

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA CLARA UNIFIED SCHOOL DISTRICT,

Employer,

and

CALIFORNIA FEDERATION OF TEACHERS,

Petitioner,

and

UNITED TEACHERS OF SANTA CLARA,
CTA/NEA,

Limited Party.

Case No. SF-RR-874-E

PERB Decision No. 1911

June 26, 2007

Appearances: Hopkins & Carley by Richard M. Noack, Attorney, for Santa Clara Unified School District; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for California Federation of Teachers.

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Santa Clara Unified School District (District) of a proposed decision (attached) by a Board Labor Relations Specialist (LRS). The California Federation of Teachers (CFT) filed a request for recognition with the District seeking to represent a unit of all hourly adult education instructors. The request was filed pursuant to PERB Regulation 33050.¹

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001i, et seq.

We have reviewed the entire record in this case, including the District's exceptions to the proposed decision and CFT's response thereto and find the LRS's findings of fact and conclusions of law to be free of prejudicial error. As such, we adopt the proposed decision as the decision of the Board itself.

ORDER

The Santa Clara Unified School District is ORDERED to grant recognition of a unit of all adult education teachers excluding all management, supervisory, and confidential employees and all program specialists and other certificated employees.

Members Shek and McKeag joined in this Decision.



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REPRESENTATION
CASE NO. SF-RR-874-E

PROPOSED DECISION
(12/22/05)

Appearances: Hopkins & Carley by Richard M. Noack, Attorney for Santa Clara Unified School District; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney for California Federation of Teachers; and California Teachers Association by Priscilla Winslow, Assistant Chief Counsel for United Teachers of Santa Clara.

Before Roger Smith, Labor Relations Specialist.

PROCEDURAL HISTORY

On April 8, 2005,¹ the California Federation of Teachers (CFT or Petitioner) filed a request for recognition with the Santa Clara Unified School District (District or Employer) seeking to represent a unit of all hourly adult education instructors. The request was filed pursuant to PERB Regulation 33050.² On May 31 a determination was made that the Petitioner provided adequate support to demonstrate majority support in the proposed unit of approximately 146 employees. The determination pointed out that there were no interventions filed by any other employee organization and that unless the Employer doubted the

¹ All dates referenced hereafter are in calendar year 2005 unless otherwise noted.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

appropriateness of the proposed unit, the Employer must grant recognition pursuant to PERB Regulation 33480 and Government Code section 3544.1.³

On June 16, the District filed its response to the petition. In its response, the Employer raised the status of employees in the classification of program specialist as supervisory employees and argued that the unit was inappropriate based on the inclusion of supervisory

³ The Educational Employment Relations Act provides at section 3544.i that:

The public school employer shall grant a request for recognition filed pursuant to Section 3544, unless any of the following apply:

- (a) The public school employer doubts the appropriateness of a unit.
- (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. The evidence shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation exists and the board shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) of this section applies.
- (c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.
- (d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.

employees in the same unit with certificated employees.⁴ Second, the Employer asserted that it was unable to grant recognition because "it has already recognized the United Teachers of Santa Clara, CTA/NEA as the exclusive representative of all certificated employees of the District who are not supervisory, management or confidential." The District requested PERB to resolve this dispute.

On September 20, the undersigned contacted the representative for the United Teachers of Santa Clara (UTSC) to inform this employee organization that the District had asked PERB to resolve the issue of what unit the hourly adult education instructors should be in. On October 5 UTSC through a letter to the parties and myself expressed an interest in representing the adult education teachers. UTSC is being treated as a limited party as described in PERB Regulation 32165 for purposes of this case.⁵

⁴ At the hearing, Petitioner clarified its petition by disclaiming any interest in representing program specialists due to their supervisory employee status.

⁵ This regulation provides:

In a representation proceeding the Board agent may allow any person, employer, or employee organization which did not file a timely request for recognition, intervention or petition to join the hearing as a limited party provided:

(a) The person, employer, or employee organization files a written application prior to the commencement of the hearing stating facts showing that it has an interest in the proceedings; and

(b) The Board agent determines that the person, employee organization or employer has an interest in the case and will not unduly impede the proceeding.

(c) The Board agent may grant participation in the hearing which shall be limited to the right to make an oral statement on the record and to file a written brief subject to such conditions as may be prescribed.

A formal hearing was conducted by the undersigned in Santa Clara on October 20. With the submission of post-hearing briefs on December 6, the matter was submitted for decision.

POSITIONS OF THE PARTIES

The Petitioner argues that it has demonstrated majority support in an appropriate unit of certificated employees. Further there were no lawful interventions filed by any other employee organizations during the required petition posting period and therefore the PERB should not foster any further delay and find the unit appropriate and order an election.⁶

The Employer asserts that it cannot lawfully grant recognition to CFT because it has recognized UTSC as the exclusive representative of a unit of "all regular probationary and permanent certificated employees." The District states that there is no dispute that the hourly adult education teachers are certificated employees. It is thus barred from recognizing CFT as the exclusive representative of another certificated unit.

Further, the District argues that EERA section 3545(b) describes that in all cases, "a negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer." Despite PERB case law that has found certificated units that contain other than all "classroom teachers" to be appropriate, the District contends that that case law is wrong and the clear language of the statute cannot be ignored. The District believes PERB should dismiss CFT's petition.

Finally, the District contends that even if PERB case law were correct, the unit as petitioned for is not an appropriate unit because the community of interest the adult education

⁶ CPT Counsel appears to be unaware of the change in the EERA that now requires an employer grant recognition of a petitioner that has demonstrated majority support in an appropriate unit. See footnote 3 above.

teachers share with "regular" classroom teachers is so significant the unit should not exist on its own.

UTSC does not dispute that the written agreement between itself and the District is silent as to the coverage of adult education teachers. UTSC indicates it has not represented these employees in the 28 years it has been the exclusive representative. It did express an interest in representing the adult education teachers following contact by PERB. UTSC argues that CFT has not demonstrated that the adult education teachers share a separate community of interest that would distinguish them from other classroom teachers.

FINDINGS OF FACT

The District is a public school employer as defined in EERA section 3540.1(k). It employs approximately 730 "regular" classroom teachers, 165 adult education teachers and 1,200 classified employees at 22 school sites. The average daily attendance of K-12 students is approximately 15,000.

CFT is an employee organization as defined at EERA section 3540.1(d).

UTSC is the exclusive representative of a unit of certificated employees as defined at EERA section 3540.1(e). This unit was certified as the exclusive representative following an election in October 1977. That election was delayed a year as there were unfair practice charges affecting the unit that were resolved prior to PERB conducting the election. The election included choices between an affiliate of CFT and UTSC, an affiliate of California Teachers Association. The official representation file of PERB does not demonstrate any modifications of the originally certified unit other than an acknowledgement that UTSC and

the District no longer objected to the exclusion of "probationary and permanent employees who are on leave without compensation.",⁷

Neither the Employer nor UTSC claim that hourly adult education instructors are currently in the unit represented by the CTA affiliate.

The District began to offer adult education classes in 1981. Classes are offered in a variety of areas from those required for adult diploma graduation to health and fitness and citizenship, English as a second language (ESL), music, computer technology, arts and crafts and foreign languages. The District follows a State Department of Education requirement that provides that adult education programs run under a separate budget from K-12 funds and that these programs be self-supporting.

The term adult, for state funding purposes, means a person eighteen years of age or older or a person who is not currently enrolled in a high school. The District conducts a survey every two to three years to ascertain the needs of the community in its class offerings.

The adult education program is operated principally at two locations, the former Wilson High School, alternatively named Benton Street site, and the Patrick Henry site. Both locations had served as regular school sites in the past but now offer special programs including adult education classes. The enrollment in adult school classes is between 12,000 - 16,000 in any given year. This represents total enrollment, in other words a student enrolled in three different classes would count three times.

Dr. Daniene Marciano is the director of educational options for the District and is responsible for the adult education program. She has served in her current position for the past eleven years but prior to that she served as an adult education instructor of ESL for eight years and as a vice-principal in the adult education program for five years. She described the

⁷ The Employer in its brief asserts that at some point UTSC and the District added "summer school certificated employees" to the unit description.

different types of classes offered and the funding sources for the classes. The classes the District offers are funded by various means. Funds are obtained from the state, city, county and federal governments as well as some classes for which fees are charged. Classes in computer science are expensive due to ever-changing technology, particularly in the heart of "Silicon Valley," therefore, those classes require some student tuition.

In the organizational chart of the District, Dr. Marciano's program is not aligned with any of the other educational services which the District offers. The Assistant Superintendent for Human Resources, Steve Stavis, described the District's administration and its functions. As part of that management functioning, the District's inner management circle includes cabinet meetings with the superintendent. The educational options program director does not participate in these meetings. The directors of educational services and secondary education do participate in the superintendent's inner cabinet.

The teachers of fee-based classes such as arts and crafts, home economics, foreign languages, health and fitness, are not required to possess a teaching credential. Teachers in the other programs such as traditional adult diploma (TAD) or ESL that charge no student fees are required to have a credential.

The adult education teachers work at sites other than "regular" classroom teachers although there are a few "regular" teachers working at the Wilson site in the continuation high school. Sites other than Wilson and Patrick Henry are also used for teaching adult education classes such as convalescent hospitals and senior living complexes. A few "regular" teachers also receive supplemental pay for teaching adult education classes. There is no other regular contact between the adult education teachers and school site personnel through training classes, social functions, faculty meetings, back to school nights or any other functions that K-12 teachers typically are involved in.

Unlike "regular" classes, adult education classes are taught in four segments often weeks each that go year around. Students sign up voluntarily for these classes and may drop out at any given time. Lesson plans are required and grades are given in the classes. Students in the TAD program are required to pass state tests in order to achieve a high school graduation. If classes do not maintain high enough levels of participation by student attendance, they may be cancelled. Students are required to purchase textbooks or other classroom materials.

Dr. Marciano is the director of the program but the line supervisors of the adult education are the program specialists. The specialists evaluate each teacher and class and act as a school site principal or administrator would in a "regular" school setting. Adult education teachers are responsible for contacting their program specialists with any problems or absences due to illness. Adult education teachers who teach classes in more than one program report to separate program specialists for each type of class they teach.

Adult education teachers are paid an hourly rate which the District establishes. The salary is not negotiated and is not based on the collective bargaining agreement between UTSC and the District. Beginning in 2004, adult education teachers who qualified with a minimum number of hours worked for the District began to receive proportionate medical coverage paid by the District based on the number of hours worked. Not all adult education teachers receive this benefit. There is no District provided dental or vision care coverage for adult education teachers. The adult education teachers do not sign employment contracts as do regular K-12 teachers. Adult education teachers and the District participate in the State Teachers Retirement System.

In 2004 a committee of adult education teachers contacted both CFT and UTSC to determine the potential benefits of being represented by either organization. The committee

met at least two times with UTSC representatives and several times with CFT. In weighing the options of representation by CFT or UTSC, the committee considered the concerns both organizations had in representing a group of adult education teachers and the answers each gave to questions from the committee members. The decision to opt for CFT was based on a popular vote of the participating adult education teachers.

ISSUES

Should PERB dismiss an otherwise valid petition, where no other employee organization has demonstrated any employee support, based on the argument the statute requires all classroom teachers of an employer to be in one unit? If not, is the unit as petitioned for, an appropriate unit?

CONCLUSIONS OF LAW

The relevant statutory criteria for unit determination are included in section 3545 of the Educational Employment Relations Act (EERA) (Government Code section 3540, et seq.), as follows:

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

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer,

Interpreting the above statutory language in Peralta Community College District (1978) PERB Decision No. 77, (Peralta) the Board found a conflict between the mandatory "In each case" language of section 3545(a) and the mandatory "In all cases" of section 3545(b). In

harmonizing the conflicting language, the Board found that the Legislature meant to minimize the dispersion of school district faculty into unnecessary negotiating units, while at the same time recognizing the possibility that critical negotiations related differences between groups of teachers that might compel unit separation.

In order to satisfy the legislative preference for the largest possible viable unit of teachers, the Board established a rebuttable presumption that all teachers were to be placed, prospectively, in a single unit. The burden of rebutting the presumption and proving the inappropriateness of a comprehensive unit would be upon the party opposing it. Peralta (pp. 9-10).

While the Board went on to decide Peralta almost exclusively upon a lack of community of interest between the groups of teachers involved, the Board specifically cautioned that other criteria contained in section 3545(a) should not be disregarded. This may include factors such as the extent to which employees belong to the same employee organization, the effect upon the efficient operations of the school district, the negotiating history and impact upon established negotiating relationships, and the harm caused by potential loss of collective bargaining rights if the petition is denied.

In Peralta, the Board gave little weight to established past practices or negotiating history prior to the enactment of EERA. Since EERA had been in effect for less than two full years when the Peralta hearing was held, history after the enactment of EERA was also of limited value. The District would have PERB reject Peralta as nonsensical and outdated and find that the clear language of the statute and the District's recognition clause require PERB to dismiss the petition out of hand.

PERB has consistently upheld the underlying principle of Peralta that there is a rebuttable presumption that allows a unit of certificated employees that does not include all

"classroom teachers" to still pass PERB muster. See Oakland Unified School District (1983) PERB Decision No. 320; Davis Joint Unified School District (1984) PERB Decision No. 474; Modesto City Schools (1985) PERB Decision No. 567; Long Beach Community College District (1989) PERB Decision No. 765; Pasadena Community College District (2001) PERB Decision No. 1098.

In Long Beach Community College District (1989) PERB Decision No. 765 (Long Beach), the Board considered the issue of how to resolve disputes over representation petitions filed by residual groups of unrepresented employees who were excluded from existing units via voluntary recognitions or consent election agreements, but would likely have been included in the unit had the issue been before the Board at that time. (Part-time faculty were not represented in the faculty unit.) The Board noted that a dilemma may arise when, sometime later, the excluded employees seek bargaining rights through a petition for a separate unit.

These types of petitions are filed because there is no mechanism for being added to the existing unit if the exclusive representative of that unit chooses not to file a unit modification petition.⁸ There is no established mechanism for forcing upon an existing unit an additional group of employees the unit does not want.

In Long Beach, the Board found that it would not effectuate the purposes of the statute to order such a forced expansion of the unit, even assuming it had the authority to order such action. The Board again held that "this case presents the anomaly of creating a separate unit of employees who likely would be included in the existing unit were the issue before us as part of an initial unit determination."

⁸ I take notice that on December 7, in an effort to meet this requirement UTSC filed a request to add the hourly adult education employees to the unit it represents. The request was withdrawn on December 21st.

However, the Board went on in Long Beach to find it could not ignore the bargaining history nor the relationship between the two groups that had developed in that case since the unit determination in 1978. The Board noted the statute required that it consider such factors. The Board concluded that it was correct to give great weight to the fact that denial of the petition for a separate unit would effectively preclude the part-time faculty from exercising their statutory bargaining rights. More importantly, the Board found no authority, express or implied, for the Board to force an employee organization to represent employees against its will.

In Santa Clarita Community College District (2003) PERB Decision No. 1506 (Santa Clarita CCD), the Board considered an attempt by the employer and the incumbent union to add part-time faculty to a unit that existed representing full-time faculty, while a rival union was gathering employee support. The Board concluded that two statutory provisions were implicated in this case:

EERA section 3543 provides, in relevant part:

(a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Emphasis added.)

EERA section 3543.5 provides, in part:

It shall be unlawful for a public school employer to do any of the following:

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. (Emphasis added.)

The Board concluded that the National Labor Relations Board's (NLRB) cases on "accretion" of unrepresented employees into an existing unit are in accord with its decision in

Santa Clarita CCD. (See, e.g., Safeway Stores, Inc.(1981) 256 NLRB 918 (107 LRRM 1338))

This "accretion" requires that in order for an employer to grant voluntary extension of exclusive representative status to unrepresented employees, evidence that unrepresented employees support such representation is required. PERB Regulation 32781 (a)(1) and its companion subsection (e) create such a requirement for an employee organization seeking to add a significant number of positions to an existing unit.⁹

Despite the District's urging to ignore or reverse well-established precedent, I conclude there has been no wavering in the Boards disinclination to disturb units that are stable and in existence for some time. See King City Joint Union High School District (2005) PERB Decision No. 1777, where the Board refused to make a determination whether disputed positions were in a unit and the parties failed to use the procedures available to modify its units under PERB Regulation 32781.

At no point since 1981 has either the District or UTSC modified the recognition article of their written agreements or attempted to modify the unit through PERB procedures. Nor has UTSC ever challenged CFT's petition with evidence of employee support of its own. Based on

⁹ PERB Regulation 32781 provides in relevant part:

Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(a) A recognized or certified employee organization may file with the regional office a petition for modification of its units:

(1) To add to the unit unrepresented classifications or positions;

(e) If the petition requests the addition of classifications or positions to an established unit, the Board may require proof of majority support of persons employed in the classifications or positions to be added. Proof of support is defined in Section 32700 of these regulations.

the well established series of PERB cases, I am not convinced that I should adopt the reasons for dismissal of CFT's petition encouraged by the District and to some extent UTSC. The belated entry into this proceeding by UTSC has not been accompanied by any evidence of employee support, a requirement under PERB's unit modification regulations. I therefore reject the argument that the District is precluded from recognizing another employee organization that has adequately petitioned for a group of unrepresented employees.

As to the appropriateness of the proposed unit, PERB has found units of adult education teachers to be appropriate units standing alone. In San Jose Unified School District (1978) PERB Decision No. 90, the Board upheld the finding that adult education teachers were distinct and should be in a separate unit.¹⁰ In Glendale Community College District (1979) PERB Decision No. 88, the Board was faced, in an initial representation case, with determining whether adult education teachers should be in a unit with regular full time and part time faculty. The Board discarded the earlier decisions which held that adult education teachers were not like regular classroom teachers, and included them in the unit as proposed by one of the petitioning unions.

Here, at the time of initial petitioning by employee organizations in 1976 there were no adult education teachers, therefore no issue arose as to whether they belonged in a wall to wall certificated unit. Since 1981, however, adult education teachers have worked for the District without any representation. The testimony of the adult education teachers at the hearing demonstrated that there was and continues to be little contact between "regular" teachers and their adult education counterparts. To a very large extent, the two groups rarely interact either

¹⁰ In PERB's early days, the Board found that adult education teachers did not meet the definition of classroom teacher. See Petaluma City Elementary and High School District (1977) EERB Decision No.9; Lompoc Unified School District (1977) EERB Decision No. 13; New Haven School District (1977) EERB Decision No. 14 and Washington Unified School District (1977) EERB Decision No. 27. Prior to January 1, 1978 PERB was known as EERB.

in development of course work, faculty meetings, social events, District training courses or even in the parking lot. The work locations of adult education teachers are unique as are their hours of work, their supervisors, their school year, their students (who can opt in or out), their pay rates and benefits, their lack of employment contracts, their credentialing requirements, and their funding sources.¹¹

In the case at hand, the record establishes that there is a separate community of interest among adult education teachers. However, this finding must be balanced against a separate unit's effect on efficiency of operations of the District.

Mr. Stavis confirmed that UTSC and the District had just concluded negotiations for a contract that expires June 30, 2007. Participating on the negotiating team for the District in meeting with UTSC were two school site principals the director of personnel and Mr. Stavis and his secretary. The last negotiations with UTSC lasted ten months with thirteen meetings and approximately 100 hours at the table. Mr. Stavis estimated that upcoming negotiations with the classified employee organization would reach between 50-70 hours.

The District does not assert that the additional requirements of meeting with another employee organization would be burdensome. The addition of 165 employees into a unit that does not currently represent the employees may create the unstable relationship the Board has urged be avoided. There was a significant amount of testimony regarding how the adult education teachers chose CFT to be their representative. They met with representatives of UTSC as well as CFT prior to deciding which organization might be a better fit and voted to contact CFT. The forced accretion of a large group of employees into a long established unit may create the destabilizing force neither the District nor UTSC desires.

¹¹ There was testimony that indicated that adult education classes at least once were cancelled because the District had exceeded the State funding cap and would receive no more funds and thus could not pay their teachers.

Based upon the evidence presented in this case, it is concluded that CFT has met its burden to demonstrate that a unit of adult education teachers is an appropriate grouping of employees.

PROPOSED ORDER

The District is ordered to grant recognition of a unit of all adult education teachers excluding all management, supervisory, and confidential employees and all program specialists and other certificated employees.

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, sees. 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
Labor Relations Specialist