

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CENTER UNIFIED SCHOOL DISTRICT,

Employer,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 610,

Exclusive Representative.

Case No. SA-UM-821-E

PERB Decision No. 2379

June 27, 2014

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by Fermin Villegas, Attorney, for Center Unified School District; Christina C. Bleuler, Lead Staff Attorney, for California School Employees Association & its Chapter 610.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Center Unified School District (District) to the proposed decision (attached) of a Hearing Officer. The proposed decision concluded that approximately 37 noon duty aides (NDAs) employed by the District share a sufficient community of interest with the District's classified employees and therefore ordered that the NDAs be included in the existing wall-to-wall classified unit, as requested in a unit modification petition filed by the California School Employees Association & its Chapter 610 (CSEA), which represents the classified unit.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the exhibits thereto, the District's exceptions to the proposed decision, and CSEA's response to the District's exceptions. Based on this review, we find the Hearing Officer's findings of fact supported by the record and his conclusions of law well-

reasoned and in accordance with applicable law. We therefore adopt the proposed decision as a decision of the Board itself, subject to the discussion below of the District's exceptions.

DISCUSSION

We begin with a review of the relevant statutory and decisional law regarding NDAs before considering the District's exceptions. Educational Employment Relations Act (EERA)¹ section 3545, subdivision (a), provides that appropriate units are to be determined based on a "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." In determining whether a community of interest exists, PERB considers several criteria. These include the extent to which employees have similar qualifications, training and skills; job duties; salary and benefits; hours of work, supervision; interaction with other employees, interchange of job functions; and other relevant factors. (*Rio Hondo Community College District* (1979) PERB Decision No. 87.) No one criterion is determinative. The point in comparing these factors "is to reveal the interests of employees and [to] ascertain whether they share substantial mutual interests in matters subject to meeting and negotiating." (*Monterey Peninsula Community College District* (1978) PERB Decision No. 76.)

Sweetwater Union High School District (1976) EERB² Decision No. 4 (*Sweetwater*) and subsequent cases establish a rebuttable presumption favoring three appropriate units of

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references herein are to the Government Code.

² Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

classified employees: a paraprofessional unit including instructional aides; an office-technical and business services unit; and an operations-support services unit. Although “preferred,” the *Sweetwater* configuration is not the only possible one and, where appropriate, the Board has approved others. (*Foothill-DeAnza Community College District* (1977) EERB Decision No. 10; *Marin Community College District* (1978) PERB Decision No. 55.) Where a proposed unit of classified employees does not correspond to the *Sweetwater* configuration, the standard used is not whether the proposed unit is *the* most appropriate unit, but whether it constitutes *an* appropriate unit. (*Elk Grove Unified School District* (2004) PERB Decision No. 1688, adopting proposed decision at p. 24.) Indeed, notwithstanding the *Sweetwater* presumption, there is some authority suggesting that the Legislature wished to avoid the unnecessary proliferation of public-sector bargaining units and generally intended for PERB “to find the largest *reasonable* unit to be the appropriate one for purposes of collective bargaining.” (*Los Angeles Unified School District* (1998) PERB Decision No. 1267, p. 5, quoting from California Assembly Advisory Council, Final Report, p. 85 (March 15, 1973) “Aaron Report,” emphasis in original.)

Regardless of how a public school employer’s classified employees units are configured, the Board has long held that NDAs are “public school employees” within the meaning of EERA section 3540.1, subdivision (j), and, that they may appropriately be included in a unit of classified employees for collective bargaining purposes. PERB has reached this conclusion, despite that the Education Code expressly excludes such employees from the definition of “classified service,” because EERA’s broad definition of “public school employee” “is not limited in any way to certificated employees or employees in the classified service.” (*Pittsburg Unified School District* (1976) EERB Decision No. 3 (*Pittsburg*); *Fontana Unified School District* (2004) PERB Decision No. 1623 (*Fontana*)). Thus, the Board has

consistently held that NDAs should enjoy the same rights afforded other public school employees to bargain collectively through a representative of their own choosing. (*Pittsburg*.)

The sole exception to this line of cases is *Castaic Union School District* (2010) PERB Order No. Ad-384 (*Castaic*), in which a majority of the Board concluded that NDAs have no collective bargaining rights under EERA because they are expressly excluded from the definition of “classified service” in the Education Code. (*Id.* at pp. 4-5.) The *Castaic* Board observed that EERA defined the term “exclusive representative” as “the employee organization recognized or certified as the exclusive negotiating representative of *certificated or classified employees* in an appropriate unit of a public school employer.” (*Ibid.*, emphasis in original.) The *Castaic* Board interpreted this language as legislative intent that, despite the statute’s more broadly-worded definition of “public school employee,” *only* certificated or classified employees may bargain collectively through an exclusive representative. As an alternative ground, the Board also concluded that the petitioner in *Castaic* had failed to provide sufficient evidence of a community of interest between NDAs and classified employees. The *Castaic* majority then overruled *Pittsburg*³ but directed that its decision only be applied prospectively to minimize disruption of existing units that included both NDAs and classified employees.

In a separate opinion, Member Wesley concurred with the majority’s view that the petitioner in *Castaic* had failed to provide sufficient evidence of a community of interest between NDAs and employees in the classified unit. However, she disagreed with the majority’s reading of EERA and dissented from its conclusion that NDAs were not covered by EERA or entitled to the same collective bargaining rights as certificated and classified employees.

³ The *Castaic* majority did not overrule or attempt to distinguish *Fontana*.

Less than a year after the Board issued *Castaic*, the Legislature enacted Assembly Bill No. 501 (Campos), which became Chapter 674, Statutes of 2011. AB 501 amended EERA to clarify that an “exclusive representative” is the exclusive negotiating representative of, not just certificated or classified employees, but of “public school employees” as defined elsewhere in the statute. We agree with the Hearing Officer’s conclusion in the present case that, “This amendment appears to repeal or overturn the holding of *Castaic, supra*, PERB Order No. Ad-384, concerning the representation rights of NDAs.” To the extent that was not the intent of the Legislature when it enacted AB 501, we hereby overrule *Castaic* as inconsistent with long-standing PERB precedent to the extent it holds that NDAs are excluded from collective bargaining rights under EERA and/or that they may not be included in an appropriate unit with classified employees. With this legal framework in mind, we turn to the District’s exceptions.

The District filed 19 exceptions to the proposed decision, the majority of which challenge the Hearing Officer’s factual findings. Exception Nos. 3, 12, 13, 15, and 16, for example, assert various distinctions in the hiring procedures, job qualifications, duties, disciplinary procedures, fringe benefits, or other community of interest factors which, according to the District, undermine the proposed decision’s conclusion that a community of interest exists between NDAs and the District’s classified employees. In the *Pittsburg* and *Fontana* decisions the Board considered essentially these same arguments and determined that the distinction between NDAs and classified employees that stem from their different status under the Education Code is not dispositive of whether they share a community of interest and may, therefore, exercise their collective bargaining rights within a common unit. For example, the fact that an employer has a more complicated or lengthier hiring process for its classified employees whereas NDAs are hired “informally” and more or less at the discretion of

individual school principals, does not dictate that NDAs belong in a unit separate from the classified employees. (*Pittsburg, supra*, EERB Decision No. 3.) Similarly, the Board has repeatedly held that even significant differences in the wages, hours, fringe benefits and other terms and conditions of employment currently available to two groups of employees is not a persuasive argument for rejecting a proposed unit including both groups, “since for all practical purposes the hours, wages and other terms and conditions of employment are mainly within the [employer’s] control” (*Oakland Unified School District* (1983) PERB Decision No. 320 (*Oakland*), p. 5), and therefore “would be negotiable if the unit modification petition is granted.” (*Fontana, supra*, PERB Decision No. 1623; see also *Redwood City Elementary School District* (1979) PERB Decision No. 107; *El Monte Union High School District* (1982) PERB Decision No. 220 (*El Monte*).

Several of the District’s exceptions do not directly challenge the Hearing Officer’s factual findings. Exception No. 1, for example, asserts that the Hearing Officer’s statement, that NDAs employed at Wilson C. Riles Middle School pick up litter, “requires clarification,” because it implies that NDAs pick up litter as part of their job duties, whereas, according to the District, they choose to do so, “merely [as] employees taking pride in their campus and surroundings.” The District is aware that NDAs pick up litter, an activity that undoubtedly inures to the benefit of the District. As such, it is part of the compensable duties performed for their employer. (29 U.S.C. § 203, subd. (g); 29 CFR § 785; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584-85.) Whether the District specifically *requires* NDAs to pick up litter, or “merely” *permits* them to do so, or whether instead it uses some combination of both, is ultimately of no significance here, since it is undisputed that NDAs regularly perform this duty, as described in the proposed decision. As such, it was appropriate for the Hearing Officer to consider the extent to which NDAs share this duty with custodians or other

classified employees as part of the community of interest analysis. (*Fontana, supra*, PERB Decision No. 1623.)

Other exceptions (Nos. 2, 5 and 12) assert that the proposed decision “depicts certain arrangements in general terms,” which the record indicates are only in place at one school, thereby misleadingly “giv[ing] the impression that particular arrangements are District-wide and much more widespread than they are.” Exception No. 13, likewise objects to the Hearing Officer’s finding that “NDAs as well as all other school site District employees have been required to attend at least two days of anti-bullying training,” because, according to the District’s witness, anti-bullying training was provided to all employees at Dudley Elementary School but not to all employees of the District. Exception Nos. 10 and 11, similarly argue that the Hearing Officer’s findings and conclusions “are not based on sufficient evidence,” because CSEA presented testimony from two NDAs currently employed at only two of the District’s eleven schools.

The District, however, does not employ NDAS at all 11 of its schools. The undisputed evidence was that NDAs work at the District’s four elementary schools, one middle school and one high school but, for obvious reasons, are concentrated at the elementary and middle schools. CSEA’s two NDA witnesses included Melissa Walker (Walker), an NDA at Wilson C. Riles Middle School, who has also worked as an NDA at Dudley Elementary School and as a substitute NDA at Oak Hill Elementary School. Walker has also previously worked as a campus monitor at Riles. CSEA’s other NDA witness was Rebecca Anderson (Anderson), who currently works as an NDA at Dudley and who previously worked as an instructional aide with the District.

In addition, CSEA put on testimony from Laura Kraft (Kraft), a 10-year cashier/cafeteria worker, who is CSEA’s chapter vice president, negotiations team member,

and job steward. Kraft testified regarding her communications and contacts with both unit employees and NDAs throughout the District, by virtue of her duties as an officer of CSEA. In particular, she testified as to assistance she has provided to classified employees who also work as NDAs. CSEA also presented various exhibits, most of which were District documents, including letters of reasonable assurance and performance appraisals issued by District personnel to NDAs, and job descriptions for various classified unit positions, some of whose duties are similar to, or overlap with, those performed by NDAs. Although the District's witnesses focused heavily on the differential pay, benefits, rights, and other working conditions affecting NDAs and classified employees by virtue of their different treatment under the Education Code, the testimony of the District's witnesses largely confirmed CSEA's evidence on the essential points relied on by the Hearing Officer. Although the District argues in its Exception No. 9 that, "there is no NDA job description in the record with which to compare [their] job duties" to those of classified employees, there was relatively little real disagreement over what duties NDAs actually perform. While Walker and Anderson tended to interpret classified employee job descriptions broadly to emphasize the degree of overlap with NDA duties, on cross-examination, each testified consistently about *what they actually do*, most of which was never disputed by the District.

The record thus indicates that NDAs are regular employees assigned to a 10-month calendar corresponding to those days when students are present. Like classified employees, and unlike seasonal, casual or substitute employees, NDAs are not required to reapply for their positions at the end of each school year. In some cases, NDAs have received letters of reasonable assurance confirming that their employment with the District will continue the following school year.

NDAAs have daily and extensive interaction with other District employees, including classified employees in the following job titles: campus monitors, instructional assistants, cafeteria workers, and custodians. Most significantly, NDAAs are responsible for the direct supervision of the District's students during lunch periods and recesses and during the breakfast period in those schools that provide morning meals. In carrying out that responsibility, NDAAs necessarily work closely with the campus monitors and instructional assistants. While NDAAs have somewhat less involvement with cafeteria workers and custodians, they nevertheless regularly perform lunchroom and clean up duties that require interaction with these classified employees. Significantly, NDAAs use radios supplied by the District to remain in contact with classified employees in the above titles to facilitate their common task of providing a safe, clean and secure campus environment for students. In some instances, an NDA may even substitute for a campus monitor when other personnel are unavailable.

NDAAs and classified employees also share common supervision by principals and vice principals. Although there was some testimony that a campus monitor "supervises" NDAAs at Wilson C. Riles Middle School, there was no disagreement that such "supervision" was limited to preparing schedules, making assignments and, at most, talking to an NDA who was not completing her duties as assigned. More serious concerns or disciplinary matters were left to the school's vice principal or principal.

The District points to some variation between NDAAs and classified employees. CSEA's unit of classified employees covers a great variety of titles, duties, skills, and qualifications. Although there are some significant distinctions between the pay, duties, hours and working conditions of NDAAs and those of employees in the classified unit, some of those differences are less significant than differences within the classified unit. NDAAs are paid \$9.28

per hour, approximately a dollar an hour lower than the contractually-defined starting pay for child aides, instructional assistants, cafeteria service workers and campus monitors, the lowest paid of the classified employees. The District's Director of Personnel and Student Services, David Grimes (Grimes), testified that, although the contractual pay schedule starts at \$10.37 per hour, no current classified employee of the District is paid less than \$11.17 per hour. At the other end of the scale are several titles earning as much as \$23.42 per hour upon completion of at least six years of service with the District. Although the contractual pay schedule includes two more ranges with starting pay as high as \$27.67 and \$29.90, Grimes testified that there are no District employees in these series. At least with respect to the current pay scale, NDAs appear to have more in common with some of the classified employees with whom they work most closely.

Similarly, the District rests much of its argument on the fact that NDAs are not entitled to the statutorily-guaranteed benefits guaranteed to classified employees by the Education Code because they are not part of the classified service. Yet, with respect to one of the most important of such benefits, health insurance, the same sort of divide runs not between the NDAs and classified employees but directly through the classified unit itself. Under the collective bargaining agreement, only those classified employees who work at least 4 hours per day are entitled to health benefits. Moreover, there was evidence that a sizable part of the current classified unit consists of part-time employees, many of whom do *not* have health benefits *at all* by virtue of the above requirement. Given these great distinctions running *through* the existing classified employees, it would be an arbitrary exercise to exclude the NDAs from the unit on the basis of distinctions in pay, hours, or working conditions which may, ultimately be diminished through collective bargaining.

Despite that *Castaic* was superseded and effectively overruled by legislation, the District raises essentially the same, supersession concerns previously considered and rejected by the Board in *Pittsburg* and *Fontana*, to conclude that NDAs should not be included in the classified unit *because* they are not classified employees under the Education Code. Although the District contends that the Hearing Officer has mischaracterized its position, under the District's interpretation of the Education Code, NDAs could not, *even through collective bargaining*, lawfully achieve any of the same *or similar* rights and fringe benefits currently afforded to classified employees by the Education Code. The District argues that,

[i]n practical terms, Section 45136 prohibits part-time employees excluded from the classified service under Section 45103 from enjoying the rights and benefits conferred on part-time employees of the classified service. In essence, this means that part-time, non-classified employees are not eligible to receive any of the benefits provided by the Education Code to classified employees, even on a pro-rata basis.

The District concludes that, "In the case of the NDAs seeking to join a classified bargaining unit, Education Code section 45136 would preclude them from negotiating any of the statutory benefits granted by Section 45103 even [on a] pro-rata basis."

As discussed above, the *Pittsburg* and *Fontana* decisions stand for the proposition that, although the Legislature chose to exclude part-time playground positions from the classified service, it did not intend to preclude NDAs either from the rights and protections afforded other public school employees under EERA, nor, necessarily to preclude the exercise of those rights in a common unit with some or all of a public school employer's classified employees. We therefore reject this exception.

Nevertheless, other exceptions follow from the District's conclusion that NDAs can share no community of interest with classified employees by virtue of their exclusion from the statutory definition of classified service. Thus, the District argues against including NDAs in

the classified unit as “inefficient,” because it would require the District to conduct two separate bargaining sessions at one table. This exception is puzzling in that the District purports to accept that NDAs are entitled to bargain collectively, and thus, it is difficult to discern what, if any additional burden may be imposed if they do so separately, or at the same table with the District’s classified employees.

In *El Monte Union High School District* (1980) PERB Decision No. 142, the Board rejected a similar concern about the inclusion of substitute teachers in the same unit with regular teachers by observing that “negotiation of a supplementary agreement covering the petitioned for employees imposes no greater burden on the parties than would the negotiation of a separate agreement.” (*Id.* at p. 11.) Additionally, the *El Monte* Board noted that future negotiations covering all employees in the modified unit presented no greater potential for disruption of the employer’s operations than would bifurcated negotiations covering two separate units. Because “having to negotiate additional provisions of an existing contract is not in and of itself disruptive” (*Oakland, supra*, PERB Decision No. 320, p. 9), and because the District has pointed to no evidence to suggest that including NDAs in the same unit with classified employees would be any more burdensome than negotiating separately, we reject this exception as well.

The District also argues that including NDAs in the same unit with classified employees would negatively impact the District’s operations by lowering employee morale, as the NDAs eventually realized that, despite being part of the classified unit and paying dues or agency fees to its representative, they would not derive any particular benefit with respect to those benefits provided to the classified employees. Although the impact of a unit determination or modification decision on the efficiency of a school district’s operations is one of the statutory criteria which PERB is required to consider when weighing the various factors,

PERB precedent points to the community of interest as a weightier factor than the efficiency of the employer's operations as determining the effectiveness of the representative. (*Sweetwater, supra*, EERB Decision No. 4.) In *Fontana*, the Board observed that in balancing the efficiency of the employer's operations against employees' right to effective representation in an appropriate bargaining unit, PERB "*has never found the efficiency factor to outweigh representation rights.*" (*Fontana, supra*, PERB Decision No. 1623, proposed decision at p. 7 and authorities cited therein, emphasis added.) Indeed, in situations in which employees perform functions for more than one unit, PERB has held that they are entitled to representation in *both* units if necessary to effectuate their statutory rights to bargain collectively through a representative of their own choosing. (*Oakland, supra*, PERB Decision No. 320, p. 11 and private-sector authority cited therein.)

Even accepting the District's clarifications and corrections to the Hearing Officer's findings of fact, we find nothing in the record that would support a dramatic departure from decades of Board precedent. Accordingly, we affirm the proposed decision.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, the petition for unit modification by the California School Employees Association & its Chapter 610 (CSEA) in Case No. SA-UM-821-E is hereby GRANTED.

Pursuant to Educational Employment Relations Act section 3545, subdivision (a), and Public Employment Relations Board (Board) Regulations, the Board adds the following job classification to the existing classified bargaining unit represented by CSEA: all noon duty aides employed by Center Unified School District.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CENTER UNIFIED SCHOOL DISTRICT,

Employer,

and

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 610,

Exclusive Representative.

REPRESENTATION
CASE NO. SA-UM-821-E

PROPOSED DECISION
(03/05/2014)

Appearances: Roderick D. Gaulman for California School Employees Association & its Chapter 610; Atkinson, Andelson, Loya, Ruud & Romo, by Fermin Villegas, for Center Unified School District.

Before Jonathan Levy, Hearing Officer.

PROCEDURAL HISTORY

The California School Employees Association & its Chapter 610 (CSEA) is the exclusive representative of a wall-to-wall classified bargaining unit comprised of Center Unified School District (District) classified employees. On October 29, 2012, CSEA filed a Petition for Unit Modification (Petition) with the Public Employment Relations Board (PERB or Board) seeking to include the position commonly referred to as "Noon Duty Aide" (NDA) in the CSEA-represented classified bargaining unit (Unit).

On November 19, 2012, the District filed its response to CSEA's Petition, requesting that the Petition be denied. On December 5, 2012, the District filed a second response to CSEA's Petition, maintaining the same position concerning CSEA's Petition. At all times relevant herein, the District's position has been that it recognizes that NDAs have representation rights, but that it is not appropriate to add the NDAs to the classified Unit.

On January 24, 2013, PERB conducted an informal settlement conference with

representatives of CSEA and the District present. The parties, however, were unable to resolve this matter.

On April 15-16 and May 14, 2013, PERB conducted a formal hearing where all sides were given the opportunity to present evidence, examine, and cross-examine witnesses. CSEA's witnesses were as follows: Laura Kraft (Kraft) is CSEA's Chapter Vice President and a Food Service Worker,¹ a classified position, at Dudley Elementary School (Dudley); Melissa Walker (Walker) is an NDA employed at Wilson C. Riles Middle School (Wilson C. Riles); and Rebecca Anderson (Anderson) is an NDA employed at Dudley. The District's witnesses were as follows: Lisa Coronado (Principal Coronado), Principal at Dudley; Joyce Frisch (Principal Frisch),² Principal at Wilson C. Riles; David Grimes (Grimes), District Director of Personnel and Student Services and former Principal at Oak Hill Elementary School (Oak Hill); Debbie Winckler (Winckler), Personnel Technician for Classified Employees; and Kristina Desgrange (Desgrange), Payroll Technician for classified employees.

On July 22, 2013, CSEA filed a post-hearing brief.³ On August 26, 2013, the District filed a post-hearing brief.

FINDINGS OF FACT

The District is comprised of two high schools, one middle school, four elementary schools, two charter schools, one adult school, and one preschool. CSEA is the exclusive representative of the District's classified employees; which includes, but is not limited to, the

¹ The titles or classifications Food Service Worker and Cafeteria Worker are used interchangeably.

² The Hearing Officer discovered midway through Principal Frisch's testimony that she had been one of the Hearing Officer's elementary school teachers. This association was disclosed to the parties. Neither party filed or made any objection or motion based on this information.

³ On July 5, 2013, CSEA requested and was granted a one-week extension of time to file CSEA's post-hearing brief, originally due on July 15, 2013, and extended to July 22, 2013.

following classifications: Instructional Assistant, Child Aide, Library Technician, Clerk, Secretary, Technology Specialist, Groundskeeper, Maintenance Worker, Bus Driver, Mechanic, Cafeteria Worker, Custodian, and Campus Monitor. By the subject Petition, CSEA seeks to add approximately 37 NDAs to the CSEA-represented Unit.

I. Noon Duty Aides

NDAs are an integral part of the District's operations in that they provide direct supervision of students during the lunch period and during breakfast periods at school sites that provide morning meals. NDAs provide this service in eating areas and in playground areas. NDAs monitor student behavior, help students line up to obtain lunch from Cafeteria Workers, seat students at lunch tables, help students open milk/food containers, check to ensure that students select a salad or fruit option, instruct students with cleaning and disposing of lunch waste, and provide students with napkins. NDAs escort students from lunch areas to playground areas where they continue to monitor students. NDAs observe students after they have finished lunch and before they return to their classrooms. If a student misbehaves, NDAs may notify the student's teacher. NDAs also ensure that playground equipment/play materials are set up, such as tether balls and jump ropes. If it is raining, NDAs perform the same or similar duties under the cover of shelter. At Dudley, NDAs encourage students to pick up litter in exchange for an award of "Dudley dollars." Some NDAs pick up litter and/or clean up spills; however, all staff are encouraged to beautify the campus and set a good example for students. At Wilson C. Riles, NDAs will generally tell students to pick up litter, because it is considered part of the students' responsibility. NDAs, however, will also pick up litter. When larger spills occur, Custodians respond to those spills. If a student is hurt, an NDA will notify the appropriate people and aide the student as he or she can until appropriate personnel arrives. NDAs help maintain a safe school environment.

NDA's have access to staff break rooms, staff restrooms, and the parking lot. The District's school sites provide a mailbox to NDAs where the District places flyers, school calendars, and completed copies of time cards used by NDAs.

NDAs interact with Unit employees such as Campus Monitors, Cafeteria Service Workers, Custodians, and Instructional Assistants, as these positions also perform duties during lunch times and other times in which NDAs perform work. To the extent that a student misbehaves, an NDA may interact with Instructional Assistants, as well as certificated employees to inform them of the behavioral issue. NDAs and Campus Monitors often communicate via two-way radios; e.g., to report that a child is injured or to report physical altercations. At Wilson C. Riles, a Campus Monitor prepares the schedules for NDAs. NDAs interact with Custodians to communicate that a spill has occurred or that the NDA has otherwise noticed that custodial service is needed.

At two school sites, either the Principal or Vice Principal will meet with the NDAs at least once a month to "check in" and see if there are any concerns. Recently, the District conducted a two-day anti-bullying training called "Healthy Play," and all District employees, including certificated staff, classified staff, and NDAs, attended. In addition, Dudley Principal Coronado required NDAs to watch a video concerning school site lockdown procedures.

At least two years ago, Dudley Principal Coronado developed a handbook for newly hired NDAs. Principal Coronado would have new NDAs take 30 minutes to review the handbook and she would generally make the handbook available to employees. When Director of Personnel Grimes was the Principal at Oak Hill, he created a handbook for NDAs, last revised in July 2005.

There are no District-wide qualifications to become an NDA. Only the most basic employment requirements are required of NDAs; e.g., fingerprinting for a criminal background

check, tuberculosis (TB) screening, and a physical examination when necessary. These requirements are imposed on all District employees and volunteers.⁴ The hiring process for NDAs is less formal and more decentralized than the hiring process for classified employees. The recruitment of NDAs is generally a school-site-by-school-site process where, usually, a school site Principal either places a job posting at the school site or sends flyers home with students inviting parents and others to apply. School site Principals conduct informal interviews; then, if an applicant is suitable by the Principal's estimation, the applicant fills out necessary forms and a background packet. The District's Personnel Office processes an applicant's TB test results and fingerprint screening as required of any employee of the District. The Personnel Office then informs a school site Principal that these prerequisites have been met so that the Principal can hire the applicant if he or she chooses to do so. NDA applicants can apply and receive a job offer within one-to-two weeks.

NDAs are paid \$9.28 per hour of work. NDAs must complete a time card for all hours worked and submit their time cards to the District Payroll Office by the 19th day of each month and are paid on the 10th day of the following month. NDAs may elect for direct deposit. NDAs do not receive District-provided benefits or benefits pursuant to the Education Code.

NDAs work approximately two hours a day, five days a week during the ten-month period while students are in attendance. NDAs have set work hours, but are occasionally absent and make informal arrangements to cover for each other. For example, NDA Anderson

⁴ District Administrative Regulation 4200 provides:

Persons hired solely for purposes which are exempted from the classified service shall nevertheless fulfill the obligations of classified employees related to physical examinations pursuant to Education Code 45122, fingerprinting pursuant to Education Code 45125, and tuberculosis tests pursuant to Education Code 49406.

has a second job at Kohl's and her hours there sometimes conflict with her assigned NDA hours. On those occasions where there is a conflict in hours, Anderson will usually get another NDA to cover for her.

At Wilson C. Riles, on occasion, some of the duties performed by the Campus Monitor position have been covered by NDA Cindy Webb. Some NDAs also work as substitutes for classified positions. When an NDA performs the work of a classified position in this official substitute capacity, the NDA fills out a separate time card for substitute hours paid at the higher substitute rate than their regular NDA rate.

As at-will employees, NDAs do not generally have a continued expectation of employment. Whether an NDA returns to work after the conclusion of a school year is a matter handled informally on a school site basis. The District issues a Notification of Reasonable Assurance (Letter of Assurance) concerning classified employees' continued expectation of employment. The purpose of a Letter of Assurance is to lessen the District's exposure to unemployment claims. Letters of Assurance issued on April 12, 2011, to NDA Anderson and NDA Vickie Hesson (Hesson).

Generally, NDAs are supervised by and report to a combination of Campus Monitors, Vice Principals, and Principals. At some school sites, the Campus Monitor acts as the lead for NDAs and sets work schedules and work assignments. Campus Monitors do not have authority to discipline or terminate NDAs. NDAs may be disciplined or dismissed from District employment at any time. School site Principals have the authority to discipline NDAs.

NDAs are not evaluated on a regular basis as there is no obligation to evaluate NDA employees. Principal Coronado, however, has evaluated some of her NDAs. Principal Coronado did not submit those evaluations to the District and does not plan on evaluating NDAs again. The NDA evaluations that were performed utilized the evaluation form created

for classified employee evaluations. Principal Coronado conducted the NDA evaluations because she thought it would be a good discussion starter and it would let those employees know how they were doing.

Approximately four to six classified employees are also employed as NDAs. For these four to six employees, all hours worked, both classified and NDA hours, combine and are treated as classified work hours. Approximately five of these dual NDA/classified employees were added to the Unit in March 2010 pursuant to a Unit Modification Order in PERB Representation Matter No. SA-UM-793-E (2010 Unit Modification).

II. Classified Employees

The hiring qualifications and requirements for classified employees, include: a high school diploma or equivalent; there are also experience requirements such as experience in youth related activities for Campus Monitors, prior experience with school age children for Instructional Assistants, and prior job related experience for Custodians.⁵ The Campus Monitor at Wilson C. Riles has received peer mediator training, as well as training concerning proper methods of restraining students. Food Service Workers are required to have a Serv Safe Certification within two years of being hired and are required to demonstrate proficiency in making change in the role of a Cashier and sanitary food handling practices. Instructional Assistants must have a No Child Left Behind (NCLB) certification or pass a test demonstrating certain competencies before being hired.

For vacant or soon-to-be vacant classified Unit positions, the Personnel Office informs a school site Principal of an opening, the Personnel Office conducts a paper screening of applicants, sets up an interview panel of individuals with an interest in the position (e.g.,

⁵ CSEA, for the most part, limited its presentation of classified positions alleged to have similarities to the NDA position to the Campus Monitor, Cafeteria Worker, Custodian, and Instructional Assistant classifications.

school site Principal where the vacancy is or will be), then the Principal provides his or her recommendation to the Personnel Office. The Personnel Office then checks the applicant's references. The hiring process for classified employees is centralized through the District's Personnel Office. Classified positions are advertised centrally through postings coordinated by the Personnel Office and, while Principals are involved, the ultimate decision to hire is not solely left to a school site Principal.

Classified employees are paid based on a salary schedule, their classification, and their length of service. Classified employees are paid on the last day of each month. Classified employees do not submit a time card to be paid unless they have performed overtime or extra duty work. Currently, the lowest paid classified employees—Child Aides, Instructional Assistants, Cafeteria Workers, and Campus Monitors—earn approximately \$11.17 per hour. Classified employees may elect for direct deposit and are paid once a month.

Classified employees receive benefits pursuant to the Education Code and receive health benefits if they work at least four hours per day pursuant to Article XX of the CSEA/District Collective Bargaining Agreement (CBA). The Education Code entitles classified employees to a set amount of sick leave, extended illness leave, vacation benefits, layoff protections, permanency, and a right to a hearing before dismissal.

With respect to the scheduling of work hours, classified employees are not allowed to have other outside jobs that interfere with their work hours. Some classified positions that provide direct services to students, such as Instructional Assistants and Cafeteria Workers, work a ten-month calendar. Other classified employees, including but not limited to Custodians and administrative office employees work 12 months out of the year.

Classified employees receive Letters of Assurance annually when their employment with the District is expected to continue.

Permanent classified employees are evaluated every two years according to an evaluation schedule that is kept by the District Office.

Classified employees are entitled to certain rights and protections and may only be disciplined pursuant to procedures contained in the Education Code.

ISSUE

Is it appropriate to add the Noon Duty Aid employees, which are not otherwise also employed in a classified position, to the CSEA Unit?

CONCLUSIONS OF LAW

A. Noon Duty Aides' Rights Pursuant to EERA

Before proceeding to an analysis of whether it is appropriate to add NDAs to the classified Unit, it must first be determined that NDAs have Educational Employment Relations Act (EERA)-protected⁶ representation rights and are not otherwise barred from being included in a classified bargaining unit.

1. NDAs' EERA Representation Rights

NDAs' rights pursuant to EERA, the Education Code,⁷ and applicable PERB decisions revealed the following relevant information.

⁶ EERA is codified at Government Code section 3540 et seq.

⁷ It is well-settled law that when enforcing the EERA, PERB must occasionally interpret sections of the California Education Code. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, accord, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.) When undertaking the necessary function of interpreting statutes, the intent of the Legislature should be examined in order to effectuate the purpose of the law. (*Long Beach Community College District* (2003) PERB Decision No. 1564 [overruled in part on other grounds, *Long Beach Community College District* (2009) PERB Decision No. 2002, citing *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*)].) Where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. (*Noroian v. Department of Administration, Public Employees' Retirement System* (1970) 11 Cal.App.3d 651, 654, hg. den.) However, in determining intent, it is important to

a. *Pittsburg Unified School District* (1976) EERB Decision No. 3

The present legal issue was first addressed in *Pittsburg Unified School District* (1976) EERB Decision No. 3 (*Pittsburg*).⁸ In *Pittsburg*, the union filed a Request for Recognition petition, which was followed by various other related filings including an Intervention petition by another employee organization. (*Ibid.*) The union later amended its Request for Recognition petition to include “noon-duty supervisors” in its proposed unit. (*Ibid.*)

The Board held:

[W]e do not view Section 13581 of the Education Code,^[9] which specifically excludes “Noon Time Playground Supervisor” from the classified service, as precluding employees so designated from the exercise of rights guaranteed in this Act. In our view, this section of the Education Code must be considered in conjunction with the definition of employee contained in the Act. Employee is defined in the Act as “. . . any person employed by any public school employer except persons elected by popular vote[,], persons appointed by the Governor of this state, management employees, and confidential employees.” This definition is not limited in any way to certificated employees or employees in the classified service.

. . . Thus, as regularly scheduled part-time employees who perform similar duties. The job description of noon-duty supervisor is virtually identical to that of campus aide; the pay schedule is identical to the first step of the Class I rates of the aide schedule; and like other paraprofessional employees they are selected by the principal. [Like other employees who do not work a sufficient number of hours to qualify, they] are excluded from fringe benefit coverage. We conclude, therefore, that noon-duty supervisors should be included in the paraprofessional unit.

examine the language of the statute and to give effect to each word. (*Moyer.*) It is also a fundamental rule of statutory construction that a statute must be construed in context, “keeping in mind the nature and obvious purpose of the statute where they appear.” (*Ibid.*) “The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.” (*Ibid.*)

⁸ Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

⁹ Education Code section 13581 was renumbered to section 45103, effective April 30, 1977.

(*Ibid.*) The Board held in *Pittsburg* that despite the language in Education Code section 45103 (formerly 13581) specifically excluding noon-duty *supervisors* from classified service, these employees may be considered “public school employees” within the meaning of EERA.

(*Pittsburg, supra*, EERB Decision No. 3; see also *Fresno Unified School District* (1979) PERB Decision No. 82, footnote 10.)

- b. *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375

After *Pittsburg, supra*, EERB Decision No. 3, the Board issued *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*), on remand from the California Supreme Court pursuant to its order in *San Mateo City School District et al. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850. The Board in *Healdsburg* held that with respect to a bargaining proposal concerning short-term employees, the union was the exclusive representative of classified employees; and pursuant to Education Code section 45103, short-term employees are expressly excluded from the classified service. The Board held, “Hence, these proposals do not concern positions over which CSEA has authority to negotiate.” (*Ibid.*)

- c. Assembly Bill 2849

In 2002, Education Code section 45103 was amended (Stats. 2002, c. 1100 [A.B. 2849]) to add subdivision (b)(4), stating:

Part-time playground positions shall not be a part of the classified service, where the employee is not otherwise employed in a classified position. Part-time playground positions shall be considered a part of the classified service when the employee in the position also works in the same school district in a classified position.

The Legislative Counsel’s Digest concerning A.B. 2849 provides the law at that time “exempts part-time playground positions from the classified service. . . . This bill would instead provide

that part-time playground positions are not part of the classified service unless the employee . . . is otherwise employed in a classified position.” (2002 Cal. Legis. Serv. Ch. 1100 [A.B. 2849].) A.B. 2849 was enacted with the caveat that, “It is the intent of the Legislature that, by granting classified service status to employees who serve in part-time playground positions and who also work in the same school district in a classified position, parents and guardians who volunteer in playground positions are not discouraged from volunteering.”¹⁰ (*Ibid.*)

d. *Fontana Unified School District* (2004) PERB Decision No. 1623

Thereafter, the Board issued *Fontana Unified School District* (2004) PERB Decision No. 1623 (*Fontana*), wherein it addressed exceptions to a Board agent’s Proposed Decision concerning a Unit Modification petition seeking to add all NDAs to the wall-to-wall classified bargaining unit. The Board adopted the Board agent’s Proposed Decision which determined that those NDAs shared a sufficient community of interest with other employees in the classified bargaining unit to warrant their inclusion in the classified bargaining unit. (*Ibid.*) The Proposed Decision states that it is undisputed that NDAs are excluded from classified service pursuant to Education Code section 45103. (*Ibid.*) Citing to *Pittsburg, supra*, EERB

¹⁰ A review of the bill analysis reveals that in the 1999-2000 Legislative Session, prior attempts were made concerning the modification of this subject language. In 2000, A.B. 1780 proposed to remove the exclusion entirely and make all part-time playground positions classified employees; Governor Gray Davis, however, vetoed the bill, stating:

While I appreciate this bill’s effort to provide better benefits for part-time playground monitors, this bill would mandate substantial increased costs to school districts. I am concerned that requiring school districts to designate all part-time playground monitors as classified employees would usurp the ability of local school districts to set personnel policies that best meet their individual needs.

The legislative effort to remove entirely the prohibition against public school employees like NDAs from becoming part of the classified service was not successful and is not the current state of the law. With this history at hand, the current law must be read so as to interpret its words as going just far enough to include employees in classified service that are employed in both a classified position and an NDA position, but no further.

Decision No. 3, the Proposed Decision states that the Board has held that the exclusion in Section 45103 “does not preclude these employees from the exercise of rights under the Act.” (*Fontana, supra*, PERB Decision No. 1623.) The Proposed Decision held that “any difficulty negotiating over contract provisions applicable to noon duty aides does not outweigh their right to representation.” (*Ibid.*)

e. *Castaic Union School District* (2010) PERB Order No. Ad-384

In 2010, the Board again considered this issue in *Castaic Union School District* (2010) PERB Order No. Ad-384 (*Castaic*), where a Unit Modification petition was filed seeking to add part-time playground monitor positions—also referred to as NDAs—to the wall-to-wall classified bargaining unit. The Board agent’s Administrative Determination in *Castaic* found that a community of interest had been demonstrated and ordered that the bargaining unit be modified to include the NDAs. The Board agent denied the school district’s request for a formal hearing and issued an Administrative Determination based on the parties’ written positions. (*Ibid.*) An appeal was filed with the Board and the Board determined that the Board agent’s Administrative Determination and grant of the Unit Modification petition was inappropriate based on two independent reasons: 1) the subject NDAs may not be placed in a classified bargaining unit because they are not public school employees pursuant to EERA; and 2) the Board agent’s community of interest determination may not stand as it was based solely on findings in prior decisions rather than on evidence supporting a community of interest in that specific case. (*Ibid.*)

The Board in *Castaic, supra*, PERB Order No. Ad-384, held that pursuant to EERA at that time, only certificated or classified employees have representation rights. EERA section 3540.1, subdivision (j) provided, “‘Public school employee’ or ‘employee’ means any person

employed by any public school employer [with exceptions not relevant hereto].” (*Ibid.*)

EERA section 3540.1, subdivision (e), at that time, provided:

“Exclusive representative” means the employee organization recognized or certified as the exclusive negotiating representative of **certificated or classified employees** in an appropriate unit of a public school employer.

(Emphasis added.) Based on a reading of these two sections, the Board held in *Castaic* that, “We interpret the plain language of the statute to mean that an exclusive representative may only represent a bargaining unit of certificated or classified employees and, therefore, cannot represent employees who do not fall into one of those two categories.” The Board concluded—relying on *Healdsburg, supra*, PERB Decision No. 375 for the proposition that “CSEA had no authority to bargain on behalf of *short-term* employees because they were statutorily excluded from the classified service” by Education Code section 45103—that, like short-term employees, NDAs do not have representation rights under EERA. (*Castaic, supra*, PERB Order No. Ad-384; emphasis added.) The Board concluded that pursuant to the stated intent of A.B. 2849, quoted-above, the Legislature intended to extend “the classified status of classified employees who perform some playground duty but also continued to encourage community members to volunteer for part-time playground positions.” (*Ibid.*) The Board continued by explicitly overruling *Pittsburg, supra*, EERB Decision No. 3 and *Fontana, supra*, PERB Decision No. 1623, but limited the application of its decision to apply prospectively. (*Castaic, supra*, PERB Order No. Ad-384.)

f. A.B. 501

In 2011, EERA section 3540.1, subdivision (e) was amended (Stats. 2011, c. 674 [A.B. 501]) to read as follows¹¹:

“Exclusive representative” means the employee organization recognized or certified as the exclusive negotiating representative of ~~certificated or classified~~

¹¹ Strikethrough text indicates deletions while underlined text indicates additions.

~~employees in an appropriate unit of a public school employer~~ public school employees, as “public school employee” is defined in subdivision (j), in an appropriate unit of a public school employer.

Seemingly, the effect of the 2011 amendment to EERA section 3540.1 is that any person employed by a public school employer, but for exceptions not pertinent hereto, (EERA, § 3540.1(j)) may be represented by an exclusive representative. This amendment appears to repeal or overturn the holding of *Castaic, supra*, PERB Order No. Ad-384, concerning the representation rights of NDAs.

2. The Parties’ Positions

a. CSEA’s Position

CSEA asserts that in this case PERB should rely on *Fontana, supra*, PERB Decision No. 1623 (citing to *Monterey Peninsula Community College District (1978)* PERB Decision No. 76) and *Pittsburg, supra*, EERB Decision No. 3. In *Fontana*, PERB held that on the facts presented in that specific instance, those NDAs could be placed in a wall-to-wall classified bargaining unit. CSEA contends that the District’s reliance on *Castaic, supra*, PERB Order No. Ad-384 is misplaced as that decision was—holding that NDAs have no representation rights as EERA then-provided that exclusive representatives may *only* represent certificated or classified employees under Section 3540.1—repealed or overturned in 2011 by A.B. 501, which established that all public school employees are covered under EERA.

b. The District’s Position

The District asserts that Education Code section 45103 specifically excludes NDAs from classified service where the employee is not also employed in a classified position and that employees excluded from classified service are not entitled to the benefits conferred to part-time employees under Education Code section 45136. The District asserts that, “Because NDAs cannot, by statute, negotiate for any level of the types of statutory benefits provided to

classified employees, it would seem that this alone would defeat finding any community of interest between noon duty aides and classified employees.” The District asserts that reliance on *Castaic, supra*, PERB Order No. Ad-384 is appropriate here and that A.B. 501 did not abrogate the entire *Castaic* decision.

3. Conclusion: Representational Rights

The current status of this legal issue appears to be as follows. EERA section 3540.1 provides, by definition, representation rights to all public school employees who are not otherwise statutorily excluded. NDAs, as employees of a public school and not statutorily excluded, are covered by EERA and have representation rights.

Currently, Education Code section 45103 provides, in relevant part:

(a) The governing board of any school district shall employ persons for positions not requiring certification qualifications. The governing board shall . . . classify all of these employees and positions. The employees and positions shall be known as the classified service.

[¶ . . . ¶]

(b)(4) Part-time playground positions^[12] shall not be a part of the classified service, where the employee is not otherwise employed in a classified position. Part-time playground positions shall be considered a part of the classified service when the employee in the position also works in the same school district in a classified position.

(c) Unless otherwise permitted, a person whose position does not require certification qualifications shall not be employed by a governing board, except as authorized by this section.

The Education Code makes clear that NDAs not also employed in classified positions shall not be part of the classified service and, therefore, shall not receive the statutory rights and benefits expressly provided to classified employees by the Education Code. Based on the relevant precedent, evolution of pertinent Education Code sections, and EERA, it does not

¹² Both parties agree that Education Code section 45103, subdivision (b), using the term “playground positions,” excludes NDAs who do not also hold a classified position from the classified service.

appear that there is a prohibition of bargaining units comprised of classified and NDA employees if substantial mutual community of interest is demonstrated.

B. Appropriateness of Unit

Having determined that NDAs are not barred from being placed in a classified unit, it must be determined that the proposed unit modification is appropriate based on the following factors. EERA section 3545, subdivision (a) provides:

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.

Therefore, in determining whether a unit is an appropriate unit, PERB balances: (1) the community of interest of employees; (2) the established practices; and (3) the effect of the size of the unit on the efficient operations of the employer.

Where, as here, the existing unit is a wall-to-wall unit and not a *Sweetwater* unit,¹³ the proper inquiry is whether the requested unit configuration is an appropriate unit—not whether it is more appropriate than the existing unit configuration. (*Long Beach Community College District* (1999) PERB Decision No. 1315.)

In determining whether there is a community of interest, PERB considers multiple factors, including the extent to which employees share: education and qualifications; training and skills; job functions; method of wages or pay schedule; hours of work; fringe benefits; supervision; frequency of contact with other employees; integration with work functions of other employees; interchange with other employees; and other related factors. (See, e.g.,

¹³ In *Sweetwater Union High School District* (1976) EERB Decision No. 4, PERB established three presumptively appropriate bargaining units for classified employees of school districts.

Elk Grove Unified School District (2004) PERB Decision No. 1688.) The overriding consideration is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*Fontana, supra*, PERB Decision No. 1623; *San Diego Community College District* (2001) PERB Decision No. 1445; *Monterey Peninsula Community College District, supra*, PERB Decision No. 76.) Unit determinations are based upon the actual work performed by the incumbents. (*Hemet Unified School District* (1990) PERB Decision No. 820.)

The point of this inquiry then is whether NDAs and classified employees share substantial mutual interests in consideration of the totality of circumstances presented here. (*Monterey Peninsula Community College District, supra*, PERB Decision No. 76.)

1. The Parties' Positions

- a. CSEA's Position

CSEA asserts, in this case, that based on the "traditional community of interest factors, it is clear that a community of interest exists . . . under *Fontana*[".]” CSEA asserts that pursuant to *Fontana, supra*, PERB Decision No. 1623, the fact that NDAs are not entitled to the benefits and rights under the Education Code does not preclude a finding of a community of interest between them and the Unit employees. CSEA asserts that a community of interest is demonstrated by comparing NDAs' work to the work performed by four classified positions: Campus Monitor, Cafeteria Worker, Custodian, and Instructional Assistant.

- b. The District's Position

The District asserts that the facts presented in this case do not demonstrate that NDAs share a substantial mutual interest with the classified employees. The District asserts that adding NDAs to the classified bargaining unit would be inefficient because the parties would

necessarily need to maintain two separate bargaining sessions at the same table and speculates that this unit modification would negatively impact morale.

2. Job Functions

Just like Campus Monitors, NDAs monitor students' behavior during lunch and breakfast periods in cafeterias and on playgrounds. Like Campus Monitors, if students misbehave during these times, NDAs may notify the student's teacher. Like Campus Monitors, NDAs make sure that students properly use playground equipment and, during their work times, watch for instances where students have a health or medical condition, such as injuries on the playground. If students are seen misbehaving in restrooms, NDAs will pull students out of restrooms, as would a Campus Monitor. The Campus Monitor job description demonstrates that Campus Monitors, similar to NDAs, have the basic responsibility to "supervise students . . . and patrol hallways, restrooms, parking lots, and other areas of the school campus." Some of the typical duties of Campus Monitors are similar to the work performed by NDAs, including supervising students in areas where students gather such as hallways and cafeterias.

The Custodian job description demonstrates that Custodians have the basic responsibility of performing "a variety of cleaning and custodial functions at assigned site(s) for the purpose of maintaining safe and sanitary site building/facility[.]" Custodians are required to perform duties such as responding to emergency cleanups and spills. Similarly, but to a lesser extent, NDAs' work includes cleaning up minor spills and they otherwise engage in picking up litter to beautify and maintain a safe and sanitary school site.

The Instructional Assistant job description demonstrates that Instructional Assistants have the basic responsibility of supervising students. Like Instructional Assistants, NDAs are responsible for the supervision of students.

The Cafeteria Worker job description, which is generally applicable to a variety of Cafeteria Worker positions, describes the basic responsibilities of Cafeteria Workers as, “assist with a variety of cooking, baking, preparing and serving food items . . . maintain facilities and equipment in safe and sanitary condition . . . [o]perate the [D]istrict’s computerized point of sale system & handle cash and check transactions.” Only Lead Cafeteria Worker employees handle food in the kitchen. NDAs working in the same general areas monitor students while they are eating. NDAs do not prepare or assist in the preparation of food or handle money. NDAs will carry the bins of extra food or milk to the food storage area for secure and sanitary storage, assisting Cafeteria Workers.

3. Supervision and Discipline

Campus Monitors act as supervisors to or leads for NDAs, often preparing work schedules and assignments. Campus Monitors report to school site principals as do NDAs at some school sites. Just like Campus Monitors, Principals at individual school sites have the authority to supervise and discipline NDAs.

Custodians report to the Director of Maintenance, Operations and Transportation.

Like many NDAs, Instructional Assistants’ supervisors are school site Principals, but Instructional Assistants also receive day-to-day direction from certificated teachers. Just like NDAs, Instructional Assistants are generally supervised by school site principals who have the authority to discipline these employees.

The job description for Cafeteria Worker under the Food Service classification series states that these classified employees report to and are supervised by the Nutrition Services Supervisor.

4. Education, Training, Qualifications

The job description for Campus Monitor requires: High School Diploma or equivalent; experience in youth related activities; California Driver's License and evidence of insurability; complete hepatitis vaccine series; and drug test clearance.

The Custodian job description requires: High School Diploma or equivalent; prior job related experience in school or institutional settings; and a valid California Driver's License and evidence of insurability.

The Instructional Assistant job description includes the following education and experience requirements: High School Diploma or equivalent; prior job related experience with school age children; and to pass an exam indicating NCLB compliance or demonstrate that they have an Associate of Arts degree.

The Cafeteria Worker job description requires: a High School Diploma or equivalent; pass the California Food Handlers Card training within six months of employment; become Serv Safe certified within two years of employment; and drug test clearance. Testimony at the formal hearing was elicited indicating that generally only lead positions handling food are required to obtain a food handlers card and Serv Safe certification.

Like Campus Monitors, Custodians, Instructional Assistants, and Cafeteria Workers, NDAs are required to meet the minimum District hiring qualifications by having a TB test and criminal background check. The education, training and qualifications required of classified employees are more rigorous than the requirements for NDAs. NDAs, as well as all other school site District employees, have been required to attend at least two days of anti-bullying training.

5. Interaction with Classified Employees

NDA's and Campus Monitors routinely and substantially interact in the performance of their job duties. NDA's communicate, by radio or in person, with Campus Monitors to inform them of safety issues, injured students, and when physical altercations occur. At least at one school site, the Campus Monitor is the lead for NDA's and sets their schedules and work assignments and deals with minor NDA issues. Further, when the Campus Monitor is absent at Wilson C. Riles, an NDA covers those work duties. NDA's interact with Custodians to inform them of spills that require cleanup. If a student misbehaves, NDA's interact with Instructional Assistants to inform them of the behavioral issue. NDA's and Food Service workers generally interact in cafeteria areas and work together to complete meal service. NDA's have access to staff break rooms and restrooms and may generally interact with other employees in those areas.

6. Hiring Process

The hiring process for classified positions is centralized through the District Personnel Office.

The hiring process for NDA's is a much less formal process decentralized from the District's Personnel Office, and is generally left to individual school sites to conduct recruitment and hiring. The only centralized components of the NDA hiring process are ones shared by all District employees: criminal background screening and TB testing.

7. Wages and Benefits

The lowest paid Campus Monitor earns \$11.17 per hour. The lowest step on the pay scale for Custodians is \$13.28 per hour. The lowest paid Instructional Assistant earns \$11.17 per hour. The lowest rate of pay for Food Service classifications is \$11.17 per hour.

Classified employees are paid based on salary schedules, classification, and length of service; are paid on the last day of each month; and may elect to use direct deposit. Classified employees only submit time cards if they perform overtime or extra duty work. Classified employees may be entitled to benefits pursuant to the Education Code and receive health benefits if they work at least four hours a day pursuant to the CBA. Classified employees are entitled to, by the Education Code, sick leave, extended illness leave, vacation benefits, layoff protections, permanency, and a hearing before dismissal.

NDAAs are paid \$9.28 per hour, are paid on the 10th day of each month, may elect to use direct deposit, and must report all hours worked by submitting time cards by the 19th day of each month.

8. Work Hours

Similar to NDAAs, Campus Monitors are generally present during the 10-month academic year. Custodians work approximately 12 months a year. Instructional Assistants work during the same ten-month period that NDAAs work. Generally, like NDAAs, Food Service classifications work during the 10-month academic year.

9. Expectation of Continued Employment

For classified employees, when they are expected to continue as District employees, they receive an annual Letter of Assurance. Further, classified employees are entitled to certain rights provided for by the Education Code, which include permanency requirements and layoff hearing processes.

NDAAs are at-will employees and do not have the permanency and lay off rights that classified employees are entitled to. Despite the at-will status, many NDAAs have been employed for long periods of time. It appears that the continuation of an NDA's employment is handled at the school site level on an informal basis between Principals and their NDAAs.

It has been established, however, that two Letters of Assurance were issued on April 12, 2011 to two NDAs. NDAs do not have an expectation of continued employment except for the two instances in which of Letters of Assurance were issued.

10. Evaluations

Permanent classified employees are evaluated every two years pursuant to an evaluation schedule maintained by the District. A standard classified employee evaluation form is used.

There is no such evaluation requirement or schedule for NDAs. However, Principal Coronado has evaluated some NDAs, but those evaluations were not relayed to the District. The classified employee evaluation form was used for those NDA evaluations.

11. Conclusion: Community of Interest

CSEA requests that approximately 37 NDAs be added to the Unit based on the similarities and community of mutual interests demonstrated by comparing NDAs with four classified positions: Campus Monitor, Cafeteria Worker, Custodian, and Instructional Assistant. The totality of the facts gathered demonstrates sufficient mutual interests. The proffered factors of comparison include: job duties, interaction with other employees, education, qualifications, training, hiring processes, wages, benefits, work hours, substitute opportunities, expectation of continued employment, supervision, and discipline.

Like classified employees, NDAs are regularly scheduled employees, integral to the District's operation. NDAs and many classified positions work a 10-month calendar and may work less than five hour days. While NDAs are currently at-will employees, many have been long-time employees of the District and, in two instances, received Letters of Assurance like classified employees receive.

NDA's and classified employees routinely and necessarily interact. NDA's interact with Food Service Workers in facilitating meal services. NDA's, at all necessary times, interact with Custodians to deal with unsafe conditions such as spills. NDA's interact with Instructional Assistants, informing them of students' behavioral issues. NDA's interact with Campus Monitors to report pertinent information and deal with certain situations; e.g., spills, unsafe conditions, physical altercations, etcetera. At least at one school site, NDA's and the Campus Monitor interact for the purposes of setting work schedules and assigning work locations. Further, NDA's interact with classified employees in shared break rooms (where both groups have mailboxes and otherwise receive pertinent information), restrooms, and parking lots. NDA's routinely communicate with classified employees via two-way radios.

Of particular import, like Campus Monitors and Instructional Assistants, NDA's provide direct supervision of students, ensuring safe school environments by monitoring their surroundings.

It is true, of course, that by virtue of the Unit being a wall-to-wall unit, many classifications share little if any overlap or similarity in duties performed. The fact that NDA's do not perform substantially the same duties as compared to some classified employees, therefore, is not dispositive of mutual interest.

Further, the argument that there is no community of interest because NDA's do not have the same benefits, pay, evaluation schedule, and other terms and conditions of employment is not persuasive because those are issues that, to the extent that they are not addressed by the Education Code, would be subject to negotiation. (*Santa Clara County Office of Education* (1990) PERB Decision No. 839.)

Based on the foregoing, NDA's share sufficient mutual interests with Unit employees.

C. Established Practices/Efficient Operations

The NDAs have never been represented so there is no established practice at the District with respect to negotiating with these employees. To the extent that District employees have simultaneously held both an NDA position as well as a classified position, no evidence or testimony was developed concerning negotiating with those employees and the issues, if any, that may have arisen in representing employees employed in that dual capacity. It appears, however, that Education Code section 45103, subdivision (b)(4) resolves these issues by mandating that these dual-serving employees are to be considered classified employees.

The District asserts that adding NDAs to the classified bargaining unit would be inefficient because the parties would essentially have to maintain two separate bargaining sessions at the same table in so far as the majority of articles shall not apply—pursuant to the Education Code—to NDAs as non-classified employees (Education Code, § 45103), thereby negatively impacting morale. The District asserts that NDAs would acquire the financial obligation of CSEA dues but would not be allowed to derive any other benefit with respect to benefits that the District is required to provide to classified employees. However, adding classifications to an existing unit is not inappropriate solely because such a change may raise legitimate negotiating topics and create difficult issues to be addressed as part of the bargaining process. (*Santa Clara County Office of Education, supra*, PERB Decision No. 839.) PERB has rejected the argument that disparities in wages and benefits, alone, points to a lack of community of interest. (*Ibid.*) Wages, hours, and other terms and conditions of employment are legitimate subjects for negotiations and disparities which exist and may be resolved through bargaining. (*Ibid.*) No evidence was presented concerning the District's assertion that morale would be impacted by granting this Petition.

What seems to be clear is that NDAs are entitled to representation rights under EERA. Further, based on the foregoing finding of facts and application of law, it is appropriate to add the NDAs to the classified Unit based on the balancing of the community of interests, established practices, and effects on the efficient operations of the District.

PROPOSED ORDER

Based upon the foregoing and the entire record in this case it is ordered that the Unit Modification Petition filed by the California School Employees Association & its Chapter 610 is **GRANTED**.

RIGHT OF APPEAL

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 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations,¹⁴ 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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the

¹⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subs. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)