

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BURLINGAME ELEMENTARY SCHOOL
DISTRICT,

Employer,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION,

Exclusive Representative.

Case No. SF-UM-611-E

PERB Decision No. 1847

June 13, 2006

Appearances: Miller, Brown & Dannis by Lawrence M. Schoenke, Attorney, for Burlingame Elementary School District; Christina C. Bleuler, Attorney, for California School Employees Association.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Burlingame Elementary School District (District) to a Board agent's proposed decision (attached) dismissing the unit modification petition filed by the District to remove the classification of benefits/payroll specialist from the bargaining unit and maintain it as a confidential position under Section 3540.1(c) of the Educational Employment Relations Act (EERA).¹

The Board has reviewed the entire record in this case and finds the Board agent's proposed decision to be free of prejudicial error. The Board adopts the proposed decision as the decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq.

ORDER

It is hereby ORDERED that the request for unit modification in Case No. SF-UM-611-E is hereby DENIED.

Members Shek and McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



BURLINGAME ELEMENTARY SCHOOL
DISTRICT,

Employer,

And

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION,

Exclusive Representative.

REPRESENTATION
CASE NO. SF-UM-611-E

PROPOSED DECISION
(April 5, 2005)

Appearances: Miller, Brown and Dannis, by Lawrence Schoenke, for Burlingame Elementary School District; Christina Bleuler, Staff Attorney, for California School Employees Association.

Before Roger Smith, Labor Relations Specialist.

PROCEDURAL HISTORY

On March 30, 2004, Burlingame Elementary School District (District or Employer) filed a unit modification petition with the Public Employment Relations Board (PERB or Board) pursuant to PERB Regulation 32781(b)(1) and (b)(4)(C).¹ The petition sought to

¹ PERB regulations are codified at California Code of Regulations, Title 8, section 31001 et seq. PERB Regulation 32781(b)(1) and (4)(C) provide:

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification:

(1) To delete classifications or positions which by virtue of change in circumstances are no longer appropriate to the established unit because said classification(s) or position(s) are management, supervisory, confidential, not covered by TEERA, EERA, HEERA or Ralph C. Dills Act, or otherwise prohibited by statute from inclusion in the unit;

(4) To 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,

exclude a benefits payroll specialist position from a wall-to-wall classified employee bargaining unit represented by California School Employees Association and its Chapter 46 (CSEA) as a confidential position within the meaning of section 3540.1(c) of the Educational Employment Relations Act (EERA).²

A determination was made that the petition was timely filed and two settlement conferences were held on July 14 and September 8, 2004, in attempts to resolve the dispute. Settlement efforts were unsuccessful and a hearing was conducted on January 7, 2005. After the submission of post hearing briefs, the case was submitted for decision on March 16, 2005.

FINDINGS OF FACT

The District is a public school employer as defined at section 3540.1(k) of EERA and CSEA is a recognized employee organization as defined at 3540.1(1). The District is composed of five elementary schools, a middle school and a charter school. There are approximately 2370 students enrolled at the District. The District employs approximately 170 certificated employees and 45 classified employees. The certificated employees are represented by the Burlingame Education Association (BEA) and CSEA represents all classified employees.

The District management structure is headed by the Superintendent, Dr. Sonny Da Marto (Da Marto). Two assistant superintendents report to Da Marto, one for curriculum and one for business. Additionally, there are two other management positions, the director of

confidential, not covered by TEERA, EERA, HEERA or Ralph C. Dills Act, or otherwise prohibited by statute from inclusion in the unit, provided that:

(C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding as defined in these regulations in Section 33020 for EERA, Section 40130 for Ralph C. Dills Act, Section 51026 for HEERA, or Section 71026 for TEERA.

² EERA is codified at Government Code section 3540 et seq.

special education and the accounting supervisor. Also working at the District office are three confidential employees, one certificated employee and five classified employees.³

Assistant Superintendent for Business Jing-Jing Wang (Wang) has one confidential secretary report to her as well as Accounting Supervisor Connie Ngo. Reporting to Ngo are an accounting technician and a benefits/payroll specialist, the position in dispute in the instant case currently held by Sally Padilla.

Da Marto acts as the District's personnel director in addition to his general role as superintendent. Reporting directly to Da Marto are the two other confidential positions, his Administrative Assistant, Eloise Freely (Freely), and Personnel Administrative Assistant, Victoria Ouye (Ouye). Da Marto has served as superintendent since 2000. In those five years he has set at the negotiating table several times with both CSEA and BEA. Assisting Da Marto, and accompanying him to negotiations as the District's team, have been Wang and a school site principal.

The District office is located away from all school sites. Upon entering the District office, a receptionist desk greets the public. Immediately behind the receptionist's work space is a central work area with six foot high partitions in modular furniture design dividing this space into six individual cubicles. Three of the cubicles are used for general office work such as space for printers, photocopiers and fax machines, mail boxes or space for testing. This central work area is surrounded on three sides by nine private offices occupied by ten of the fourteen employees at the District office. The desks in the central work area are six to ten feet from the walls or doors of the nine private offices.

Sally Padilla's work location is in one of the cubicles just across from Assistant Superintendent Wang's office. The confidential employee assigned to assist Wang, Pat De

³ The school sites each employ a site principal and the middle school also has a vice principal.

Moulin, works directly across from Padilla in another cubicle. The other two confidential employees, Freely and Ouye, work in separate walled offices.

Padilla has been employed by the District for fourteen years. Her first assignment with the District was as payroll technician. In 1994, the title of her job was changed to benefits payroll specialist. The position was designated as confidential until October 2000. She indicated that her duties have remained similar since she was given the benefits portion of her assignment in 1994.

In January 2000, Da Marto became superintendent after moving over from San Mateo-Foster City School District where he served as Associate Superintendent Human Resources. In October 2000, following difficulty in finding suitable candidates to fill an accountant position which had recently become vacant, Da Marto, on behalf of the District, reached an agreement with CSEA to allow for the creation of a new classification of Accounting Supervisor that would be an excluded position. (The accountant position had been a position within CSEA's unit.) This allowed the District to increase the proposed salary and attract more qualified candidates. In exchange, the District agreed that the position which Padilla held would be assigned to CSEA's unit and become a non-confidential position.

It was shortly after this agreement was reached that Da Marto indicated he felt remorse regarding having given up the benefits payroll specialist to CSEA's unit. He indicated he checked with Padilla before agreeing to the switch and she indicated she was not concerned with the agreement. It was the upcoming negotiations in 2001 which required additional staff time that convinced Da Marto that he had made a mistake.

In 2001 the District was negotiating with both CSEA and BEA and in November of that year an issue arose that prompted Da Marto to attempt to regain Padilla's position as a confidential position. The background of this issue is somewhat muddled by the contradictory

and confusing testimony of Da Marto, Wang, Padilla and CSEA Labor Representative Diana Hull. There is no dispute that Padilla was asked to assist then Personnel Assistant Mary Lycett gathering information relative to the longevity of teachers' tenure with the District. Padilla acknowledges that she did prepare a report for Lycett that demonstrated the longevity and salary range, voluntary deductions, social security information, and District contributions to State Teachers Retirement System and benefit plans. Padilla disputes that the District ever explained the reasons given for her preparing a longevity list of teachers or that she had any discussions about the assignment with Da Marto.

Da Marto contends that he called Lycett and Padilla into his office to discuss the assignment and that he had subsequent conversations with Padilla and Lycett about the survey which ended up as background material for a proposal to BEA. The District proposed eliminating full-time benefits for part-time certificated employees in exchange for adding longevity steps to the BEA agreement.

At almost the same time Padilla was sitting across the bargaining table from Da Marto as a member of CSEA's negotiating team. CSEA and the District had reached a tentative agreement on a new agreement. This agreement included language confirming the assignment of a benefits payroll specialist to the unit. However, following news of BEA's settlement CSEA through its then President, Mary Ann Mealhow, advised Da Marto that she was not sure CSEA membership would ratify the agreement without some of the same longevity increases that BEA had obtained. This infuriated Da Marto, both because he did not believe BEA's agreement with the District was public information and because CSEA sounded like it was not going to support ratification of the tentative agreement it had reached after many hours of negotiating. Da Marto indicated that he believed Padilla, who had been selected to become the

new CSEA Chapter President in December 2001, was the source of CSEA's knowledge regarding the BEA-District settlement.

Padilla indicated that she did not provide any information to CSEA regarding the District's agreement with BEA to add longevity pay to the agreement because she had none. She believed Mealhow learned of the BEA agreement through her receipt, as CSEA President, of the District's Board packet prior to a Board meeting in November 2001. The upshot of the Superintendent's remorse at agreeing to release the payroll/benefits specialist classification and sense of betrayal by Padilla was the filing of an unfair practice charge against CSEA on January 18, 2002. (Unfair Practice Charge No. SF-CO-601.) The charge asserted that CSEA was violating EERA by representing Padilla and refusing to release her position from the bargaining unit. On March 25, 2002, the charge was dismissed. The Board upheld the dismissal in Burlingame Elementary School District (2003) PERB Decision No. 1510.

On a nearly simultaneous track was an unfair practice charge filed by CSEA on February 21, 2002. (Unfair Practice Charge No. SF-CE-2249.) This charge alleged that the District sought to have Padilla's position removed from CSEA's unit less than a month after agreeing to the new contract. The charge further asserted that the District would not respond to inquiries or requests from Padilla while acting as CSEA Chapter President, and refused to grant her release time to deal with internal CSEA matters. The District was in effect challenging Padilla's status to remain represented by CSEA.

A complaint issued in CSEA's charge and PERB conducted an informal settlement conference. A settlement of the charge resulted. On September 3, 2002, the parties signed an agreement that acknowledged that Padilla's position would stay in CSEA's unit and that certain duties enumerated on the benefits payroll specialist duty statement would be removed.

The District according to Da Marto, left the settlement conference with the feeling that it had "lived to fight another day." That day came when it filed the instant petition.

Benefits/Payroll Specialist

Padilla's duties as referenced earlier have not changed significantly over her fourteen years with the District. There was no evidence provided by the District as to Padilla's duties prior to 2000 other than a duty statement. Padilla testified that she did not assist the District in preparing proposals for bargaining with either CSEA or the BEA. She further indicated that she did not provide confidential materials to any other District staff in response to grievance defenses.

The primary duties of the benefits/payroll specialist are to process the monthly payroll of all District employees; make any changes to employees' pay, hours, classification, withholding, or benefits plans; coordinating with Personnel Administrative Assistant, Ouye, changes in status of employees whether on salary schedules, sick leave accrual, child support withholding, income tax withholding, or other personnel related matters that would affect an employee's pay; maintaining worker's compensation records; communications with County of San Mateo and state agencies to clarify payroll and benefits procedures; and exchange information and provide answers to employees with questions regarding their pay checks. In exercising these duties, Padilla has access to two computers at her work station. One of the computers, a PC, has a dedicated line with access to the county office, CalPERS in Sacramento and the medical plan providers. Wang and Ngo also have dedicated lines in their offices with a PC with the same connections. In addition, Padilla has the District-wide Macintosh used for intra-District e-mails and file maintenance. All District staff and school site employees have a Macintosh.

Positions of the Parties

The District contends that its decision to redesignate the benefits/payroll specialist as a regular classified employee in 2000 was a regrettable mistake, and urges that based on the workload of the superintendent, assistant superintendent of business, and accounting supervisor, the District needs to have an additional staff position available as a resource to assist in preparing and analyzing bargaining proposals. The District argues that it entrusted Padilla with information relative to a proposal made to BEA that impaired the District in negotiations with CSEA. Based on that sense of betrayal, the District felt it could not rely on Padilla.

The District also argues as in Imperial Unified School District (1987 PERB Decision No. 647 (Imperial)), it is a small district that requires the limited number of staff to take on a variety of functions. The District, in arguing for the benefits payroll specialist position, contends that "it is at a great hindrance to be unable to ask the position for advice regarding how the District might approach negotiation . . ."

The District acknowledges that the benefits/payroll specialist has not been performing "confidential duties" but argues that PERB must take a different look at the situation as it exists in this District. The District urges rather than applying the standard review of tasks performed, PERB analyze this position as it has in cases where the incumbent had yet to perform the duties that would be assigned to the classification. The District relies in part on Calexico Unified School District (1990) PERB Decision No. 800 (Calexico) and Hemet Unified School District (1990) PERB Decision No. 820 (Hemet). Otherwise, the Employer is placed in a "Catch-22" where it needs someone to perform confidential duties but can not assign them because the duties are not currently in the duty statement.

CSEA argues that Padilla never has performed confidential duties either prior to 2000 or since the District's agreement to include the benefits payroll specialist in the CSEA unit. CSEA asserts the assignment to calculate BEA longevity pay increments, if it was a confidential assignment, should not have been given Padilla because the District had already agreed that she no longer was a confidential employee. Further, CSEA contends that this case is not like Calexico or Hemet in that those two cases represented fact situations dissimilar to the instant one. Padilla has worked for fourteen years in ostensibly the same position and unlike Calexico is not in a recently created position yet to face a round of bargaining or Hemet where the secretary's supervisor was absent and she had yet to perform confidential duties.

CSEA stresses the District's repeated agreements to include the position in CSEA's unit (2000), through contract language (2001), and resolution of unfair practice charges (2002), culminating in the removal of any reference to confidential duties from the statement of work duties. CSEA urges the petition be dismissed.

ISSUE

Is the benefits payroll specialist classification a confidential position as defined in EERA section 3540.1(c)?

CONCLUSIONS OF LAW

In drafting the EERA, the Legislature denied confidential employees rights under the Act for the purpose of guaranteeing the orderly and equitable development of employer-employee relations. (Sierra Sands Unified School District (1976) EERB Decision No. 2 (Sierra Sands)⁴) EERA section 3543.4. provides, in pertinent part:

A person serving in a ... confidential position may not be represented by an exclusive representative. ... A representative

⁴ Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

may not be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a ... confidential position.

EERA section 3540.1(c) describes a "confidential employee" as:

[a]ny employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.⁵

In interpreting section 3540, 1(c), the Board has stated its assumption that the employer should be allowed a "small nucleus" of loyal individuals to assist the employer in developing the employer's positions in matters of employer-employee relations; that nucleus of individuals must maintain the confidentiality of those matters because if they are made public, it would jeopardize the employer's ability to negotiate from an equivalent position. (Sierra Sands.)

However, the designation of an employee as confidential is not done lightly, and because of the serious impact of such a determination, an exclusion from a broad grant of rights under EERA must be strictly construed. (Los Rios Community College District (1977) PERB Decision No. 18 (Los Rios)). In Fremont Unified School District (1976) EERB Decision No. 6 (Fremont), the Board established a standard requiring that confidential employees have access to and possess information about the employer's employer-employee relations, which includes, inter alia, negotiations and the processing of employee grievances. Further clarifying this standard, the Board in San Rafael City Schools (1977) EERB Decision No. 32, required the employee to have access to or possess confidential information in the regular course of duties performed. Although the frequency of these duties is not controlling, the access or possession must occur within the regular course of the employee's duties and be more than a happenstance. (Id.) More than a fraction of the employee's time must be spent on

⁵ This revised definition of confidential employee became effective January 1, 2004.

confidential matters. (Campbell Union High School District (1978) PERB Decision No. 66, (Campbell) citing Los Rios.)

While I note the change in the definition of confidential employee under EERA has not yet been thoroughly reviewed by the Board, cases decided under the Higher Education Employer-Employee Relations Act (HEERA),⁶ which contains a definition of confidential employee virtually identical to that in the new EERA section, have applied the same principles. In In the Matter of Unit Determination for Technical Employees, Lawrence Livermore National Laboratory, of the University of California Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act) (1983) PERB Decision No. 241b-H, e.g., the Board quoted much of the language from Sierra Sands and cited Fremont and Campbell with approval.

In Mendocino County Office of Education (2002) PERB Decision No. 1505 (Mendocino), the Board found that a confidential employee is any employee who "in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations." PERB found the positions in that case were not confidential because the employees did not have access to or possess information concerning the county's employer-employee relations in the regular course of their normal duties. Here, other than the one time in 2001, for which there is disputed testimony, the testimony shows that Padilla did not have access to and possession of information concerning the District's employer-employee relations in the regular course of her duties.

The Board in Mendocino as well as the District in its argument in this case cited Calexico. In Calexico, the employer had created a new position of assistant personnel clerk (APC). The APC was supervised by a confidential employee. The APC was not actually

⁶HEERA is codified at section 3560, et seq.

involved in grievances or bargaining because she had only been an employee for five months and no grievances had been filed and no bargaining had yet occurred. She maintained the employee personnel files and some of her duties were shared with her supervisor. Because of the interchangeability of duties, the duty statement of the APC and the likelihood based on the undisputed testimony that her duties eventually would perform confidential duties, the Board found her position was confidential.

The District also cited Hemet. The position at issue there was secretary to the director of special education. She was to maintain grievance files, take correspondence related to grievances, gather information relating to grievances and type grievance responses. The Board noted:

She is also required to handle, as part of her routine duties, confidential administrative materials that pertain to collective bargaining, including reports and memos about bargaining proposals. She has not performed these duties during her tenure, only because there have been no grievances and because her supervisor's medical problems preclude him from participating in the District's bargaining team during his regular rotation.

The Board found the secretary to be confidential because she and her supervisor were the only employees with access to confidential files.

In those cases, the classifications at issue did not have the same access and place in the flow of information as Padilla does here. However, in the only circumstance during her fourteen year career that the District could reasonably assert she had access to confidential information that was used to contribute significantly to the development of management positions, there is a dispute as to what Padilla knew. I do not find it necessary to resolve the dispute as to the 2001 assignment involving longevity calculations for a proposal to BEA, as the classification at that time was not a confidential position.

As to the District's argument that small districts require all hands to help, unlike Imperial where there was evidence of the interchange of assignments in that small office that warranted the designation of the receptionist position as confidential, there is no evidence in this case of what other support staff do, or that they share duties or responsibilities. The fact that the management team is overworked and an additional confidential position is needed does not, no matter how compelling the argument, warrant a finding that this classification should be designated as confidential. There is no evidence that the benefits payroll specialist meets the definition of confidential employee as delineated in EERA section 3540.1(c).

PROPOSED ORDER

For the reasons stated above, the Petitioner has failed to demonstrate that the classification of benefits/payroll specialist meets the definition as defined at Government Code section 3540.1 (c). Therefore the petition is HEREBY DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A

document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

By . **Roger Smith**
Hearing Officer