STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT, Employer, and FAIRFIELD-SUISUN ASSOCIATION OF SPEECH-LANGUAGE PATHOLOGISTS, Petitioner, and FAIRFIELD-SUISUN UNIFIED TEACHERS ASSOCIATION, Exclusive Representative.	Case No. SF-SV-129-E PERB Order No. Ad-452 August 16, 2017

Appearances: McLeod Larsen for Fairfield-Suisun Association of Speech-Language Pathologists; California Teachers Association by Laurie Burgess, Staff Counsel, for Fairfield-Suisun Unified Teachers Association.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from an administrative determination (attached) by PERB's Office of the General Counsel denying a severance petition filed by the Fairfield-Suisun Association of Speech-Language Pathologists (Association). The petition sought to sever speech-language pathologists employed by the Fairfield-Suisun Unified School District (District) from the

District's other certificated employees, the vast majority of whom are currently represented by the Fairfield-Suisun Unified Teachers Association (Teachers Association).[1]

The administrative determination noted that, in applying the criteria of the Educational Employment Relations Act (EERA) section 3545, subdivision (a),[2] the Board has consistently held that pupil services personnel, such as counselors, psychologists, school nurses, social workers, librarians, and audio visual personnel, are appropriately included in a bargaining unit with other certificated employees of the same public school employer. (*Grossmont Union High School District* (1977) EERB[3] Decision No. 11; *Stanislaus County Office of Education* (1993) PERB Decision No. 1022 (*Stanislaus*), adopting proposed decision at p. 18 [appropriate certificated unit including "a variety of instructional personnel working in different settings ranging from classrooms to hospital rooms, and [] non-instructional personnel [including] audiologists and nurses"].) The administrative determination also noted that, under long-standing Board law, it is not enough, for approval of a separate unit, to show that a group

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[1] School psychologist is the only classification of certificated personnel employed by the District not included in the general certificated unit represented by the Teachers Association, and, as noted in the administrative determination, this unit placement decision, because it was not approved by PERB, is therefore afforded little, if any, weight in considering the present severance petition. (*Pleasanton Joint School District, Amador Valley Joint Union High School District* (1981) PERB Decision No. 169, p. 6, fn. 8.)

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code. Section 3545(a) states:

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

[3] Until January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

possesses a community of interest, as one particular classification inevitably will; rather, it is also necessary to establish that the community of interest of the proposed unit is "separate and distinct" from the larger group from which it seeks severance. (*San Diego Unified School District* (1981) PERB Decision No. 170, p. 5; *Lodi Unified School District* (2001) PERB Decision No. 1429, adopting proposed decision at p. 17; *Oakland Unified School District* (2001) PERB Decision No. 1464, adopting proposed decision at p. 17.) Applying these principles, the Office of the General Counsel determined that the Association had not met its burden of showing that the District's speech-language pathologists have a community of interest that is separate and distinct from that shared with teachers and other certificated employees, including other pupil service personnel.

The main thrust of the appeal is that the administrative determination neglected to consider the Association's contention that speech-language pathologists share a community of interest with other service providers who help rehabilitate students, including occupational therapists and behavior analysts and mental health clinicians. According to the Association, these classified titles "have nearly the same responsibilities as speech-language pathologists but cannot be grouped together in bargaining due to the outdated separation of classified and certificated personnel that has been the standard of PERB doctrine for decades." The appeal reiterates this point by referencing "mountainous changes in public policy in Special Education and in the practice of Speech-Language Pathology" which have so altered the educational landscape of the 21st Century, that the community of rehabilitative service providers in public education now "transcends the traditional PERB separation of classified and certificated personnel." However, according to the appeal, "PERB's regulations separating classified and certificated personnel prevent SLPs from forming or joining in a bargaining unit with [other,

similarly-situated] individuals" are outdated and should be controlling for this appeal. We are not persuaded.

Outdated or not, the distinction between certificated and classified personnel in public education is not simply a standard imposed by PERB Regulations and decisional law, but a *statutory* distinction set forth in EERA[4] and the Education Code. Education Code section 44006 defines a "certificated person" as one who holds "one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents," and other provisions of the Education Code expressly contemplate speech-language pathologists as credentialed, i.e., certificated personnel. (Ed. Code, §§ 44265.3, 44268, 45104.[5])

As noted in the administrative determination, the community of interest among certificated employees is also implicit in the statutory guidelines used for evaluating all certificated personnel, as set forth in the Stull Act, Education Code Article 5.5, sections 13485 through 13490, which are not used for evaluating classified personnel. The fact that speech-language pathologists provide a rehabilitative service to only one segment of the student population, as opposed to educational services to the general student population, would appear to be of no significance to the legislative scheme, as the Education Code expressly provides that a "position requiring certification qualifications" includes "*every type of service* for which certification qualifications are established by or pursuant to" the Education Code. (Ed. Code, § 44001, emphasis added; see also Ed. Code, § 44065 [expressly contemplating a

[4] EERA section 3545, subdivision (b)(3), provides: "Classified employees and certificated employees shall not be included in the same negotiating unit."

[5] Education Code 45104 provides, in pertinent part: "Every position not defined by this code as a position requiring certification ... shall be part of the classified service."

"teaching or service credential"]; *Fremont Unified School District* (2014) PERB Decision No. 2397, pp. 18-19; and *Stanislaus, supra*, PERB Decision No. 1022, proposed decision at pp. 12-13, 18-19.)

PERB is not a court of general jurisdiction, but an administrative agency whose jurisdiction is limited to administering EERA and the other California public-sector labor relations statutes. (EERA, § 3541.3.) Although we may interpret the provisions of the Education Code and other external law where necessary to decide matters within our jurisdiction (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583), we have no authority to "declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." (Cal. Const., art. III, § 3.5, subd. (c); *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31; *Cooper v. Swoap* (1974) 11 Cal.3d 856, 864; *San Diego Community College District* (2003) PERB Decision No. 1467a, pp. 4-5; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 12-13.) The appeal cites no appellate authority holding that the Individuals with Disabilities in Education Act (IDEA)[6] or other federal law is incompatible with the separation of certificated and classified personnel for collective bargaining purposes mandated by California law. Consequently, even if we agreed with the Association that federal and state law governing special education has changed sufficiently to render the distinction between certificated and classified personnel in California public education outdated or impractical, we would be without authority to alter or ignore that distinction.

[6] IDEA is codified at 20 U.S.C. § 1400 et seq.

For the reasons set forth in the administrative determination, we agree with the Office of the General Counsel that the Association has not met their burden of showing that the District's speech-language pathologists have a community of interest that is separate and distinct from that shared with teachers and other certificated employees. The Board hereby affirms the administrative determination and adopts it as the decision of the Board itself.

ORDER

The severance petition in Case No. SF-SV-129-E is hereby DENIED.

Chair Gregersen and Member Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 21, 2017

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Re: Fairfield-Suisun Unified School District
Case No. SF-SV-129-E
ADMINISTRATIVE DETERMINATION DISMISSAL OF PETITION

Dear Interested Parties:

The above-referenced severance petition (Petition) was filed with the Public Employment Relations Board (PERB or Board) on April 7, 2016. The Fairfield-Suisun Association of Speech-Language Pathologists (Petitioner) petitions for a bargaining unit of Speech-Language Pathologists (SLPs) employed by the Fairfield-Suisun Unified School District (District). SLPs are currently within the certificated bargaining unit represented by the Fairfield-Suisun Unified Teachers Association (FSUTA).

On May 11, 2016, this office determined that the Petition was accompanied by sufficient proof of support pursuant to PERB Regulation 33050(b).[1] However, because the employees covered by the Petition were already represented by FSUTA, and because FSUTA did not join in the Petition, the District was not permitted to grant voluntary recognition. The District did not file a decision to grant or deny recognition.

[1] Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On August 24, 2016, Petitioner timely filed a petition for investigation pursuant to PERB Regulation 33230. In its petition for investigation, Petitioner contends that there are significant differences between the working conditions of SLPs and the other employees in the certificated bargaining unit, and that these differences demonstrate a need for a separate unit of SLPs. FSUTA contends that the Petition was not filed timely, and that SLPs are appropriately placed within the existing certificated unit. The District has taken no position on the matter.

On October 27, 2016, this office tentatively concluded, in an Order to Show Cause (OSC), that although it was timely filed, the Petition must be dismissed because Petitioner had not demonstrated that SLPs have a community of interest separate and distinct from other employees in the existing certificated bargaining unit. Petitioner was afforded an opportunity to show cause why the Petition should not be dismissed.

On December 13, 2016, Petitioner filed additional facts and argument in support of its Petition. For the reasons discussed below, the Petition must be dismissed.

SLPs are Certificated Employees

"The term 'certificated person' refers to a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents." (Ed. Code, § 44006.) The Commission on Teacher Credentialing issues credentials in speech-language pathology. (Ed. Code, § 44265.3.)

Since 1976, PERB has consistently held that non-instructional certificated personnel are appropriately included in a bargaining unit with other certificated employees, including teachers. (See e.g., *Los Angeles Unified School District* (1976) EERB Decision No. 5.)[2] The only instances in which the Board has approved a separate unit of non-instructional certificated staff, involved circumstances where no petitioner was seeking to include them in a larger unit of all certificated staff. (*Oakland Unified School District* (2001) PERB Decision No. 1464, citing *Pleasanton Joint School District, Amador Valley Joint Union High School District* (1981) PERB Decision No. 169 and *Arcadia Unified School District* (1979) PERB Decision No. 93.)

Where a party seeks to establish a new unit via a severance petition, it must demonstrate that the employees in the new unit have a community of interest separate and distinct from other employees. (*Lodi Unified School District* (2001) PERB Decision No. 1429.) It is not sufficient to show merely that the employees within the proposed new unit share a community of interest. In cases where a proposed unit contains only a single classification of employees, it will generally be true that those employees have more in common with one another than with other employees. But, a separate unit will be approved only where those employees share a community of interest that is "unique, or separate and distinct" from others. (*Id.* at p. 17.)

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

Community of Interest

The OSC noted the alleged differences between SLPs and classroom teachers. For example, SLPs are subject to education and credentialing requirements that are unique. Specifically, the District requires that SLPs hold a Speech-Language Pathology Services credential. Acquisition of this credential requires a Master's degree in Speech-Language Pathology, which in turn requires specific undergraduate coursework for the relevant Bachelor's degree. The credential does not authorize its holder to perform classroom instruction. Petitioner also asserts that SLPs who have the proper licensure can work in a variety of non-educational settings. Although more than half of SLPs are employed in educational settings, others work in home health, skilled nursing facilities, inpatient and outpatient hospital facilities, or private practice. Petitioner asserts that this range of options within the career provides SLPs with more job options than a classroom teacher. At the District, SLPs are within a different supervisory chain than classroom teachers. Specifically, SLPs are supervised and evaluated by the Assistant Director of Special Education, rather than school principals.

However, the OSC also noted that these facts, even if proven, would not meet Petitioner's burden. For one reason, the existing certificated unit contains not only classroom teachers, but other non-instructional certificated personnel as well. Those other pupil support services employees include counselors, librarians, nurses, and special education instructors. Many of the alleged differences between SLPs and classroom teachers appear to be shared with other pupil support services personnel. For another reason, there are significant shared interests between SLPs and other certificated employees, *including classroom teachers*, the Petitioner ignores. As noted by FSUTA, "all certificated employees' employment is in large part shaped by important statutory rights...." PERB has noted that the common applicability of Stull Act evaluation requirements and entitlement to permanent status weighs in favor of a unit of all certificated employees, including classroom teachers and pupil support services personnel. (*Grossmont Union High School District* (1977) EERB Decision No. 11.) And SLPs share a common goal, student success, with other employees in the certificated bargaining unit. (See *Oakland Unified School District*, *supra*, PERB Decision No. 1464.)

In response to the OSC, Petitioner emphasizes inevitable peculiarities in the SLP job, obscuring overarching similarities with other positions. For example, Petitioner notes that SLPs are qualified to administer assessments for speech, language, voice, and fluency disorders, whereas teachers, counselors, nurses, and librarians are not. Petitioner notes that SLPs conduct assessments related to state eligibility requirements for special education and present that to the student's Individualized Education Plan (IEP) team, whereas the other members of the IEP team do not conduct the same assessments. These allegations focus on the particular to such a degree that they achieve a kind of tunnel vision. In essence, Petitioner asserts that SLPs should be in their own bargaining unit, because no other classifications are SLPs.

The OSC noted that PERB has long held that differences in specific prerequisite degree programs are less relevant than the similarities. (See *Kings County Office of Education* (1990) PERB Decision No. 801.) Nurses, librarians, counselors, or SLPs may have distinct degree programs from one another in many ways, but each requires a bachelor's degree or higher, plus

specialized training. Apparently in response to this, Petitioner emphasizes that SLPs require a master's degree and misquotes the OSC as describing SLP degrees as being "more similar than different" to the degrees of other certificated staffers. Contrary to Petitioner's assertion, this investigation has not shown "willful ignorance" to the differences between SLPs and other certificated staffers where those have been alleged. Rather, it has been concluded that these differences are outweighed by the fundamental similarities SLPs share with other certificated employees, *as certificated employees*.

It is axiomatic that a classification will have more in common with itself than with other classifications. As the Board noted in *San Diego Unified School District* (1981) PERB Decision No. 170:

> Every classification possesses a community of interest among its members. Janitors, undisputedly, have more in common with other janitors than they do with gardeners, but we have yet to find a separate unit of only janitors appropriate, absent unusual circumstances.

(*Id.* at p. 5.) As noted above, the only unusual circumstances in which PERB has approved bargaining units of non-instructional certificated staff have been where the alternative would have left them unrepresented. (*Oakland Unified School District*, *supra*, PERB Decision No. 1464.) That is not the case here. SLPs may differ from other certificated employees in a variety of interesting ways, but those differences are insufficient reasons to depart from forty years of PERB precedent. The Petition is hereby dismissed.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet 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, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, § 32360, subd. (c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, § 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Cal. Code Regs., tit. 8, § 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the San Francisco Regional Office regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, § 32140 for the required contents). The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32 35, subd. (c).)

Sincerely,

Daniel Trump
Regional Attorney

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