STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MERCED CITY SCHOOL DISTRICT, Employer, and MERCED CITY TEACHERS ASSOCIATION, CTA/NEA, Exclusive Representative.	Case No. SA-UM-888-E PERB Decision No. 2901 April 25, 2024

Appearances: California Teachers Association by Mandy Hu, Attorney, for Merced City Teachers Association; Atkinson, Andelson, Loya, Ruud & Romo, by Peter Denno, Attorney, for Merced City School District.

Before Banks, Chair; Paulson and Nazarian, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision from a hearing officer. The dispute concerns a Unit Modification Petition (Petition) filed under the Educational Employment Relations Act (EERA) by Merced City Teachers Association, CTA/NEA (MCTA) pursuant to PERB Regulation 32781, subdivision (a)(1).[1] MCTA's Petition sought to add 21 unrepresented preschool teachers employed by the Merced City

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

School District to an existing unit of certificated District employees, which MCTA exclusively represents.

After a PERB administrative hearing, the hearing officer denied the Petition, relying primarily on *Redondo Beach City School District* (1980) PERB Decision No. 114 (*Redondo Beach*). In his analysis, the hearing officer found that: (1) the preschool teachers did not share a community of interest with the existing bargaining unit, and (2) established practices and efficiency of operations weighed against modifying the unit.

MCTA filed a statement of exceptions seeking to reverse the hearing officer's decision. MCTA excepted to the hearing officer's factual findings and legal conclusions, including, inter alia, the conclusion that preschool teachers do not have a community of interest with other bargaining unit employees.

The Board reviews a hearing officer's legal conclusions de novo, and we find that *Redondo Beach* is distinguishable from the instant case. Therefore, based on our review of the proposed decision, the entire record, and relevant legal authority, we reverse the proposed decision and grant MCTA's Petition for the reasons discussed below.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

The District is a public-school employer within the meaning of section 3540.1, subdivision (k). The District has 14 elementary schools serving students in preschool through sixth grade, and a middle school that serves students up to eighth grade.

MCTA is an employee organization within the meaning of section 3540.1, subdivision (d), and is the exclusive representative of the District's sole certificated employee bargaining unit. The bargaining unit includes the following classifications: teachers, summer school teachers, counselors, speech therapists, psychologists, and nurses. There are approximately 510 employees in the bargaining unit, and MCTA has been the exclusive representative for 46 years.

The District and MCTA are parties to a collective bargaining agreement (CBA) with a term from July 1, 2020 to June 30, 2021, and at the time of the Petition were negotiating a successor agreement.

Overview of the Certificated Unit and Preschool Teachers

In determining whether a community of interest exists among public school employees, PERB considers several factors including: qualifications; training and skills; work functions; method of wages or pay schedule; employment benefits; hours of work; supervision; interaction with other employees; interchange/integration with work functions of other employees; and sources of funding. Therefore, these factors guide our analysis. Of the teachers in the unit, the record includes job descriptions for kindergarten teacher and classroom teacher, grades 1-3. The record also contains job descriptions for school nurse, school psychologist, and speech therapist.

I. Licensing, education, and qualifications

There are a variety of licensing and educational requirements in the certificated unit.[2] The District requires teachers to hold a multiple or single subject teaching

[2] The record does not include licensing and education requirements for school counselors.

credential issued by the Commission on Teacher Credentialing (CTC).[3] There are multiple subject matters in which an applicant can earn a single subject teacher credential, and to do so they must pass a subject matter knowledge examination. (Ed. Code, § 44282, subd. (a).)

School nurses must have the appropriate credential as required by the CTC, which includes training in audiometry and child abuse and neglect detection. They must also have a valid California Certificate of Registration and all courses necessary to meet the credential requirements, as well as two years of successful nursing experience, preferably in an elementary school.

School psychologists must hold the requisite credential from the CTC and have earned a bachelor's degree, with the District preferring a master's degree in psychology. They must also have school practicum experience which satisfies the competency requirements of a certifying college, or one year of an internship as a school psychologist.

Speech therapists must have the requisite credential from the CTC as well as a bachelor's degree, preferably with a major or minor in the field of speech, hearing, and

[3] The requirements to obtain a preliminary or clear multiple or single subject teaching credential include: a bachelor's degree; meeting the basic reading, writing, and mathematics skills proficiency test requirement in Education Code section 44252, subdivision (b); CTC-approved multiple subject or single subject program of professional preparation; completion of a study of alternative methods of developing English language skills; basic competency of computer use in the classroom; completion of a CTC-approved program accredited by the Committee on Accreditation in the preliminary credential sought; and demonstration of subject matter knowledge either through passage of an examination (Ed. Code, §§ 44280, 44281, 44282) or completion of a subject matter program (Ed. Code, § 44310). (See Cal. Code Regs., tit. 5, § 80413.)

language disorders, and courses necessary to meet the credential requirements. They must successfully complete a student teaching assignment or have two years full-time teaching experience working with speech, hearing, and language disabled students.

Preschool teachers, per the Education Code, are certificated employees and must hold an appropriate Child Development Permit issued by the CTC to teach preschool. (See Ed. Code, § 8303, subd. (a).) The CTC issues several types of Child Development Permits based on the number of early childhood education or child development units completed, including Child Development Teacher, Child Development Master Teacher, Child Development Site Supervisor, and Child Development Program Director Permits. (See Cal. Code Regs., tit. 5, § 80109.)

In addition, the District requires its preschool teachers to possess a Child Development Site Supervisor Permit (Site Supervisor Permit), which authorizes the holder to "supervise a childcare and development program operating at a single site, provide service in the care, development, and instruction of children in a childcare and development program, and serve as a coordinator of curriculum and staff development in a childcare and development program." (Cal. Code Regs., tit. 5, § 80114, subd. (d)(1).) Like other certificated classifications, preschool teachers are required to obtain first aid and cardiopulmonary resuscitation (CPR) certificates.

The Preschool Teacher and Assistant Preschool Teacher job descriptions require, at minimum, an associate's degree, while Lead Preschool Teachers, Response to Intervention (RtI) Preschool Teachers, and Youth Enrichment Program (YEP) Preschool Teachers must have a bachelor's degree.

II. Purpose of programs and curriculum

Teachers make up the majority of the certificated unit, but several groups of employees—counselors, speech therapists, school psychologists, and school nurses—are not teachers. Because they lack the requisite licenses and qualifications, counselors, speech therapists, psychologists, and nurses do not teach in classrooms, prepare lesson plans, or discipline students. Rather, these employees provide support for students in their related fields.

An elementary teacher's core purpose is to provide instruction to the children in their classroom. Teachers utilize a state-wide curriculum for classroom instruction that corresponds to the grade level they teach. Per a District flyer, the TK curriculum focuses on preparing students "academically, socially, and emotionally for the transition to kindergarten" and the preschool curriculum focuses on "social-emotional development" and "explicit instruction/academics."

Like elementary school teachers, preschool teachers utilize a state-wide curriculum for classroom instruction. For preschool, the curriculum is the California Preschool Learning Foundations, which focuses on preparing students academically, socially, and emotionally for the next grade.

III. Work functions

There are a range of work functions in the certificated unit. Transitional kindergarten (TK) through eighth grade teachers primarily teach students in their classrooms. To do so, they develop lesson plans and instructional materials; assist students in developing good citizenship, self-concepts, and other academic and personal values; establish standards of student behavior; maintain a classroom

environment that motivates learning; and evaluate student's academic and social growth. The also keep appropriate records; prepare progress reports; inform parents or guardians of student progress; participate in district and/or self-selected professional growth activities; attend and participate in staff meetings; perform attendance accounting and other necessary functions required for classroom management; plan and coordinate activities for aides, teacher assistants, and other paraprofessional staff; and administer group standardized, competency, and criterion-referenced tests.

School nurses primarily conduct health assessments at their school site, including for students referred for special education. They also serve on students' Individual Educational Plan (IEP) Committees and provide input based upon their assessments; perform follow-up assessments for students in the Resource Specialist Program; assure that all required health information is recorded per mandate or district policy; secure and furnish first aid supplies to the schools; and provide periodic in-service training to those in the schools who are responsible for administering first aid. They are also responsible for preparing District-wide, county-wide, and state-wide reports for vision screening, immunizations, and the California Health and Disability Prevention Program.

School psychologists also have unique functions in the District, primarily assessing and diagnosing students to determine specific learning, emotional, and behavioral disabilities. To do so, they conduct case study evaluations, prepare recommendations for remediation or placement, conduct other pertinent psycho-educational interventions, and periodically re-evaluate children as needed. They also

provide psychological counseling and other types of therapeutic intervention for children and parents, consult with parents to assist in understanding their children's learning and adjustment processes, consult with teachers and resources specialists in the development and implementation of methods and procedures designed to facilitate student learning and to overcome learning and behavior disorders, and consult with school administrators regarding appropriate learning objectives for children and the planning of developmental and remedial programs for students in regular and special classes. They also provide in-service training for District staff and serve as liaisons among the school, the family, and selected community resources. Psychologists compile reports about the various services administered through special education programs as required by federal and state regulations.

Speech therapists primarily initiate, develop, and administer corrective (therapeutic) programs in their assigned schools. To do so, they evaluate candidates for therapy to determine the nature and severity of any communicative deficiencies; consult with principals and keep them advised of the status of the speech, hearing, and language programs in their respective schools; consult with teachers regarding the progress of students; work with teachers to provide follow-up activities in the classroom; and consult with parents regarding the progress of their children. They also assist students in developing good citizenship, self-concepts, and other academic and personal values, and in establishing standards of student behavior. In addition, they participate in District and/or self-selected professional growth activities to enhance professional competence, attend and participate in staff meetings, and perform basic attendance accounting and other necessary functions required for program

management. Speech therapists are also required to submit an annual report required by the California Department of Education.

The record is sparse as to school counselors' specific job functions, but they primarily provide counseling support to students (and do not teach in classrooms using a state-wide curriculum).

For preschool teachers, their basic work function is to educate students in a classroom five days a week during the school year. Based on the California Department of Education curriculum, preschool teachers prepare and execute lesson plans, create schedules for instruction and activities, assess students based on District and state-wide standards, supervise students in the classroom, keep attendance records, and monitor student progress. Like TK through eighth grade teachers, preschool teachers communicate with parents about students' progress during student drop-off and pick-up, twice-annual parent-teacher conferences, back-to-school night, open houses, and via e-mail or virtual classrooms. They update and maintain students' cumulative files, which are created upon their enrollment in the District and follow them throughout their time with the District.

Like TK through eighth grade teachers, preschool teachers refer students to support services when needed, including speech therapists, special education, social workers, nurses, psychologists, and librarians. They also maintain a clean, safe, and positive learning environment to ensure the health and safety of their students. As teachers, they model standards of behavior for students and address student behavioral concerns when necessary. Preschool teachers are also in charge of operating classroom technology like iPads, laptops, televisions, and Zoom, and

perform yard duty as needed. In the event they will be absent, preschool teachers prepare advance lesson plans for substitute teachers. Preschool teachers sometimes assist students with bathroom needs, although typically instructional aides handle these duties.

IV. Interchange and functional integration of duties

Within the certificated bargaining unit, there is some interchange and integration of duties, but there are also many job classifications with no interchange whatsoever. Employees in multiple classifications—including therapists, school psychologists, school nurses, and school counselors—perform their duties exclusively. For example, only nurses secure health assessments for students, only psychologists diagnose behavioral disabilities, and only speech therapists provide educational programs for language-handicapped students.

Of the classroom teachers in the unit, there are separate job descriptions depending on grade level(s), and the record does not indicate whether or how often a lower-grade teacher would teach, for example, an eighth-grade class.

There is no interchange of duties between preschool teachers and other certificated staff, as the certification and credentialing requirements are different among elementary school teachers, middle school teachers, preschool teachers, counselors, speech therapists, psychologists, and nurses.

As to functional integration of duties, there is largely a single work operation being performed by different groups with different responsibilities throughout the certificated unit. That is, all employees in the unit perform different aspects of educating and enriching the lives of students in a safe and healthy environment

according to the requirements of their certificated position. Preschool teachers perform their duties in line with this operation as well.

V. Interaction with other District employees

There is considerable interaction among employees in the certificated unit. Teachers serve with other teachers on committees, attend grade-specific staff development trainings and staff meetings together, and all new teacher hires attend District orientation. Teachers interact with other employees like counselors, nurses, and psychologists to communicate about student progress, providing information about their students to teachers of the next grade level, and assisting the District in preparing assessments which go into students' cumulative files.

Similarly, preschool teachers regularly interact with other District employees, including members of the certificated unit. Preschool teachers attend the same District orientation as all newly hired teachers. Preschool teachers are invited to attend "welcome back" staff meetings at their school sites as well as open houses. They also participate in the same professional training as elementary school teachers. Preschool teachers may serve on the emergency committees at their schools. Like elementary and middle school teachers, preschool teachers have a Professional Learning Community (PLC) or a grade-specific staff development teachers' group.

When necessary, preschool teachers refer their students to support services such as librarians, speech therapists, special education instructors, social workers, nurses, and psychologists, and the same employees provide support services to preschool students and the rest of the students in the elementary school where the preschool is located.

Additionally, preschool teachers interact with and provide information about their students to teachers of the next grade level. Preschool teachers contribute to students' pre-kindergarten assessments, which go into students' cumulative files and assist kindergarten teachers in placing students.

VI. Work location, hours, and work year

Employees in the certificated unit generally work at the same school site location. However, not all certificated bargaining unit members work the same hours. Teachers, counselors, librarians, and speech therapists work seven hours and 15 minutes per day while school psychologists work eight hours per day.

Similarly, not all certificated employees work for the same period each year. While teachers work 184 days per year, there are different requirements for speech therapists, psychologists, and teachers who are new to the District.

Most preschool teachers work at elementary school sites. The District has 14 sites at which there are preschool classes, with 13 of those sites integrated into elementary schools. At the elementary school sites, preschool students share facilities, such as the cafeteria and library, with elementary school students. At some sites, TK students and preschool students share a playground. Similarly, preschool teachers and other certificated employees use the same facilities, including administrative offices, staff lounges, restrooms, and parking facilities. Preschools use the same custodial staff as their respective elementary schools. Preschool students may attend the same assemblies as the rest of the students at the school site, and preschool classrooms are physically located on their respective campuses in age-appropriate groupings, e.g., next to the TK classroom.

Preschool teachers' work hours and term are similar to the other certificated teachers' work hours and term. Preschool classes are three hours per day, and preschool teachers teach two classes per day (a morning and afternoon session). Additionally, the operating hours for preschool classes typically align with the hours at their elementary school site because a site administrator, usually the principal, must be present when classes are in session. Preschool teachers teach during the same academic school year as the teachers in the certificated unit, and both groups work approximately 182 to 185 days (including 2-3 staff development days) per year.

VII. Wages and benefits

The District pays certificated employees according to a negotiated salary schedule. The certificated employees' salary schedule has six columns and 14 steps. All bargaining unit employees participate in the California State Teacher Retirement System (CalSTRS) and are offered a District-provided health benefit plan.

The District pays preschool teachers less than TK through eighth grade teachers, and their salary schedule is not linked with the classroom teachers' salary schedule. However, like certificated bargaining unit members, preschool teachers are paid once a month in accordance with their own salary schedule. Preschool teachers may participate in CalSTRS or the California Public Employees' Retirement System (CalPERS) for retirement benefits. The District offers preschool teachers the same health insurance as it does other teachers. Like other teachers, preschool teachers are eligible for extra-duty assignments like coaching.

VIII. Personnel practices

When hiring new personnel, the District posts vacant positions on EdJoin, an educational job website. For teachers, hiring panels can include an elementary teacher, principal, and another school administrator. Other than indicating that the District posts vacancies on EdJoin, the record does not specify the District's hiring practices for speech therapists, school psychologists, school nurses, or school counselors.

Bargaining unit employees may file grievances over contractual violations under a negotiated grievance procedure in MCTA's CBA, which includes mediation and arbitration. Under Education Code sections 44949 and 44955, certificated employees subject to layoff, including elementary school and middle school teachers, are entitled to a written notice of layoff before March 15, and can request an evidentiary hearing before a hearing officer to contest the layoff.

The hiring process for preschool teachers is similar to that of other certificated staff. As the District does when it is hiring for vacant bargaining unit positions, the District posts vacant positions on EdJoin when hiring new preschool teachers. Preschool teacher applicants are interviewed by a hiring panel including the Director of the District's Preschool Program (Preschool Director) as well as preschool teachers.

Preschool teachers have a two-year probationary period, followed by permanent status, like the teachers in the certificated bargaining unit. Unlike TK through eighth grade teachers, under Education Code section 8303, subdivision (c), preschool teachers may be laid off for lack of work or lack of funds at any time during the school year, without regard to specific notice deadlines or the right to demand an

evidentiary hearing to contest the layoff. Because they are not in the certificated bargaining unit, preschool teachers do not have contractual procedural protections, nor do they have access to contractual grievance procedures.

IX. Supervision and support staff

School site administrators—i.e., principals and learning directors—supervise teachers, evaluate their job performance, and are responsible for elementary teacher discipline. TK through eighth grade teacher disciplinary procedures are governed by the CBA, which contains standards for just cause, due process, and progressive discipline. Teachers are subject to a two-year probationary period.

Various district managers supervise the other certificated employees. The Director of Special Services supervises school nurses and school psychologists. Speech therapists are under the general direction of the Educational Services department, and when they are performing services at a school site the principal supervises them.

The District evaluates all certificated unit members pursuant to the terms of Article 10 of the MCTA CBA, which lays out the evaluation procedures. That section states, "[t]he established evaluation process for school psychologists shall remain in place" but does not indicate what those procedures are.

TK teachers have an instructional assistant as support staff in their classrooms.[4]

[4] The record does not indicate whether kindergarten through eighth grade teachers have support staff in their classrooms, nor does it indicate whether speech therapists, school psychologists, school nurses, or school counselors utilize support staff in their work.

For the 13 integrated preschool sites, the preschool classes can only operate when the principal of the respective elementary school is present on site. The Preschool Director oversees the preschool program operations and directly supervises preschool teachers. The Preschool Director evaluates preschool teachers on an annual basis until they achieve tenure, and then evaluates them biannually. The evaluation standards for preschool teachers and other certificated teachers are identical.

Preschool teachers have support staff in their classrooms, including a full-time instructional assistant and two part-time instructional assistants.

X. Sources of funding

The District pays salaries for elementary and middle school teachers, speech therapists, school psychologists, school nurses, and school counselors out of the District's General Fund.

Funding for preschool teacher salaries comes from the District's Fund 12, which is specific funding for preschool programs.

Procedural History

On July 29, 2021, MCTA filed its Petition with PERB seeking to add preschool teachers to MCTA's certificated unit. On September 8, 2021, the District filed its response to the Petition, confirming certain information contained in the Petition, asserting that preschool teachers lack a community of interest with employees in MCTA's certificated unit, and informing PERB that it lacked sufficient factual information to determine whether to support or oppose the Petition. PERB held an investigatory conference call with the parties on December 3, 2021, and on

December 16, 2021, MCTA filed a statement of reasons to provide additional information in support of the Petition.

On January 6, 2022, the District filed a response to the statement. PERB held a settlement conference with the parties on January 11, 2022, but the parties did not reach a resolution. PERB held a second investigatory conference call with the parties on March 11, 2022.

The hearing officer conducted an evidentiary hearing on the petition on May 4 and June 9, 2022, via videoconference. The parties filed their post-hearing briefs on July 27, 2022.

The hearing officer issued a proposed decision on September 22, 2023, finding that the preschool teachers did not share a community of interest with the existing bargaining unit, and that established practices and efficiency of operations weighed against modifying the unit to include the preschool teachers. He therefore dismissed the Petition.

MCTA filed exceptions to the proposed decision on November 1, 2023, and the District filed a response to MCTA's exceptions on December 12, 2023.[5]

[5] Also on December 12, 2023, the District requested oral argument pursuant to PERB Regulation 32315. MCTA filed an opposition to the District's request for oral argument on December 13, 2023. The Board typically denies such requests when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M, pp. 6-7; *Arvin Union School District* (1983) PERB Decision No. 300, p. 12.) Because these criteria are met here, we deny the request for oral argument.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) Accordingly, the Board may reverse a Board agent's legal determinations and draw different or even opposite inferences from the factual record than those the hearing officer drew. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.)

EERA requires that employees be grouped in "appropriate" units for purposes of collective representation. (§ 3540.) EERA enumerates specific criteria that the Board must consider when evaluating the appropriateness of a unit:

> "[T]he 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."

(§ 3545, subd. (a).)

When determining unit appropriateness, PERB has great flexibility to weigh and balance the statutory criteria to achieve the objectives of the statutes. (See *Alliance Judy Ivie Burton Technology Academy High et al*. (2020) PERB Decision No. 2719 (*Alliance I*), p. 24.) As a result, the same criteria may receive different weight and consideration in different factual settings. (*Regents of the University of California* (2015) PERB Decision No. 2422-H, pp. 5–6.)

I. *Peralta* and *Redondo Beach*

Initially, we address two cases as they relate to the instant matter: *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*) and *Redondo Beach*, *supra*, PERB Decision No. 114. The parties referenced both cases in their

briefing and exceptions, and the hearing officer addressed both cases in the proposed decision.

a. *Peralta*

In *Peralta*, *supra*, PERB Decision No. 77, the Board interpreted EERA section 3545 as creating a statutory presumption that all classroom teachers of a public school employer should normally be included in a single bargaining unit. This is known as the "*Peralta* presumption." (*Alliance College-Ready Public Charter Schools* (2023) PERB Decision No. 2879, p. 25 (*Alliance IV*).) Appellate precedent approves the presumption as a reasonable exercise of PERB's discretion to balance the "seemingly broad mandate" found in section 3545, subdivision (b) with the "more nuanced approach" set forth in section 3545, subdivision (a). (*Wu v. Public Employment Relations Board* (2022) 87 Cal.App.5th 715, 728 (*Wu v. PERB*).) While a party may rebut the presumption based on the cumulative weight of three factors—community of interest, past practices, and efficient operation standards (*Alliance Morgan McKinzie High School et al.* (2022) PERB Order No. Ad-491, p. 16)—the party opposing a comprehensive classroom teachers' unit has the burden of proving that a different unit is more appropriate (*Wu v. PERB*, *supra*, 87 Cal.App.5th at p. 728; *St. HOPE Public Schools* (2018) PERB Order No. Ad-472, pp. 4-5 (*St. HOPE*)).

Here, the parties dispute whether the *Peralta* presumption applies. MCTA's position is that because preschool teachers are "classroom teachers" as described in *Peralta*, their inclusion in the unit is presumed appropriate. (*Peralta*, *supra*, PERB Decision No. 77, p. 10.) The District argues that MCTA failed to provide any legal authority showing that preschool teachers are "classroom teachers" within the

meaning of section 3545, subdivision (b)(1). Absent such authority, it argues, PERB cannot assume that the preschool teachers belong in the certificated unit, and the District does not have the burden to overcome the *Peralta* presumption.

In the proposed decision, the hearing officer declined to decide whether the preschool teachers are "classroom teachers" under section 3545, subdivision (b)(1). Instead, the hearing officer determined that even assuming the preschool teachers are classroom teachers, the separate and distinct communities of interest of preschool teachers and elementary teachers outweigh the efficiency of operations and established practices criteria, rendering inclusion of preschool teachers in the certificated unit inappropriate.

We disagree with this line of reasoning and find that the preschool teachers are classroom teachers. (See *post*, Sections II–IV.) As such, the District has the burden of proving that the preschool teachers do not share a community of interest with the other employees in the bargaining unit, that such employees do not belong to the same employee organization, and that a separate unit would not negatively affect the efficient operation of the district.

b. *Redondo Beach*

The proposed decision relied heavily on *Redondo Beach*, *supra*, PERB Decision No. 114, to find that the preschool teachers lacked a community of interest with the rest of the certificated bargaining unit and that, ultimately, all the relevant factors under section 3545 weighed against granting MCTA's Petition. MCTA excepted to the hearing officer's reliance on *Redondo Beach*, arguing that *Redondo Beach* concerned children's centers, which are wholly different from preschools.

We agree with MCTA that, although sometimes described as preschool teachers, the staff in *Redondo Beach* were teachers at children's centers which are fundamentally different from the District preschools at issue here. As described in cases related to children's centers of the 1970s and 1980s, these centers were more akin to daycares, serving children who ranged in age from six months to 12 years. (See *Oakland Unified School District* (1977) EERB[6] No. 15, p. 13 (*OUSD*); see also *Gilroy Unified School District* (1979) PERB Dec. No. 98 (*Gilroy*), p. 6.) Unlike the District's preschools, the centers' terms did not coincide with the academic calendar, but operated year-round, approximately 255 days per year. (*Redondo Beach*, *supra*, PERB Decision No. 114, p. 6; *OUSD*, *supra*, p. 13.) The children's centers operated 11 hours per day, including before and after regular school hours, and some of the children's center students attended elementary school during the regular school day. (*Redondo Beach*, *supra*, p. 8.) The basic purpose of the children's centers was to provide childcare services for parents who were working or participating in training programs for work, as the centers were part of a program offering job opportunities and training for recipients of public assistance. (*OUSD*, *supra*, pp. 14-15, 25; see also *Redondo Beach*, *supra*, adopting proposed decision at pp. 9, 15 ["The children's center is a child development program which provides learning experiences, health and nutrition services for the child, and social services for the entire family"].)

Here, by contrast, the District's preschools are similar to the District's TK program and to elementary classrooms more broadly. The preschools operate during

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

the same work hours as the elementary schools and use a similar academic calendar as that of the District's elementary schools. Preschool students may not simultaneously enroll in both preschool and another District grade, and the preschools only serve students between the ages of 3 and 5 (they do not provide infant or toddler care). Crucially, the purpose of the District's preschools is to educate students and promote their development, not to provide childcare for parents who are participating in job training.

Accordingly, we find that the hearing officer erred when he relied on *Redondo Beach* to support the conclusion that the proposed modified unit lacks a community of interest. Although the Board referred to the employees in *Redondo Beach* as preschool teachers, the staff in that decision were not the same as the preschool teachers in the instant case. To the extent that these types of differences are present in future cases, *Redondo Beach* should not be relied upon when discussing preschool teachers.

Here, as we explain, a deeper analysis shows that preschool teachers do, in fact, share a community of interest with the certificated unit.

II. Community of Interest

In determining whether a community of interest exists among public school employees, PERB considers several factors, including qualifications; training and skills; work functions; method of wages or pay schedule; employment benefits; hours of work; supervision; interaction with other employees; interchange/integration with work functions of other employees; and sources of funding. (*Oakland Unified School District* (2016) PERB Decision No. 2509, p. 15 (*Oakland*); *Center Unified School*

District (2014) PERB Decision No. 2379, p. 2; *Peralta*, *supra*, PERB Decision No. 77, pp. 15, 18.)

PERB assesses community of interest based on the totality of circumstances and not by going down a checklist of factors. (See *Oakland*, *supra*, PERB Decision No. 2509, p. 16; see also *Monterey Peninsula Community College District* (1978) PERB Decision No. 76, p. 13.) This is because different factors may be more important in different factual situations. (*Oakland*, *supra*, p. 16.) No single factor is determinative, and the overriding issue is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*St. HOPE*, *supra*, PERB Order No. Ad-472, p. 14.) Not all employee duties or concerns need to be identical to establish community of interest. (See *City of Palmdale* (2011) PERB Decision No. 2203-M, adopting proposed decision at pp. 26-28; *Oakland*, *supra*, p. 16.)

Moreover, community of interest determinations generally turn on differences inherent to a job—such as skills, qualifications, duties, and interchange—more so than on terms and conditions of employment that the employer primarily controls, and which the parties can change through collective bargaining. (*County of Monterey* (2022) PERB Decision No. 2821-M, p. 12.)

a. Community of interest factors

Although we do not determine community of interest by mechanically applying a checklist of factors, it is nevertheless helpful to consider the factors methodically. As is usually the case, some community of interest factors in this matter weigh against

modifying the existing unit. These factors, however, are outweighed by the factors supporting unit modification.

i. Licensing, education, and qualifications

PERB has found that the difference in credentials between teachers and credentialed pupil services employees (i.e., counselors, psychologists, school nurses, and social workers) is insufficient to defeat their community of interest. (*Grossmont Union High School District* (1977) EERB Decision No. 11, p. 6 ["[A]ny credential differences between teachers and other certificated personnel are no greater than those between teachers themselves or between the various pupil services classifications themselves"].)

Here, like all members of the bargaining unit as currently constituted, preschool teachers are certificated employees. Although they do not hold the exact same credentials as elementary school teachers, preschool teachers must hold an appropriate Child Development Permit issued by the CTC. Moreover, although the educational requirements are different for elementary and preschool teachers, the educational differences are no more significant than the differences between teachers and nurses, psychologists, counselors, or speech therapists.

There is no indication from the record that the different CTC licenses or educational requirements will prevent preschool teachers and other certificated employees from sharing substantial mutual interests in matters subject to negotiations with the District. As such, this factor weighs in favor of modifying the unit.

ii. Purpose of programs and curriculum

PERB has found preschool teachers to have a community of interest with other certificated teachers even where a district argued that the nature of a preschool teacher's primary function is custodial day care. (*Gilroy*, *supra*, PERB Decision No. 98, p. 8.)

Here, it is the case that the preschool curriculum is different from the elementary school curriculum. However, the key factor is that preschool teachers—unlike school nurses, psychologists, counselors, or speech therapists—teach children using a curriculum. Moreover, the curricula for the preschool and TK programs are similar in that both focus on the social, emotional, and academic development of children aged 3-6 years. The preschool program focuses on "social-emotional development" and "explicit instruction/academics" and the TK program "prepares students academically, socially, and emotionally" for the next grade. Thus, this factor also weighs in favor of finding a community of interest.

iii. Work functions

In evaluating job duties, PERB conducts an "individual analysis" of the actual work performed by the incumbents. (*Hemet Unified School District* (1990) PERB Decision No. 820, p. 9.) The Board has held that "[n]ot all employee duties or concerns need be identical to establish a community of interest." (*Oakland*, *supra*, PERB Decision No. 2509, p. 16.)

Here, like the TK through eighth grade teachers, preschool teachers are certificated teachers whose primary work is the daily education of children in classrooms at District sites. It is true that preschool teachers teach the youngest

students in the District; however, for the purpose of determining whether a community of interest exists, it is immaterial that different teachers serve different ages of students. The District's eighth grade teachers serve students with different personal and developmental needs than the District's TK teachers, yet undoubtedly those differences are not compelling enough to require those teachers to be in separate bargaining units. Rather, the eighth grade and TK teachers are presumed to be appropriately in the same bargaining unit because they are classroom teachers.

There will necessarily be differences in job duties or job descriptions between classifications in any bargaining unit. That is already the case here, as the pupil services employees—nurses, counselors, speech therapists, and psychologists—are in the same bargaining unit as District teachers. Importantly, the District has expressed no doubt that the pupil services employees share a community of interest with classroom teachers even though their job duties are not identical. Because the preschool teachers' work functions are at least as similar as the pupil services employees' functions with respect to the TK through eighth grade teachers' work functions, we find that this factor weighs in favor of modifying the unit.

iv. Interchange/integration of duties

In evaluating the interchange of employees' duties, there is always variation between any two classifications in a bargaining unit, and such variation does not defeat community of interest if there are sufficient countervailing commonalities. (*County of Monterey*, *supra*, PERB Decision No. 2821-M, pp. 12-13.) Indeed, if the opposite were true, each classification would be its own bargaining unit. (*Id*. at p. 13.)

As expected, the record presents some variation between preschool teachers' duties, on the one hand, and TK through eighth grade teachers' duties, on the other. There is no interchange of duties between preschool teachers and other certificated staff. Most preschool teachers hold only the required Site Supervisor Permit that does not authorize them to teach grades TK through eighth grade. TK through eighth grade teachers hold a multiple or single subject teaching credential that does not authorize them to teach preschool classes.

Yet, there are also multiple classifications in the unit—including speech therapists, school psychologists, school nurses, and school counselors—for which employees perform their duties exclusively, with no interchange whatsoever. Furthermore, the record indicates that even among classroom teachers in the unit, not all teachers' duties are integrated.

As to functional integration, the Board looks to whether there is a single work operation being performed by different groups with different responsibilities. (See, e.g., *Office of the Santa Clara County Superintendent of Schools* (1978) PERB Decision No. 59, p. 7.) For instance, the Board has held that office professional employees employed at university agricultural experiment stations and cooperative extensions were appropriately included in a unit with researchers, because the office professionals' jobs—"advising and instructing the public"—were "a direct product of and dependent upon the research function." (*Regents of the University of California (Non-Academic Senate Instructional/Research and Allied Professionals)* (1982) PERB Decision No. 270-H, p. 16.)

Here, the preschool teachers' work is similarly functionally integrated with TK and kindergarten teachers because the preschool program is designed to prepare students for the next stage of their education. In particular, the preschool teachers provide pre-kindergarten assessments, which the District then uses when placing students in kindergarten. As such, this factor favors granting MCTA's Petition.

v. Interaction with other District employees

While the preschool programs are generally self-contained within each campus, preschool teachers have significant interaction and contact with the credentialed pupil services employees and non-teacher support staff, like librarians. Moreover, preschool teachers attend training and orientation with other certificated District employees and the District invites them to attend "welcome back" staff meetings and open house events. Preschool teachers may serve on staff committees at their school sites.

Therefore, while there is limited evidence that preschool teachers interact with other District employees, this factor does not weigh against modifying the unit to include preschool teachers.

vi. Work location(s)

The vast majority of preschool teachers teach at the same school sites as the elementary school teachers and other certificated District employees. Although the preschool programs are distinct within the school sites (and one program is located at the District head office), the preschools are not wholly separate entities. Preschool teachers and certificated employees at the sites share facilities and resources, including the administrative office, staff lounges, restrooms, parking facilities, custodial

staff, and cafeteria facilities. Accordingly, this factor weighs in favor of modifying the unit.

vii. Hours and work year

The workday for preschool teachers is the same length (7.25 hours) as TK through eighth grade teachers. At the 13 preschool sites located at elementary schools, preschool class hours track the same schedule as the other non-preschool classes in that school. Preschool teachers' work year (182-185 days per year) is similar to that of the elementary teachers' (184 days per year). This factor weighs in favor of modifying the unit.

viii. Wages and benefits

As stated *ante*, community of interest determinations generally turn on differences inherent to a job more so than on terms and conditions of employment that the parties can change through collective bargaining. (*County of Monterey*, *supra*, PERB Decision No. 2821-M, p. 12; *Redwood City Elementary School District* (1979) PERB Decision No. 107, p. 8 [finding that disparities in wages and fringe benefits do not negate the community of interest because those subjects are wholly within an employer's control].)

Here, preschool teachers' wages differ greatly from other certificated employees, whose wages are set pursuant to a negotiated salary schedule which has six columns and 14 steps. The District pays preschool teachers less than the TK through eighth grade teachers, and their salary schedule is not linked to the other certificated teachers' salary schedule.

Preschool teachers may participate in either CalSTRS or CalPERS for retirement benefits, while other certificated employees may only participate in CalSTRS. Preschool teachers receive the same health insurance that the District provides to other teachers.

Wages and benefits are mandatory subjects of bargaining. Therefore, while there are differences in wages and benefits among the preschool teachers and the certificated bargaining unit, this factor does not outweigh the other ways in which the preschool teachers share a community of interest with other certificated employees.

ix. Personnel practices

There are several personnel practices that are similar for preschool teachers and TK through eighth grade teachers. Preschool teachers have a two-year probationary period, followed by permanent status, like the other teachers in the bargaining unit. Also, the hiring process for preschool teachers is similar to other certificated staff. Supervisors evaluate preschool teachers on an annual basis until they achieve tenure, and then biannually. The evaluation standards for preschool teachers and other certificated teachers are identical.

However, there are also several differences. TK through eighth grade teachers must be laid off within specific statutory deadlines and can request an evidentiary hearing with discovery, whereas preschool teachers do not have the same procedural protections if they are laid off. (Ed. Code, §§ 44949, 44955, 8303, subd. (c).) Additionally, because they are not in the bargaining unit, preschool teachers do not have access to the contractual grievance procedures that MCTA has bargained for other teachers.

There are some differences in personnel practices among the preschool teachers and the certificated bargaining unit. However, as with wages and benefits, some of these differences are bargainable. Therefore, this factor does not outweigh the factors supporting a community of interest with other certificated employees.

x. Supervision and support staff

While PERB considers lines of supervision when evaluating a unit's community of interest, this factor is not dispositive. (See, e.g., *Gilroy*, *supra*, PERB Decision No. 98, p. 12 [placing preschool teachers in the certificated bargaining unit with elementary school teachers where the assistant superintendent supervised the preschool teachers and the school principal supervised elementary school teachers].) In *Fairfield-Suisun Unified School District* (1983) PERB Decision No. 370, for example, PERB held that the differences that existed between employees, including pay and line of supervision, generally were not crucial enough to disturb the community of interest required for successful negotiations. (*Id.* at pp. 5–6.)

Here, preschool teachers and TK through eighth grade teachers have separate lines of supervision, with school principals and learning directors supervising TK through eighth grade teachers and a Preschool Director supervising preschool teachers. However, principals and learning directors do have occasional supervisory duties over preschool teachers, such as when attending special education IEP meetings or when addressing preschool teachers' concerns related to parent-teacher conferences. Moreover, the principals at the schools at which the preschool sites are located have authority to direct practices and respond to events in preschool

classrooms by establishing student schedules, placing notices in classrooms, and requiring preschool classes to participate in emergency drills.

As to support staff, both preschool teachers and TK teachers have instructional assistants as in-class support staff.[7] Preschool teachers have a full-time and two part-time instructional assistants and TK teachers have an instructional assistant.

Although preschool teachers do not share the same primary supervisor with the other certificated employees, for the reasons stated above, we do not find that this factor weighs against modifying the unit.

xi. Sources of funding

The District pays preschool teachers from a funding source separate from that for TK through eighth grade teachers. The District pays preschool teacher salaries out of a specific funding for preschool programs (Fund 12), and it pays elementary teachers out of the District's General Fund. Moreover, the District does not use elementary school site funds to support the preschool programs, nor does it use preschool program funds to support elementary school operations.

---

[7] In a related matter, we find that the hearing officer erred in concluding that preschool teachers perform site supervision and administrative decision-making functions. While preschool teachers do assign certain tasks to instructional aides and direct them in the performance of those tasks, non-preschool teachers do the same. Indeed, the District's job descriptions state that teachers in grades TK through third grade supervise aides, teacher assistants, and other paraprofessional staff, and those teachers remain in the certificated bargaining unit. (See, e.g., *Redlands Unified School District* (1982) PERB Decision No. 235, adopting proposed decision at pp. 12-14 [describing teachers' relationship to aides as "quasi-supervisory" but not "supervisory" within the meaning of EERA].) Furthermore, to the extent that preschool teachers make decisions about parent interaction, snack service, class supply inventory, calling custodians, or student small groups, these are decisions that any teacher would make in the course of their work.

The differing funding sources may have an impact on negotiating priorities within a modified unit, so this factor weighs slightly against modifying the unit. However, while it is the case that separate funding sources and budgets are often indicative of separate communities of interest (see, e.g., *Redondo Beach*, *supra*, PERB Decision No. 114, p. 8), we do not find this factor to be dispositive here. Moreover, the speculative nature of how separate budgets will impact negotiations should not outweigh the other factors that strongly support our finding that there is a community of interest among all certificated employees, including preschool teachers.

b. The community of interest factors weigh in favor of unit modification

As we explained *ante*, in assessing community of interest, factors such as duties, qualifications, skills, and working conditions bear more weight than factors that are negotiable, such as wages, benefits, or just cause protections. (*County of Monterey*, *supra*, PERB Decision No. 2821-M, p. 12.) The law does not require an exclusive representative to represent the "most" appropriate unit; rather, "the proper inquiry is whether the requested unit configuration is an appropriate unit—not whether it is more appropriate than the existing unit configuration." (*Oakland*, *supra*, PERB Decision No. 2509, p. 5, citing *Long Beach Community College District* (1999) PERB Decision No. 1315 [emphasis in original].) As the Board has explained, "[i]n every case we must weigh and balance the statutory criteria in order to achieve consistency of application and the general objectives of EERA." (*Alliance I*, *supra*, PERB Decision No. 2719, p. 24.)

Here, the vast majority of factors weigh in favor of modifying the unit pursuant to MCTA's Petition. Preschool teachers are certificated public school employees

whose primary work function is to educate students in classrooms, just like the other teachers in MCTA's bargaining unit. As explained, preschool teachers have at least as much in common with TK through elementary school teachers as credentialed pupil services employees—speech therapists, school psychologists, school nurses, and school counselors—do.

Preschool teachers are classroom teachers and they share a community of interest with certificated employees and belong in the MCTA bargaining unit. As explained below, the established practices and efficiency of operations prongs of the unit modification criteria further support this conclusion.

III. Established Practices

In assessing the "established practices" criterion under section 3545, subdivision (a), PERB evaluates the parties' negotiating history and the extent of employee organization in the unit. (*St. HOPE*, *supra*, PERB Order No. Ad-472, pp. 6-7; *Los Rios Community College District* (2018) PERB Decision No. 2587, p. 4.) PERB does not take into account that a classification was not previously included in a bargaining unit. As the Board has explained,

> "[I]n cases not arising under the transit acts, PERB's unit modification procedure is a proper mechanism by which to resolve disputes over unit placement at any time, even if there is a long history of the classification having been excluded from the unit and even if the petitioning union previously agreed to such exclusion. (*Regents of the University of California* (2010) PERB Decision No. 2107-H, pp. 18-23 (*Regents I*); *Hemet Unified School District* (1990) PERB Decision No. 820.) Under these cases and their progeny, (1) a union may seek to add unrepresented employees to a unit even if the employees were excluded at the time the unit was first determined, and/or the union clearly bargained for some benefit in exchange for their

> exclusion at some point, or otherwise waived their inclusion; and (2) a petitioning union must only establish a community of interest between the unrepresented employees to be added and the existing unit, plus proof of support from a majority of the employees to be added, if and only if the union proposes to increase the size of the unit by more than ten percent. (PERB Reg. 32781, subd. (e)(1).) PERB has declined to incorporate the 'historical exclusion' rule from *Union Electric Co.* [(1975)] 217 NLRB 666 and *Laconia Shoe Co*. (1974) 215 NLRB 573, 576."

(*San Joaquin Regional Transit District* (2019) PERB Decision No. 2650-P, p. 12, fn. 11.)

Here, MCTA has an extensive bargaining history with the District, having been the exclusive representative for 46 years. However, because preschool teachers have been unrepresented, they do not have bargaining history with the District. Because PERB does not take into account that a classification was not previously included in a bargaining unit, though, the established practices prong of the unit modification criteria does not weigh against granting MCTA's Petition.

IV. Efficiency of Operations

In unit appropriateness determinations under section 3545, subdivision (a), the Board considers the effect of the proposed unit configuration on the efficient operations of the employer. (*Long Beach Community College District* (1989) PERB Decision No. 765, adopting proposed decision at p. 12; *Rio Hondo Community College* District (1979) PERB Decision No. 87, p. 11.) Specifically, EERA directs PERB to consider "the effect of the size of the unit on the efficient operation of the school district" when determining whether the proposed unit is appropriate. (§ 3545, subd. (a).) The efficiency of operations criteria weighs against fragmentation of units,

as the greater number of units for the District to negotiate with, the greater must be its use of resources for administering and negotiating contracts. (*Pajaro Valley Unified School District* (1983) PERB Decision No. 363, p. 9 [internal citations omitted].) Indeed, PERB generally favors broader units to avoid fragmentation. (*County of Monterey*, *supra*, PERB Decision No. 2821-M, p. 11; *County of Santa Clara* (2019) PERB Decision No. 2670-M, pp. 19, 27.)

In *Gilroy*, *supra*, PERB Decision No. 98, the Board approved the inclusion of six preschool teachers in a unit of 314 certificated employees, finding that a separate unit would unduly fragment the bargaining unit, and impair the efficiency of the district's operations. (*Id.* at p. 12 [noting that "there is no evidence that the interests of the permit teachers are so disparate with the interests of the other certificated employees as to create disruptions within the bargaining unit or preclude bargaining from taking place"].) Importantly, PERB balances any impact on efficiency with the employees' right to effective representation in appropriate units. (*San Diego Unified School District* (1977) EERB Decision No. 8, p. 7.)

Here, MCTA seeks to add 21 preschool teachers to an existing unit of 510 teachers. Unlike in *Redondo Beach*, these 21 preschool teachers share a community of interest with the employees currently in the unit. Creating a separate unit would unnecessarily fragment the bargaining unit and require the District to use additional resources for administering and negotiating separate contracts. Moreover, no evidence in the record demonstrates that MCTA (or any other employee organization) would be willing to act as the exclusive representative for a standalone unit of preschool teachers.

Furthermore, there is no evidence in the record that including the preschool teachers in the unit would be burdensome to MCTA. Aside from the initial negotiation, it would not take a lot of time for MCTA to bargain regarding preschool teachers. In fact, the parties have a history of adding positions to the bargaining unit, including the speech therapists and school psychologists, with no apparent negative effects on the efficient operations of the District. MCTA witnesses also testified that the size of the bargaining teams would not change and MCTA would not have to spend significant additional time on contract administration.

Therefore, the efficiency of operations criterion weighs in favor of modifying the unit to include the preschool teachers. When taken with the community of interest and established practices criteria, there is no question that PERB should grant MCTA's modification petition.

ORDER

Based on the foregoing and on the entire record in this case, Merced City Teachers Association's Unit Modification Petition is GRANTED. The Preschool Lead Teacher, Preschool Teacher, and Preschool Response to Intervention Support Teacher classifications are hereby added to the Merced City School District's existing certificated bargaining unit.

Members Paulson and Nazarian joined in this Decision.