or that there were inherent flaws in the initial proceeding, the petition for unit modification should dismissed.

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[8]This analysis would not affect the recently proposed PERB Regulation 32781, subdivision (g). This proposed regulation provides for a one-time-only "window period" during which a state employer may file a petition to transfer classifications or positions from one represented established unit to another. Such transfers would not be subject to a showing of changed circumstances.

I am quite troubled by the specter of relitigation of all the initial state unit determinations. There were over two hundred (200) stipulated exempt classifications, all subject to unit modification petitions if the original unit determinations are not considered final. Furthermore, the majority's analysis is not restricted to the state unit determinations. Instead, its broad rejection of res judicata principles to unit determinations would permit unbridled relitigation of any unit determination by the Board. Consequently, the majority's analysis is not only legally indefensible but, in practical terms, extremely shortsighted.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA, DEPARTMENT OF PERSONNEL ADMINISTRATION, Employer, and CALIFORNIA UNION OF SAFETY EMPLOYEES, Exclusive Representative.	Case No. S-UM-238-S (S-SR-7) PROPOSED DECISION (3/30/87)

Appearances: William R. Williams, Jr., and Michael P. White, for California Union of Safety Employees; Christine Bologna for State of California, Department of Personnel Administration.

PROCEDURAL HISTORY

This case arises from a unit modification petition filed by the California Union of Safety Employees (CAUSE) under section 32781(a)(1) of the Regulations of the Public Employment Relations Board (Board).[1] In its petition, CAUSE seeks to add to State Bargaining Unit 7 (Protective Services and Public

[1]PERB Regulations can be found at California Administrative Code, title 8, part III (section 31001 et seq.). Regulation 32781(a) reads in relevant part:

> A recognized or certified employee organization may file with the regional office a petition for unit modification:
>
> (1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit.

Safety) the position of State Park Ranger II (Ranger II). CAUSE alleges that the 91 positions in this classification should not be excluded from the coverage of the Ralph C. Dills Act (Act)[2] as supervisory employees, and that those positions are thus appropriately included in State Unit 7. The State of California, Department of Personnel Administration (State) opposes the petition, contending that the classification of Ranger II is appropriately excluded from the unit as supervisory under section 3522.1 of the Act.

Previously, in the original state bargaining unit determinations made by the Board itself in 1979, the Board accepted a stipulation between the State and the employee organizations involved in that proceeding, which excluded the Ranger II classification from the bargaining unit on the grounds that employees in that classification were "supervisory employees" within the meaning of section 3522.1 of the Act. The Board made no specific findings regarding the"supervisory" duties of the classification, but rather merely accepted the parties' stipulation. State of California (1979) PERB Case No. 110c-S, at page 32. CAUSE was not a party to the original unit determination proceeding, nor to the stipulation which excluded this classification from the bargaining unit. CAUSE was certified as the exclusive representative for Unit 7

[2]The Ralph C. Dills Act is codified at section 3512, et seq., of the Government Code.

employees on July 13, 1981 pursuant to a representation election held among unit employees.

Extensive investigation was conducted in this case prior to hearing. Each party produced numerous and lengthy declarations and related materials in support of its position. The record prior to hearing contained nearly 2,000 pages of materials, including declarations, job descriptions, organizational charts, job specifications and qualifications, and excerpts from administrative and operations manuals from the State Department of Parks and Recreation. From those materials, the undersigned determined that the record contained sufficient facts essentially not in dispute for a determination of the section 3522.1 supervisory elements of "hire", "transfer", "suspend", "layoff", "recall", "promote", "discharge", "reward" and "discipline".

However, with regard to the statutory criteria of "assign," "direct," "adjust grievances," and "substantially similar duties," as well as the statutory modifiers of "effective recommendation" and the requirement of "use of independent judgment" regarding those criteria, the undersigned found that the evidence contained substantial questions of fact which could be resolved only by an evidentiary hearing.

A hearing regarding these supervisory elements was held on March 26, 27, April 1 and 15, 1986. At hearing, the parties stipulated that the testimony of the limited number of

witnesses who testified was representative of the duties of all 91 of the positions at issue herein.

After numerous delays, including a change in CAUSE legal representatives in this matter, briefs were filed by both parties in late October, 1986, and the case went under submission at that time.

FINDINGS OF FACT

The employees at issue are employed by the Department of Parks and Recreation (DPR), and generally work in one or more of the 102 State parks or state recreation areas in geographically separated and diverse areas throughout the state. Organizationally, the DPR's state park system is geographically divided into six regional areas, which are further subdivided into 51 districts, each headed by a district superintendent. Those districts are further divided into areas headed by an Area Manager. The positions at issue here provide the next organizational level. Generally, Ranger II's are the highest level on-site DPR employee in a particular park sector or recreation area. Among the 91 positions, 5 possess a working title of Chief Ranger, 63 are sector supervisors, 16 are shift supervisors, and 7 are program supervisors. The variances in working titles generally relate either to the size or the function of the particular park or recreation area involved.

With limited exception, each Ranger II has a varying number of subordinates reporting to him/her. These employees

generally are classified as State Park Ranger I (Ranger I) State Park Ranger Intermittent, State Park Technician, and seasonal employees. The number of subordinates reporting to the Ranger II varies both by the size of the park(s) administered by that Ranger II, and by the season of the year, since park use is generally greater from April through October than it is the remainder of the year.

Each Ranger II is generally responsible for the daily administration, control, and coordination of the functions and services provided in the park(s) under that Ranger's jurisdiction. Direction of these activities is guided by general policies contained in both district and departmental administrative and procedural manuals. Because of the small staffs and hours of necessary coverage at the parks, both Ranger II's and their immediate subordinate Ranger I's are often expected to work independently under the departmental guidelines contained in the manuals, described above. Normally, Ranger II's work the day shift, and those Ranger I's who work the night shift usually do so without any superior officer on duty at the same time.

Ranger II's may participate in an interview panel and may make recommendations for the hiring of permanent subordinate employees, but any such recommendations are reviewed and hiring decisions for permanent employees are made at organizational levels well above that of the Ranger II. They may similarly make recommendations for the discipline, suspension, or

discharge of permanent subordinates, but normally their role is limited to serving as an investigator to gather facts for any subsequent discipline or discharge decision made by higher authority. The results of such investigations are independently reviewed and investigated by higher level department employees, and disciplinary decisions are made by departmental employees in positions no lower than that of District Superintendent. Ranger II's do "counsel" permanent subordinate employees for minor infractions of departmental regulations, but such "counseling" is normally first discussed with the Ranger II's immediate supervisor, who may determine whether such counseling is necessary.

Ranger II's have no role in layoff and recall of permanent subordinate employees. Determinations in those areas are made by higher authority based upon departmental guidelines. Likewise, permanent transfer decisions are made by either the Regional Director or District Superintendent, in accordance with the provisions of the parties' collective bargaining agreement and departmental policies. However, Ranger II's may be consulted by higher authority before permanent transfer decisions are made, to ascertain the effect of any transfer decision upon the operations of a particular park.

In the areas of promotion and reward, the Ranger II serves as the first-line evaluator for all of his/her subordinate employees. Employee evaluations may address job performance and development, promotional readiness, and training needs.

Evaluations completed by Ranger II's are reviewed and signed by the Area Manager, who may add information and comments to the evaluation. Ranger II's may also approve merit salary increases consistent with procedures outlined in department administrative manuals. Ultimate promotional decisions are made by higher departmental authority, and are based only in part upon the employee evaluations initiated by Ranger II's.

The parties' collective bargaining agreement calls for employees to go to their "immediate supervisor" at the "informal" step of the grievance procedure, and the DPR has designated the Ranger II as that "immediate supervisor." The role of the Ranger II is to attempt to deal with the problem involved before it becomes a formal grievance. The Ranger II may recommend or make adjustments in employees' complaints at this level, if such adjustment is previously approved by higher level department management. Any disagreements at this level are referred to the District Superintendent, the departmental representative at the first formal level of the grievance procedure. There has been little actual involvement of Ranger II's in the informal step of the grievance procedure.

Ranger II's prepare the monthly work shift schedules for their subordinates and coordinate the work functions in the various parks under their jurisdiction. Their determinations of shifts to be filled are based upon such known factors as past visit use patterns and staff level changes. Ranger I's and other permanent employees then bid upon the available

shifts by seniority in accordance with procedures outlined in the parties' collective bargaining agreement. The Ranger II may thereafter fill-in or rearrange the monthly schedule if there are gaps in park coverages needed. Any disputes over monthly scheduling are normally resolved by the Chief Ranger.

Functional duties, such as resource, administrative or interpretative duties, are generally rotated on a yearly basis among the subordinate Ranger I's. Assignment of individual tasks by the Ranger II to his subordinates is normally controlled by the functional area which the task involves.

Normally, Ranger II's do not meet with their subordinates on a daily basis to make assignments. Rather, Ranger I's are assigned projects within their functional areas and given deadlines for completion of those projects. However, Ranger II's may assign additional tasks to Ranger I's without prior approval of higher authority, unless such assignments would have a manpower or budgetary impact. Requests for short-term additional manpower are channeled through the Chief Ranger, who also makes training assignments which may impact upon the availability of Ranger I's in a particular park.

Ranger I's normally perform their daily work functions without specific direction from Ranger II's. Indeed, Ranger II's often do not communicate daily with Ranger I's, who may work different shifts or at different work locations than the Ranger II. Ranger II's review daily logs and incident reports of Ranger I's, and check to determine the Ranger I's

compliance with work deadlines. Generally, however, Ranger I's are expected to work independently, and little time is spent by the Ranger II's in observing their performance.

Ranger II's are not involved in approval of long-term vacation requests for their subordinates. Such vacation scheduling is determined by seniority under the shift bidding system previously described. Short-term leave requests for periods of one or two days, however, may be granted or denied by the Ranger II's based upon their judgment regarding whether operational needs can withstand the manpower shortage such time-off creates. Ranger II's may also approve sick leave and require doctor's excuses without checking, but any decision to deny sick leave or to require employees to go onto the DPR's sick leave reporting system is made only after consultation with the Area Manager.

Ranger II's may also authorize overtime without prior approval, based upon their view of the necessity for overtime work. Such decisions may be cleared with the Area Manager, if he/she is available, but in his/her absence, Ranger II's approve overtime based upon their own assessment of its necessity. Ranger II's may also allow subordinates to report extra hours worked as overtime, or to take such hours as compensatory time off (CTO). Like short-term vacation requests, the decision of the Ranger II concerning an employee request to take CTO is based upon his/her determination of operational needs. Ranger II's may also require subordinates

to take CTO time when upper limits on accumulated CTO time set by higher authority are reached. These decisions are generally made by Ranger II's without prior consultation with higher authority.

Ranger II's may also call out employees from off-duty based upon their view of the necessity of such callout. Decisions on whether to call out employees are normally made by the Ranger II based upon his/her experience and expertise, and are made without prior approval from the Area Manager. Once that decision is made, the decision on who to call out is usually pre-set, and actual callouts may be made by County Sheriff dispatchers or by Ranger I's.

Ranger II's have input into the amount of budget allotted to the parks within their jurisdiction. They suggest the budgetary amount needed for their operation to the Area Manager, who then makes a recommendation to the District Superintendent. Once the budget for his/her area is determined, the Ranger II administers that budget and determines the level of coverage to be provided. The budgeted amount includes both full-time and seasonal costs. The amount of cost incurred by Ranger I's overtime work lessens the budget amount available for seasonal employee utilization, and the Ranger II is required to balance those competing needs. The Ranger II may also increase the number of seasonal employees if the budgeted amount can absorb those costs.

Ranger II's are paid at a level approximately 10 percent higher than Ranger I's, and receive fringe benefit amounts above those earned by Ranger I's in the amounts received by employees classified by the state as supervisors. They also attend regular supervisory meetings on a district-wide basis.

Ranger II's have full supervisory authority over seasonal employees. They determine the need for seasonals and, if the need exists, recruit, interview and hire them. Similarly, they may evaluate, discipline and/or discharge seasonal employees. Ranger II's also establish schedules and assign work to seasonals, and often delegate the actual direction of their work to their subordinate Ranger I's. These decisions concerning seasonals are made by Ranger II's without any review by or consultation with higher authority.

Seasonal park aides employed by DPR and supervised by the Ranger II's, however, have been found by the Board to be excluded from the coverage of the Act because they are not "civil service employees." State of California (1981) PERB Decision 110d-S (Attachment 1 - Recommendation on Remand Re Board's Order, Paragraph 4, PERB Decision No. 110c-S).

The record contains wide variations in the Ranger II's estimates of the proportion of work time spent in duties which are "substantially similar" to those of their subordinate Ranger I's. Those estimates range from 0 percent to 85 percent of that work time. Based upon examination of the entire record, I find that the average Ranger II generally spends

between 45 and 55 percent of his work time in such "substantially similar" duties. These duties normally include front line law enforcement, citation writing, occasional park patrol shifts, public interaction, medical emergencies, mutual aid to other public agencies, and service as backup to the Ranger I in arrest situations. Both administrative and front line law enforcement duties increase during the park's peak season, and Ranger II's are more likely to perform patrol duties in manpower shortage situations. Additionally, Ranger I and II positions require the same minimum qualifications. The only difference in Ranger II qualifications is that that position requires two years of experience performing the duties of a Ranger I.

Unlike the Ranger II, Ranger IVs do not, inter alia, review reports of subordinates, administer the allotted budget, grant time off, complete monthly work schedules, or attend supervisory meetings with higher level DPR employees. Additionally, Ranger II's do not normally perform the rotated functional duties described above which are part of the duties of the Ranger I classification.

ISSUES

1. Is the Board's decision in State of California (1980) PERB Decision No. 110c-S, which approved the parties' stipulation to exclude Ranger II's from State Unit 7 as supervisory employees, res judicata for the instant proceeding, requiring dismissal of the petition?

2. If not, do the duties of the Ranger II classification exclude that classification from the coverage of the Act as supervisory employees under section 3522.1 of the Act?

DISCUSSION

I. THE RES JUDICATA ISSUE

In the original State unit determination, State of California (1980) PERB Decision No. 110c-S, the Board determined that the position of Ranger II, inter alia, should be excluded from State Unit 7 as supervisory based upon a stipulation reached by the State and employee organizations involved in that proceeding. The Ranger II classification was one of several excluded from Unit 7 in Appendix B of that decision. With regard to those exclusions, the Board stated:

> The parties stipulated to facts supporting the exclusion of classifications set forth in Appendix B. The Board accepts the stipulations of the parties and holds that those classifications are properly excluded from the unit.[3]

In accepting the stipulations, the Board approved the exclusion of those classifications from the unit, but made no specific findings regarding the supervisory duties of the classifications excluded, including that of Ranger II.

The common law principle behind res judicata is that a particular dispute has been litigated and decided, and the interests of finality and consistency require that the matter

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[3]State of California (1980) PERB Decision No. 110c-S at page 32.

not be litigated again, but that the prior decision be followed.[4] However, determination of the appropriate application of that doctrine to any subsequent case requires affirmative answers to three questions: 1) was the issue decided in the prior adjudication identical with the one presented in the action in question; 2) was there a final judgment on the merits; and 3) was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication.[5]

In addition, while the Board has not previously addressed with specificity the elements necessary for a res judicata finding, California courts have indicated that many of the actions of administrative agencies like PERB "should be subject to a qualified or relaxed set of rules concerning res judicata."[6]

Based upon the record, and after taking official notice of the documents contained in the Board's decisions in PERB Decision Nos. 110(c) and 110(d) and their attachments, it is

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[4]See University of California (1986) PERB Decision No. 586-H; Los Angeles Unified School District (1984) PERB Decision No. 405.

[5]Pacific Maritime Association v. California Unemployment Insurance Appeals Board (1965) 236 Cal. App.2d 325 [45 Cal. Rptr. 892]; Bernhard v. Bank of America (1942) 19 Cal.2d 807, 813 [122 P.2d 892].

[6]Bank of America v. City of Long Beach (1975) 50 Cal.3rd 882, 124 Cal.Rptr. 256; Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control (1961) 55 Cal.2d 728, 732; 13 Cal.Rptr. 104; 361 P.2d 712.

apparent that CAUSE was neither a party nor in privity to a party which was involved in the original stipulation. Neither CAUSE nor its predecessor, the Coalition of Associations and Unions of State Employees, are listed in the extensive appearance sheets which precede the Board's actual decisions in PERB Decision Nos. 110(c) and 110(d). Additionally, no CAUSE petition to represent any State employees was on file with the Board at the time of the hearing in those cases. That organization was not, therefore, involved in the hearing which resulted in the stipulation in question.

The State argues that since CAUSE representatives were included on a list of parties receiving service of the Board's state unit determinations, CAUSE had full notice of those proceedings and participated in them. In support of its position, the State attached to its brief copies of service sheets in matters relating to those unit determinations, showing that CAUSE had received the Board decisions in those cases. However, careful review of those documents shows that CAUSE was served with Board decisions relating to State unit determinations only after the Board issued its 110c-S exclusionary decision on December 31, 1980. Curiously, the State's documentation not only fails to include service upon CAUSE of the Board decision in PERB Decision No. 110c-S, it completely ignores the fact that the exclusionary hearings themselves were concluded in January of 1980, and fails to specifically address whether CAUSE was involved in those

hearings, which occurred nearly a year before the documentary evidence of service upon CAUSE provided by the State.

In addition, under the court findings that the technical rules of res judicata should be "relaxed" in administrative proceedings, it would be inappropriate to apply those rules "to the letter" under the facts of this case. It is obvious that the Board's 1979 decision did not involve full litigation and reasoned determination of the supervisory status of Ranger II's, since no specific findings were made concerning the actual supervisory duties of the classification. Arguably, the Board's decision, in the absence of full litigation, does not constitute "final judgment on the merits" under those technical criteria.

Based upon the above, I find that CAUSE was not a party to the original stipulation which excluded Ranger II's from State Unit 7, and that the Board's decision on the Ranger II's supervisory status was not "fully litigated." For both of these reasons, the technical criteria necessary for a finding of res judicata do not exist, and the original Board decision is not dispositive for the instant case. The State's Motion to Dismiss on this basis is therefore denied.

II. THE SUPERVISORY ISSUE

A. THE GENERAL LEGAL FRAMEWORK

Section 3522.1 of the Act provides as follows:

> "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the

> employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

In its initial State unit determination decision, State of California (1980) PERB Decision No. 110c-S, the Board formulated certain general standards for the determination of supervisory status under the above definition, and then applied those standards to numerous positions at issue in that case. Under the Act, the burden of proving that a certain classification should be excluded from the unit is on the party asserting that claim.[7] Additionally, the supervisory indicia of section 3522.1 are to be read in the disjunctive. Where an employee meets one of the specific criteria of that section, and performs no bargaining unit work, that employee is to be excluded from the unit.[8]

Supervisory authority will not be found where actual authority is limited to a choice between two or more tightly directed or narrowly defined procedures. "Independent judgment" in the performance of duties includes the opportunity

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[7] State of California, supra, note 3, at page 1.

[8] Id. at page 6.

to make a clear choice between two or more significant alternative courses of action, without broad review or approval.[9]

Since statutory exclusions are designed to prevent a division of supervisors' loyalty, the alleged supervisory activity must be exercised in the interest of the employer. In addition, the potential for this conflict of interest lies in the authority to control personnel decisions. The demonstration of control over work processes alone does not support an exclusion.[10]

Finally, the language of section 3522.1 specifically provides that employees whose duties are "substantially similar" to those of their subordinates shall not be considered supervisory employees. The Board has rejected a quantitative analysis of this phrase, and has interpreted "substantially similar" to require exclusion when the employee's duties reach the point at which the supervisory obligation to the employer outweighs that employee's entitlement to the rights afforded rank-and-file employees. At that point, the existence of such supervisory obligations precludes a finding that the employee's duties, overall, are substantially similar to those of his/her subordinates.[11]

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[9]Id, at page 9.

[10]Id, at page 10.

[11]Id, at page 8.

B. THE ALLEGED SUPERVISION OF SEASONAL EMPLOYEES

The duties and responsibilities exercised by Ranger II's regarding seasonal park aides are markedly different than their duties vis-a-vis their full-time bargaining unit subordinates. Additionally, there is conflicting case precedent regarding whether supervision of non-unit employees constitutes supervision "in the interest of the employer" under the statute. As a result, the law and analysis regarding supervision of seasonal employees has been specifically separated for discussion in this opinion.

Specifically, the issue is whether the Ranger II's supervision of seasonal park aides, who are not only nonbargaining unit employees, but are also excluded from the coverage of the Act as "non civil service employees," constitutes supervision "in the interest of the employer" under section 3522.1 of the Act.

There is a conflict in the Board's case precedent when applied to supervision of nonbargaining unit employees. One line of cases generally holds that "sporadic"[12] or "minimal"[13] supervision of non-unit employees "incidental to the performance of [the alleged supervisor's] own professional

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[12]Washington Unified School District (1978) PERB Decision No. 56; State of California (1979) PERB Decision No. 110c-S at page 43 (Fire Captains).

[13]Monterey Peninsula Community College District (1978) PERB Decision No. 76.

duties"[14] does not require a supervisory finding. Another case summarily finds that supervising library assistants are included in the unit because "their supervisory functions are exercised only with respect to clerical employees and student assistants."[15] Additionally, that case includes supervising librarians in the unit despite the one sentence finding that they "work at reference desks and supervise non-unit employees."[16]

On the other hand, other Board decisions have excluded employees from units as supervisors both because they supervise non-unit employees and because they supervise persons who are not "employees" under the Act. For example, in Berkeley Unified School District, grade coordinators were found to be supervisory based upon, inter alia, their broad supervisory authority over large numbers of non-unit classified employees. In that case, the Board stated that the supervisory definition contained in the Educational Employment Relations Act (EERA)

> . . . does not distinguish between the supervision of unit and non-unit employees, and the Board will not read such a distinction into the provision. The

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[14]Redlands Unified School District (1982) PERB Decision No. 235; University of California (1983) PERB Decision No. 247b-H, at page 15.

[15]California State University (1981) PERB Case No. 173-H, at page 55.

[16]Id, at page 44.

> authority of the grade coordinator to supervise certain classified employees is clear and uncontradicted in the record.[17]

Similarly, the Board in University of California found that supervision of only non-unit employees did not preclude designation of certain library employees as supervisory.[18]

Moreover, the Board has found classifications to be supervisory based, inter alia, upon their authority to hire seasonal and limited term employees.[19] Particularly significant is the Board's decision regarding the classification of Park Maintenance Supervisor I (PMS I) in State of California (1979) PERB Decision No. 110c-S. That position, like the Ranger II an employee of DPR, also had subordinate seasonal aides who were not "civil service employees" under the Board's prior decision. In addition to their ability to authorize overtime and reassign personnel as necessary, the PMS I classification was found to be supervisory due to that position's "total discretion as to the hiring of seasonals."[20]

In the instant case, there is no real dispute concerning the authority of Ranger II's over seasonal employees during the

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[17]Berkeley Unified School District (1979) PERB Decision No. 101, at page 20.

[18]University of California, supra, note 14, at page 13.

[19]State of California, supra, note 3, at pages 44-46.

[20]Id, at pages 66-67.

time period when the seasonals are working. Ranger II's have discretion not only to recruit, interview and hire seasonals, but also to determine the underlying need for such personnel. They are empowered to evaluate, discipline and/or discharge seasonals, establish their work schedules, and assign them work. These decisions by Ranger II's are made without any review by or consultation with higher authority. Ranger II's are clearly exercising "independent judgment" on "personnel decisions" concerning seasonal employees.

CAUSE argues that the previously cited decisions in Washington, Monterey, Redlands and California State University are controlling on this issue, since those cases necessitate a finding of supervision of bargaining unit employees as a prerequisite for exclusion from the unit. In my view, however, each of those cases is distinguishable from the instant situation. Both the Washington and Monterey decisions found that "minimal" or "sporadic" supervision of non-unit employees did not disqualify employees from the unit as supervisors. In this case, however, there is no evidence of mere sporadic or minimal supervision of seasonals. Here, Ranger II's perform these supervisory functions for their seasonal employees on a regular, recurring basis during the time period when the seasonals are working. That authority and the exercise of it is clear and uncontradicted in the record.

Nor is the exercise of such supervision by Ranger II's "incidental to the performance of [the Ranger II's] own

professional duties" as in Redlands. In that case, the Board rejected exclusion of teachers from the unit because they "supervised" their teachers' aides, on the grounds that any "independent judgment" and "supervisory" functions exercised by teachers in assigning tasks to aides stemmed from the mission of both teacher and aide to improve the quality of the education provided.[21] While all park employees, including both Ranger II's and seasonal employees, maintain a common goal of providing a safe and enjoyable park for its visitors, only the Ranger II is responsible overall for the daily administration, control, and coordination of the functions and services provided into the parks under that Ranger's jurisdiction. In carrying out those duties, the Ranger II relies upon his/her subordinates, including seasonal employees, to perform their specific functions or services. The Ranger II is responsible to higher DPR authority to assure that those functions are carried out by subordinate employees, and is held accountable if they are not. As such, the Ranger II's supervisory authority is clearly "in the interest of the employer," the Department of Parks and Recreation, rather than "incidental to the performance of [his/her] professional duties." Rather than being incidental, those duties constitute an integral part of the Ranger II's responsibility to control and coordinate the park's functions and services.

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[21]Redlands Unified School District, supra, note 14, at page 13.

The Board's decision in California State University is likewise distinguishable. Both of the findings cited above in that case are clearly based upon an extremely limited amount of evidence provided by the University, in the context of University claims that numerous classifications systemwide should be excluded from units as supervisory. As such, it is apparent that the Board's finding of nonsupervisory status was based largely upon the University's failure to meet its burden of proof that the positions in question performed supervisory functions sufficient to require their exclusion from statutory coverage.

Although it was not specifically raised by the Union in its brief, the undersigned believes it necessary to address the potential contention that supervision of seasonal Park Aides cannot constitute "supervision" under section 3522.1 of the Act, since that section requires a supervisory employee to exercise the enumerated functions over "other employees," and park aides are not "employees" within the meaning of the Act. Although park aides are not employees under the Act because they do not meet "the criteria of civil service employees in the hire and retention of employment," the undersigned cannot escape the fact that, while they are functioning as Park Aides, they meet all of the normal "employee" requirements. They work for the Department of Parks and Recreation, they are paid on an hourly basis with State funds, they serve as representatives of the State in meeting and dealing with the public, they work

established hours at State facilities on State property, and they are responsible to a full-time State employee, the Ranger II. Under such circumstances, an employer-employee relationship is established during the time they are functioning as seasonal park aides, irrespective of whether their hiring and tenure rights qualify them as "civil service employees."

Based upon the above, I find that the Ranger II's exercise of supervisory functions over seasonal Park Aides constitutes supervision "in the interest of the employer" of "other employees" within the meaning of section 3522.1 of the Act. As such, those duties must be strongly considered in determining whether the Ranger II's supervisory obligations are substantially similar to those of their subordinates.

C. THE ALLEGED SUPERVISION OF PERMANENT EMPLOYEES

Turning to the question of the Ranger II's alleged supervision of permanent subordinate employees, the evidence indicates that Ranger II's do not have the authority to hire, suspend, layoff, recall, promote, discharge, reward, or discipline permanent DPR employees, or effectively to recommend such action. Although Ranger II's may participate in interview panels and make recommendations for the hiring of permanent subordinates, the ultimate hiring decision is made by higher DPR authority. The Board has not afforded supervisory status to employees who merely participate on a hiring panel unless the record demonstrates that they - rather than the panel -

make the effective recommendation.[22] There is no such evidence in the record here. Likewise, the Ranger II's participation in employee evaluations under the facts of this case is not an indicator of supervisory status. Where an employee's participation in the evaluation procedure is subject to substantial review and approval, or where it follows a routine course prescribed by existing policy, the Board has refused to find grounds for exclusion.[23] Moreover, authority to evaluate is not one of the statutorily enumerated supervisory criteria.

In addition, participation by the Ranger II in the counseling function, though it involves criticism and corrective effort, is not one requiring exclusion where that function is conducted on an informal basis, as it is here. Such informal counseling does not amount to effective recommendation for discipline.[24] Nor does the responsibility to gather information and refer it to others for action constitute authority to discipline within the meaning of the Act.[25]

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[22]Foothill-DeAnza Community College District (1977) EERB Decision No. 10; California State University (1983) PERB Decision No. 351-H.

[23]State of California, supra, note 3, at page 14.

[24]Marin Community College District (1978) PERB Decision No. 55.

[25]State of California, supra, note 3, at page 13. Dunkirk Motor Inn 524 F.2d. 663; 90 LRRM 2961 (2nd Cir. 1975).

Similarly, the role of the Ranger II in recommendations for transfers is limited to consultation by higher authority as to the impact any such transfer would have upon the operation of a particular park. The transfer decision itself is made by higher authority after review of the factors involved. The Ranger II's role in this process does not constitute "effective recommendation."

Ranger II's are designated as the "informal" step of the DPR grievance procedure, and may occasionally resolve informal disputes or grievances of their subordinates. The Board has dealt with this precise situation in California State University, as follows:

> The sergeants' authority to adjust employee grievances is alleged by the University as a basis for requiring the supervisory exclusion. We disagree. We do not dispute the hearing officer's finding that the sergeants frequently resolve the informal disputes or grievances of the officers. However, we do not view this function as satisfying the statutory directive to adjust employee grievances in the interest of the employer. In other words, the sergeants' adjustments of these day-to-day work disputes are not based on an obligation or allegiance to the employer. Efforts to resolve problems in an informal manner spring from the employees' common goal of insuring a congenial, smooth functioning work environment. The sergeants' involvement in this process poses no conflict with the officers' negotiating relationship with management.
>
> As to the University's established grievance procedure which purports to invest sergeants with first level authority to adjust certain types of grievances, we find no evidence to substantiate the claim that the sergeants have so acted. We decline to conduct that the University has satisfied

> its evidentiary burden where no evidence establishes that the sergeants regularly act in this capacity. The mere potential to do so, like a job description, is insufficient to remove the sergeants from HEERA's collective bargaining scheme.[26]

Like the sergeants above, the Ranger II's role in resolving informal problems poses no conflict with [their] negotiating relationship with management. Furthermore, there is no evidence that they exercise any independent judgment when those informal "problems" become actual grievances, since any adjustments to complaints must be previously approved by higher management, and any disputes in these matters are referred to the District Superintendent. For the reasons set forth in the above decision, the role of the Ranger II in the departmental grievance procedure does not require their exclusion from the unit.

Ranger II's are involved to some degree in the assignment of work. Although they are responsible for compiling the monthly work schedule, any judgments as to what shifts to fill are based upon such known factors as visitor use patterns and staff availability. Once established, the shifts themselves are subject to bids by Unit 7 subordinates on a seniority basis, and any scheduling disputes are resolved by higher authority than the Ranger II. Likewise, since Ranger I's rotate among functional duty assignments on an annual basis, any specific work assignment decisions among subordinates are

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[26]California State University, supra, note 22, at pages 9-11.

largely controlled by the particular functional area which the task involves. Under these circumstances, those assignments are routine, and are more akin to control over work processes by an employee with greater experience, rather than exercise of authority to control or influence personnel decisions.[27]

Similarly, Ranger II's spend little time in observing actual subordinate performance or directing their work. Indeed, there is often little or no daily communication between Ranger II's and their permanent subordinates, since they may work different shifts and have different reporting locations. The nature of the park service provided, with its small staffs, large geographical areas, and extensive hours of coverage, inherently requires that employees be capable of working independently under general departmental guidelines. The minimal direction of work exercised by Ranger II's therefore does not require the use of independent judgment contemplated by the Act.

Ranger II's do have a significant role in the granting of certain categories of time off and in decisions concerning call out of off-duty employees and the necessity of overtime work. Although not involved in long term vacation requests, Ranger II's may allow subordinates to take short-term vacations and to use accumulated compensatory time. Determinations in these areas are made without checking with higher authority,

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[27] Id. See also Oakland Unified School District (1978) PERB Decision No. 50.

based upon the Ranger II's own perception of operational needs. The Ranger II's decisions on the necessity to call out an off-duty employee or to authorize overtime are similarly based upon their own perception of the necessity for such action. The Ranger II's decisions in these areas, based only upon their perception of need or effect upon the overall operation of the park, constitute "independent judgment" on behalf of the employer with respect to personnel decisions, within the meaning of the Board's prior decisions cited above.[28]

In a like manner, the Ranger II's control over the allocation of the amount budgeted to a particular park is further indicia of his/her authority to hire seasonal employees and assign overtime to permanent subordinates. The Ranger II determines, without higher authority authorization, not only the level of coverage possible within the given amount but also how that amount will be allocated. In doing so, the Ranger II exercises judgment in balancing the amount of overtime work for permanent subordinates with the availability of work itself for seasonal employees. Those judgments based upon Ranger II's

[28]On these subjects, the facts of this case are distinguishable from those under which the Board found sergeants nonsupervisory in California State University, supra. In that case, sergeants could decide, without prior approval, to call in off-duty officers or to require overtime in order to maintain certain preestablished minimum staffing levels. Here, in contrast, decisions made by Ranger II's on these subjects are made independently based upon that Ranger's perception of the need for such action, rather than upon establishing minimum manpower requirements.

perception of the proper mix between overtime and seasonal work availability, also constitute "independent judgment" within the meaning of the Act.

D. THE ISSUE OF "SUBSTANTIALLY SIMILAR DUTIES".

There can be little question that the duties of the Ranger II classification are in many ways similar to those functions performed by their subordinate Ranger I's. Under the "substantially similar" language of section 3522.1 of the Act, the Board has refused to automatically exclude an employee from the unit simply because one or more of the listed supervisory duties is included among his/her functions. Rather, the question is whether their involvement in supervisory functions outweighs or conflicts with their participation in and entitlement to rank and file unit activity.[29]

Based upon the entire record, the Ranger II's supervisory duties toward both permanent and seasonal subordinate employees, when taken as a whole, "outweigh their entitlement to the rights afforded rank-and-file employees." Those supervisory duties therefore preclude a finding that Ranger II's overall duties are "substantially similar" to those of Ranger I's. While the limited supervisory functions exercised by Ranger II's over permanent subordinates would likely be insufficient to overcome the statutory "substantially similar" criterion, their overall supervisory duties vis-a-vis all of their subordinates easily surpass "the point at which

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[29]State of California, supra, note 3, at pages 6 and 8.

their supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees." The Ranger II's unfettered supervisory duties over seasonal employees encompass virtually every element of the seasonal's employment and of the supervisory criteria of section 3522.1 of the Act, all the way to the point of deciding whether a seasonal position itself will be created and filled. Under such circumstances, the overall duties of Ranger II's are not "substantially similar" to those of Ranger I's, and they therefore meet the criteria for definition of a "supervisory employee" under section 3522.1 of the Act.

CONCLUSION AND PROPOSED ORDER

Based upon the entire record, including the foregoing findings of fact and conclusions of law, I find that employees in the classification of State Park Ranger II who have subordinate employees[30] are excluded from the unit as supervisory employees under section 3522.1 of the Act. With respect to those employees, the unit modification petition to add them to State Unit 7 is hereby DISMISSED. Any State Park Ranger II positions without subordinate employees are hereby added to State Unit 7.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall

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[30]The evidence shows that a few employees in this classification work at the DPR headquarters office in Sacramento and have no subordinates reporting to them. Those employees are not supervisors and are appropriately included in the unit.

become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing . . ." See California Administrative Code, title 8, part III, sections 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: March 30, 1987

RONALD HOH
Hearing Officer