

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Employer,

and

TEAMSTERS LOCAL 2010,

Exclusive Representative.

Case No. SF-UM-778-H

PERB Decision No. 2578-H

July 18, 2018

Appearances: Paul, Plevin, Sullivan & Connaughton, by Sandra McDonough, Attorney, for Regents of the University of California; Beeson, Tayer & Bodine, by Peter McEntee, Attorney, for Teamsters Local 2010.

Before Banks and Winslow, Members.

DECISION¹

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the attached proposed decision by a PERB hearing officer granting a unit modification petition filed by Teamsters Local 2010 (Teamsters). The petition sought to add to its Clerical and Allied Services Unit (CX) the classification of child development center teacher II (Lead Teacher or Lead). These teachers and other unit members work at the Early Care and Education Center (ECEC) at the University of California, Los Angeles (UCLA) which provides early childhood education to UCLA faculty, staff, and students. The Regents of the University of California (University) opposed the petition

¹ Pursuant to Government Code section 3563, subd. (j), the Board has delegated its powers to decide the merits of this dispute to Members Winslow and Banks.

because it claimed the Lead Teachers were supervisors as defined by the Higher Education Employer-Employee Relations Act (HEERA), section 3580.3.²

The hearing officer determined that the University did not meet its burden to prove that the Lead Teachers exercised the requisite supervisory authority over other teachers with respect to personnel matters. Even if they did exercise some supervisory authority over the core teachers, because the Lead Teachers' work was substantially similar to that of the purported core teachers, the hearing officer concluded that the Lead Teachers cannot be considered supervisors pursuant to HEERA section 3580.3.

The University excepts to the proposed decision, asserting that the hearing officer erred in analyzing the facts and ignored the potential conflict of interest that would occur if the Lead Teachers were placed in the same unit as the teachers they purportedly supervise.³ The University also excepts to the hearing officer's denial of its motion to re-open the record to receive a settlement agreement between the University and another exclusive representative allegedly agreeing that Lead Teachers were supervisors. The University urges the Board to "adopt and respect" this agreement entered into "by the parties."

We have reviewed the entire administrative record, including the proposed decision, and have considered the exceptions and response thereto in light of applicable law. The record supports the hearing officer's factual findings, and his conclusions of law are well reasoned

² HEERA is codified at Government Code section 3560, et seq. Unless otherwise specified all statutory references herein are to the Government Code.

³ The University has requested oral argument pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Modesto* (2008) PERB Decision No. 1994-M, pp. 8-9.) This case satisfies all of the above criteria. We therefore deny the University's request for oral argument.

and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by the following discussion of the University's exceptions.

BACKGROUND

Although the Board reviews exceptions to a proposed decision de novo, where the proposed decision adequately addresses the issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M.) Nor does the Board need to address alleged errors that would not affect the result, particularly where the excepting party has simply reasserted claims without identifying a specific error of fact or law to justify reversal. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2.) Several of the University's exceptions repeat arguments made to and considered by the hearing officer. Because he correctly applied the law to the facts, we need not address these exceptions. Instead we consider those exceptions that do not repeat arguments raised to the hearing officer.

FACTUAL SUMMARY

We summarize the factual findings of the proposed decision that pertain to the exceptions. After considering the evidence regarding the actual duties of Lead Teachers,⁴ the hearing officer made the following findings regarding their purported supervisory functions.

The hearing officer found that the primary function of the Lead Teacher is to teach preschool children and provide a safe and healthy environment for them in their classrooms,

⁴ The hearing officer correctly considered evidence of actual duties performed by the Lead Teachers, rather than exclusively relying on the job description. (*Hemet Unified School District* (1990) PERB Decision No. 820, p. 9: "... the Board must look at the actual nature of the work performed by the incumbents in the position, rather than the work specified in the job description." (Emphasis in original. See also *Marin Community College District* (1978) PERB Decision No. 55, p. 17; *Lincoln Unified School District* (1997) PERB Decision No. 1194, p. 5.) To the extent the University contends the hearing officer erred by not considering only the job descriptions of the Lead Teachers, we reject such exceptions.

the same duties assigned to the core teachers, who are indisputably in the CX unit. Leads have an additional role in giving professional guidance to less experienced teachers assigned to their classroom.

Hiring

Hiring for classroom (or core) teachers is done by a committee. Lead Teachers participate on hiring committees that may include a parent, but always includes the Center Director. All committee members have input on the hiring decision, but the Center Director makes the ultimate decision.

Discipline

Leads do not have the authority to issue formal discipline, such as written warnings, suspensions or terminations, but they may raise concerns with the Center Director regarding an employee's performance.

Evaluation

Beginning in approximately 2016, the University asked the Lead Teachers to complete performance evaluations of other core teachers. However, these evaluations are subject to review by the Center Director who suggests edits and signs off on the evaluation. Upon approval, either the Center Director or the Lead Teacher may present the evaluation to the employee.

Scheduling

The work schedule for classrooms is centrally set by the ECEC, with three different shifts starting at 6:45 a.m., 8:30 a.m., and 9:30 a.m. The core teachers rotate between these shifts on a regular basis. Generally the core teachers collaboratively set the schedule based on availability and preferences. If the teachers cannot agree to shift assignments, preference is

given on the basis of seniority or the dispute is decided by the Center Director, not the Lead. Because state regulations mandate a certain child-to-adult ratio in the classrooms, breaks must be scheduled so that the ratio is always maintained. Again, the teachers work together to accommodate their respective preferred break time. There was no evidence showing that Leads unilaterally determined the break schedules of the other core teachers. Leads do not have authority to approve or disapprove of vacation or sick leave requests.

The University's exceptions focus on the hearing officer's findings and conclusions regarding whether the Leads perform substantially similar duties as the core teachers: hiring, performance management, scheduling, and whether a settlement agreement between the University and a predecessor union concerning the supervisory status of the Leads should be enforced. We turn now to those issues.

DISCUSSION

HEERA's Definition of Supervisors

HEERA section 3580.3 provides in pertinent part:

“Supervisory employee” means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . . *Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.* (Emphasis added.)

The Board has held that this section:

“clearly authorizes the Board to include in representation units employees who perform some supervisory functions” if their performance of supervisory functions is only “sporadic and atypical,” if “their exercise of authority does not require the use

of independent judgment, but is merely routine or clerical in nature,” or if, in addition to their supervisory functions, the employees also perform rank-and-file work and are “sufficiently invested with rank-and-file-interests to warrant their inclusion in bargaining units.”

(*Trustees of California State University* (2014) PERB Decision No. 2384-H, p. 26, (*Trustees*) quoting *Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California* (1983) PERB Decision No. 246b-H, p. 8 (*Unit Determination, LLNL*).) The Board has also recognized that if an employee performs some supervisory duties by virtue of greater experience or technical expertise or knowledge of the craft, yet the majority of the work is similar to those of subordinates, that employee is appropriately deemed a “lead employee” and may be included in the bargaining unit. (*Trustees, supra*, p. 27.)

Lead Teachers Perform Substantially Similar Duties as Core Teachers

The University asserts that the duties are not “identical” or “substantially similar” because, among other reasons, the Lead Teachers’ job description includes initiating, planning and implementing the program for children and planning a developmentally appropriate daily schedule for children. The University also cited to testimony that described the role of the Lead Teacher as the direct point of contact between the Director and the classroom; to make sure regulations and Center philosophies are adhered to, to immediately respond to the needs of the classroom, children, parents, student teachers and staff.

We reject this exception. The fact that the Lead Teacher is responsible for curricular matters, dealing with parents and student teachers, and implementing regulatory requirements for preschool classrooms does not determine supervisory status within the meaning the HEERA section 3580.3. Instead, we examine the role of the purported supervisor in personnel decisions concerning matters within the scope of representation, not in decisions over work

processes, or as in this case, over curricular matters. (*Unit Determination LLNL, supra*, PERB Decision No. 246-b-H, pp. 8-9; *Regents of the University of California* (2011) PERB Decision No. 2217-H, adopting proposed decision at p. 15.) The hearing officer correctly determined, based on the evidence, that the substantial majority of the Lead Teachers' duties were substantially similar to those of the core teachers.

Hiring Decisions

The University asserts error in the hearing officer's conclusion that the Lead Teachers' role in hiring is as a member of a committee but the Director is the ultimate decision-maker. According to the University, the Director's role in the decision is merely ministerial, as she only makes sure the candidates meet the educational and licensing requirements for the position. This is however, belied by the Director's own testimony that she listened to the Lead Teacher's recommendations about hiring and if she agreed based on her own observations, the hiring or promotion process proceeds.

The University also excepts to a proposed finding: "Generally, Leads do not participate or provide any input into the hiring of core teachers in their specific classroom." The testimony on which the University relies for this exception described one occasion in which a Lead Teacher insisted that a particular candidate be assigned to her classroom. She testified: "that's one of the main times that I've really kind of put my foot down and said I must have this person, and he [the director] went with it. I mean, *he wanted to hire her anyway for a position*, but I made sure it was in my room." (Emphasis added.) Unlike the University, we view this as a successful request or demand for a particular teacher placement, not a hiring decision. As the Lead Teacher later stated, "I don't have the ultimate say necessarily, but I definitely think that my feedback is valued." This evidence does not contradict or undermine

the evidence on which the hearing officer relied for his conclusion that Lead Teachers do not hire.

The hearing officer found that one Lead Teacher participated in a hiring panel for a program coordinator position and was told by the director that the ultimate hiring decision did not belong to her. This finding was not excepted to.

We conclude that there was substantial evidence to support the hearing officer's conclusion that Lead Teachers participate in the hiring process but do not make the final decision. Participating on hiring panels does not necessarily confer the authority to effectively recommend hiring. (*The California State University* (1983) PERB Decision No. 351-H, p. 8; *Lincoln Unified School District, supra*, PERB Decision No. 1194, adopting proposed decision at p. 37.) The University has not met its burden to establish that the Lead Teachers had the authority to effectively recommend hiring decisions, and the hearing officer did not err in rejecting this contention.

Authority to Discipline

The hearing officer found that there was no evidence that Lead Teachers effectively recommend discipline, act with independent judgement regarding personnel decisions, or that they are authorized by the Center Director to take independent disciplinary action against an employee. The University does not except to these findings but instead points out that but for the reports from Lead Teachers, management would not be aware of performance deficiencies. It also points to an incident in which a Lead Teacher participated in a parent-teacher conference with a family who had a concern about a teacher's performance. After hearing their concerns, the Lead provided feedback, guidance and training to her entire team.

Neither of these attributes confers supervisory authority on the Lead Teachers. The responsibility to gather information about the performance of other employees and report it to management does not necessarily constitute authority to discipline. (*Unit Determination for the State of California* (1979) PERB Decision No. 110-S, p. 13.) The parent-teacher conference demonstrates only that the Lead Teacher provided guidance by virtue of her greater experience and expertise, not because she had the authority to discipline. (*Trustees, supra*, PERB Decision No. 2384-H, p. 27.) Alternatively, this incident can also credibly be seen as an informal counseling session, which is not considered discipline. (*Unit Determination LLNL, supra*, PERB Decision No. 246-b-H, pp. 14-24.)

The University also takes issue with the fact that in reaching his conclusion that Leads do not have the authority to discipline, the hearing officer focused on whether they actually had issued corrective actions, not whether they had the ability to do so. Under that reasoning, purported supervisors would be compelled to “flex their muscle and issue corrective action just to stay within the supervisory definition.” This argument assumes much more than we are willing to on this record. First, there is scant evidence that the Lead Teachers here wish to be considered supervisors and therefore would be tempted to “flex their muscle” to issue corrective actions. Second, the argument sets up a false dichotomy—whether the Lead Teachers in fact issued corrective actions or whether they had the authority to do so, even if rarely exercised. The hearing officer did not base his conclusion on the fact that Leads had ever issued corrective actions. His findings were broader and not focused on corrective actions. Instead what he actually found was that Lead Teachers do not have the authority to issue formal discipline, e.g., written warnings, suspensions, or terminations. While they may forward information to management regarding employee conduct or performance, they do not

provide input on the recommended level of discipline or if discipline should issue in the first place. It is the Center Director, not the Lead Teacher, who is responsible for placing a teacher on a performance improvement plan to address performance issues raised by a Lead Teacher. The University has not excepted to these factual findings.

With respect to probationary employees, there was no evidence that Lead Teachers participate in their evaluation. Unlike the sergeants in *Regents of the University of California, supra*, PERB Decision No. 2217-H, who did have the effective authority to terminate probationary employees based on evaluations prepared by the sergeants, the Lead Teachers had no such authority.

The University provides no basis for overturning the hearing officer's findings and conclusions regarding the Lead Teachers' authority to discipline. Their own witness, the Center Director, admitted that Lead Teachers do not write written warnings, do not have the ability to suspend or terminate an employee, and that she, the Director, is the one who would initiate those disciplinary actions.

Evaluations

There are two grounds for the University's exception to the hearing officer's findings regarding the Lead Teachers' role in evaluations. First, it asserts that the hearing officer erred in concluding that the Lead Teachers' evaluation function is not marked by independent judgment because the evaluations are subject to scrutiny by their superior, the Center Director. We reject this exception because the hearing officer's conclusion is supported by the Center Director herself. When asked what input she had as the management reviewer of the evaluation, she testified that the Lead Teacher would prepare a draft of the evaluation and "we would discuss it together . . . like the teacher thinks this person exceeds all job expectations,

but I might have concerns from my observations. And we'll discuss it and come to an agreement on what it should be, and then a final report is written up." This admission by the University's witness provides sufficient support for the hearing officer's conclusion that the Lead Teachers' evaluation of employees is not marked by independent judgment.

Second, the University takes issue with the hearing officer's finding that there was no evidence that evaluations had any impact on terms and conditions of employment. The University points to a provision of an expired collective bargaining agreement, which provides that non-probationary employees who receive a satisfactory performance evaluation shall receive a one-step salary increase. Resolution of this exception would have no bearing on the outcome of this case in light of our conclusion that the Lead Teachers do not exercise independent judgement in preparing evaluations. We therefore decline to address this exception. (*State of California (Department of Mental Health, Department of Developmental Services)* (2013) PERB Decision No. 2305a-S, fn. 5; *West Contra Costa Unified School District* (2000) PERB Decision No. 1404, adopting proposed decision at p. 10 [conducting evaluations only indicative of supervisory status when evaluation has effect on promotions or terminations and not subject to substantial review by a superior].)

Authority to Assign or Direct Work

The University contends that this indicia of supervisory status is met by the comments of several witnesses that the Lead Teachers are "in charge" of the classroom, and ultimately responsible for complying with state regulations, implementing the curriculum, assuring students are safe—they have "ultimate responsibility of the classroom." This is essentially the same arguments presented to the hearing officer, who correctly addressed them. We need not repeat his work here.

With respect to determining work schedules, the University excepts to the hearing officer's finding that the Lead Teachers do not have significant control over scheduling decisions, as he or she cannot unilaterally make scheduling decisions. However, the University did not except to a single fact upon which this conclusion is based. The hearing officer found that the work schedule was established by ECEC policies and rules; that the core teachers collaborate in setting a work schedule; that the classroom weekly schedule is not set exclusively by the Lead Teacher, but core teachers take on that responsibility as well; and that if there is a dispute about work schedules, it is ultimately resolved by the Center Director, not the Lead Teacher. Both core teachers and the Lead take responsibility in maintaining the student-teacher ratios in the classrooms, and Leads do not have authority to approve or disapprove of vacation time or sick leave. Accordingly we reject this exception.

Curriculum Development

The University excepts to the hearing officer's conclusion that the process for defining classroom curriculum does not support the conclusion that Lead Teachers are supervisors. We reject this exception because it is irrelevant to the statutory definition of a supervisor. Curricular issues, such as what gets taught to children when and by what method are not remotely included in the indicia listed in HEERA section 3580.3. Regardless of how much or how infrequently a Lead Teacher may collaborate with her core colleagues on curricular matters, it has no bearing on supervisory status because curriculum matters do not pertain to the terms and conditions of employment within the scope of negotiations.

By the same token, the Lead Teachers' role in performing student assessments or overseeing the core teachers' assessments of students does not make the Leads supervisors. The hearing officer correctly summarized the Leads' role as "identical to that of the other

teachers in the classroom and does not require the exercise of independent judgement regarding a personnel matter.” We agree that to the extent the Lead Teachers provide guidance to others concerning student assessments, dealing with parent conferences, and the craft of teaching generally, it is based on the Leads’ greater experience and expertise in the profession, and they are more accurately characterized as “lead” employees rather than supervisors.

Filling in for the Center Director

For similar reasons discussed above, the fact that the Lead Teachers may fill in for the Center Director in her absence does not make them supervisors, and we reject the University’s exception to the hearing officers’ finding on this issue. As he noted, the substitute duties relate to work process and has nothing to do with personnel matters. The University points to no evidence or law that suggests error. The exception is therefore rejected.

Prior Settlement Agreement Regarding Lead Teachers

After the close of the administrative hearing, the University filed a motion to re-open the record to receive newly discovered evidence, viz., a 2002 settlement agreement between the University and the Coalition of University Employees, the former exclusive representative of employees at issue here. That agreement purported to provide that Lead Teachers will remain outside the CX unit based on “supervisory status.” Relying on PERB precedent holding that a parties’ agreement concerning bargaining unit status does not divest PERB of its authority to resolve unit disputes, the hearing officer determined it was unnecessary to rule on the motion.

The University excepts to this ruling and argues that the agreement should be enforced. Yet it makes no attempt to explain why the authority relied on by the hearing officer, *Hemet*, *supra*, PERB Decision No. 820, should not be followed. It did not even deign to discuss the

case, and instead cited cases that are obviously inapplicable to the principle established in *Hemet*—that parties cannot divest PERB of its statutory authority to resolve disputes concerning unit determinations or unit placement by agreement.⁵ (See also *El Monte Union School District* (1982) PERB Decision No. 220, pp. 4-5.) We would be justified in dismissing this exception on that ground alone for failure to comply with PERB Regulation 32300, subdivision (a)(4),⁶ which requires the excepting party to state the ground for each exception. Failing to discuss, distinguish, or explain why the authority cited by the hearing officer should not be followed is tantamount to abandoning the exception.

In an effort to give guidance on this issue, however, we address the merits of the exception. We agree with the hearing officer that even if the hearing had been re-opened to take evidence regarding the 2002 settlement agreement, the ultimate decision in this case would be no different. In *Hemet, supra*, PERB Decision No. 820, the Board stated:

A mutual agreement regarding unit placement is . . . permissible and desirable; however, if, at any time, either party decides it is not satisfied with the agreed-upon placement, a “dispute” then exists. At that point in time, PERB has the ultimate authority and duty to resolve the dispute. (See *Regents of the University of California (California Nurses Association)* (1989) PERB Decision No. 722-H.)

The petition in this case is an obvious indication that the Teamsters were not satisfied with the 2002 agreement. Under the holding of *Hemet*, such agreement cannot as a matter of law be considered a waiver of the Teamsters’ right to petition for inclusion of the Lead Teachers in

⁵ Cases relied on by the University supporting its contention that public policy favors settlement of disputes are inapposite because the agreements had nothing to do with placing job classifications in or out of bargaining units.

⁶ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the CX bargaining unit. The hearing officer therefore did not err in refusing to rule on the motion to re-open the record.

ORDER

For all of the above-stated reasons, the proposed decision is hereby affirmed and the Teamsters' Local 2010 unit modification is GRANTED. The Child Development Center Teacher II Supervisor classification (Lead Teacher or Lead) at University of California, Los Angeles is hereby ordered to be added to the Clerical and Allied Service Bargaining (CX) Unit.

Member Banks joined in this Decision.



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

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TEAMSTERS LOCAL 2010,

Exclusive Representative.

REPRESENTATION
CASE NO. SF-UM-778-H

PROPOSED DECISION
(January 12, 2018)

Appearances: For Regents of the University of California, Sandra McDonough, Attorney at Paul, Plevin, Sullivan & Connaughton; for Teamsters Local 2010, Peter McEntee, Attorney at Beeson, Tayer & Bodine.

Before Yaron Partovi, Hearing Officer.

PROCEDURAL HISTORY

On December 21, 2016, Teamsters Local 2010 (Teamsters), the recognized organization of the Regents of the University of California's (UC or University) Clerical and Allied Services Unit or "CX Unit," filed a unit modification petition (petition) with the Public Employment Relations Board (PERB). The petition was filed under the Higher Education Employer-Employee Relations Act (HEERA) and pursuant to PERB Regulation 32781,¹ seeking to add the Child Development Center Teacher II Supervisor ("Lead" or "Lead Teacher")² to the CX Unit. On February 17, 2017, the University filed its opposition to

¹ HEERA is codified at Government Code section 3560 et seq., and unless otherwise specified, all statutory references are to the Government Code. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB's regulations may be found at www.perb.ca.gov.

² At the time of hearing, the Lead positions were exclusively located at UC's Los Angeles Campus (UCLA). PERB records show that there are currently two petitions seeking

Teamsters' petition asserting that the Lead must be excluded from the CX unit purportedly because it is a "supervisory employee" under HEERA.

On April 26, 2017, the parties participated in a telephonic settlement conference with a PERB Board agent; however, the matter was not resolved. On April 27, 2017, the case was transferred to the undersigned hearing officer for an evidentiary hearing. On June 9, 2017, the parties participated in a pre-hearing conference call with the undersigned hearing officer. On June 14, 2017, the undersigned hearing officer issued a Prehearing Conference Order identifying the issues to be decided at hearing. From June 20-21, 2017, an evidentiary hearing was held at PERB's Glendale office.

On August 11, 2017, the University filed a motion to reopen the record, purportedly based on new evidence (i.e., a settlement agreement between the parties) discovered after the hearing. On September 6, 2017, Teamsters filed its opposition to the motion. On September 15, 2017, the University filed its reply brief in support of its motion.

On September 22, 2017, the parties filed their respective post-hearing briefs, and the matter was submitted for decision pending resolution of UC's motion to reopen the record.

FINDINGS OF FACT

I. Parties

The University is a higher educational employer within the meaning of section 3562, subdivision (g). Teamsters is a recognized organization within the meaning of section 3562, subdivision (p) of the University's "CX Unit," at multiple UC campuses, including: Berkeley, Davis, Irvine, Los Angeles, Merced, Riverside, San Diego, San Francisco, Santa Barbara, and Santa Cruz. Within the CX Unit there are approximately 12,000 employees and 57 different

to add similar classifications located at UC's Irvine campus (Case No. SF-UM-797-H) and UC's Santa Barbara campus (Case No. SF-UM-774-H).

classifications; within UCLA, there are 3,455 CX Unit employees and approximately 25 different CX Unit classifications. The University and Teamsters are parties to a memorandum of understanding (MOU).

II. UCLA Early Care and Education Center

UCLA operates the Early Care and Education Center (ECEC) to provide early childhood education to children (who range in age from two months to five years) of UCLA faculty, staff, and students. There are three ECEC childcare center locations: Krieger Center, University Village, and Fernald. Both the Krieger and Fernald centers are located on UCLA's campus; the University Village is located five miles off the campus at the university family housing. The University Village is licensed for 115 children; Fernald is licensed for approximately 60 children; and Krieger is licensed for approximately 160 children.

The Executive Director is responsible for overseeing the ECEC as a whole including the three centers.³ At each of the three centers, there is an assigned Center Director in charge of overseeing the day-to-day operations of the individual center. There are multiple classrooms at each center. Each classroom is assigned three core teachers, ranked in the following order: Lead, Assistant Lead Teacher, Teacher I, and/or Child Development Center (CDC) Assistant.⁴ Each classroom has one lead and at least one other core teacher in any of the titles. Some classrooms also have student workers.

Each ECEC classroom teacher is assigned one of the following shifts: opening shift (6:45 a.m. to 3:15 p.m.); mid-shift (8:30 a.m. to 5:00 p.m.); and closing shift (9:30 a.m. to 6:00

³ Jayanti Tambe served as the Executive Director until March 2017. Deb Valentine is the current Executive Director.

⁴ These positions—with the exception of the petitioned-for Lead Teacher—are currently included in the CX unit.

p.m.). Each shift is assigned on a rotational basis and each classroom team collaborates on the best schedule in each classroom. When Leads are not in the classroom, the next highest-ranked teacher at that time is considered “in charge,” and at times, that can be the Teacher I or CDC Assistant. However, all core teachers in a given classroom work collaboratively and as a team.

Each of the three centers (i.e., Krieger Center, University Village, and Fernald) is accredited by the National Association of the Education of Young Children (NAEYC). Individual centers are also licensed separately and regulated by several entities including the Department of Social Services (DSS) licensing division, and the Department of Education.⁵ DSS requires all teachers to have a Child Development permit issued by the California Commission on Teacher Credentialing.⁶ The licensing agencies also set specific staffing ratios of children to staff members (based on the age of the children) that each center must follow.

The ECEC also employs UCLA students as classroom aides. The assignment of student workers varies among each center. However, in most centers, the Center Director gets a list of student workers, reviews their schedule and available times, and assigns them accordingly. In some situations, the Leads review documents and decide which student they would like in their classroom, but this is not universal.

⁵ Testimony was provided that State funding comes through California Code of Regulations, title V (Education), and with it certain rules and regulations need to be followed by the ECEC.

⁶ There are different levels of permits, but all Leads and Assistant Lead Teachers are required to have a “Site Supervisor” permit. DSS regulations also require that each center designate qualified individuals to take over in the center director’s absence and to be the point of contact for the center; the designees also must have a “Site Supervisor” permit.

III. Child Development Center II, Supervisor (“Lead”)

The disputed position has an official payroll title of “Child Development Center II, Supervisor,” but the approved working title is “Lead Teacher.”

A. General Duties

The duties of the Lead are summarized in their job description below; their actual work duties—obtained through testimony—are also described below.

1. Duties Described In Job Description Of Lead

The Lead’s job description provides that their responsibilities include: working cooperatively with supervisory staff to coordinate the childcare program; assuming responsibility for individual classroom programs while under the Center Director supervision; and “Hiring; Performance Evaluation; Work Assignments; Complaint & Grievance Resolution.” Eighty percent (80%) of the position’s duties involve coordinating the program for children and parents. Specific job functions cover all aspects of the classroom activities, including, initiating the program, setting up daily activities and curriculum, planning a daily schedule, evaluating staff, assisting children in eating, bathing, cleaning, and other similar activities consistent with teaching in a classroom. The remaining twenty percent (20%) of the position’s duties are specified as “working cooperatively to coordinate overall program for children,” which includes attending weekly staff meetings, participating in planning meetings, serving as liaisons between supervisory and classroom staff, working with a center director to involve parents, and other tasks. The breakdown of duties and assignments is similar to the job description of the Assistant Lead and Teacher I.

2. Testimony Of Actual Duties

At hearing, seven of the Leads testified that the primary function of their position is to teach and provide a safe and healthy environment for the children assigned to their classroom. They also testified that their primary duties as a classroom teacher are virtually identical to other core teachers (e.g., the Assistant Lead and the Teacher I), although Leads have an additional role in providing guidance to less experienced teachers in their classroom.

The primary function of University Village Lead Teacher Sandy Mac is performing all of the duties of a teacher—similar to other core teachers—and that the only difference is that her position is responsible for ensuring that certain paperwork (e.g., scheduling and curriculum forms) is filled out and submitted on a timely basis. Trina Marguerite's primary function as a Lead at University Village, is to first provide for children's physical safety and care, and to provide an engaging learning environment for children. The same duties were attributed to Jane Wohl, Lead at Krieger (and previously at Fernald). Similarly, Ethel Wiggins's duties as a Lead at Fernald are the same as any classroom teacher: to care for the children, support other staff, maintain a safe and healthy environment, and meet the basic needs of the children. The Lead at Kreiger, Rosaura Castillo, also performs all of the general duties—alongside the other teachers in her classroom—such as, playing, teaching, feeding and changing the diapers of children.

Approximately 80 to 85 percent of Lead Teacher Mac's and Lead Teacher Wohl's duties are the same as the Assistant Leads and Teacher Is. Approximately 90 percent of Lead Teacher Wiggins's duties are identical to those performed by the core teachers assigned to her classroom. Between 60 to 80 percent of such core teacher duties are also performed by Emily Winnie, a Lead at Krieger. According to Lead Teacher Marguerite, all of her duties are

teacher-oriented responsibilities that are essentially identical to teachers in her classroom. Similarly, Fernald Lead Teacher Arpine Panosyan, testified that her duties as the Lead at Fernald involved the same primary functions as the Assistant Leads, except that she also completes performance evaluations.

B. Hiring

1. Hiring And Promoting Of Career Positions

The University utilizes a committee for hiring new classroom teacher candidates. The hiring committee consists of three or four panel-members including Leads, a parent and the Center Director. The Leads are typically not involved in the initial screening of the candidates and are not included in successive interviews of candidates. All panel members provide input on the hiring decision and may recommend a candidate; however, the ultimate hiring decision rests with the Center Director. The questions panel-members ask during interviews are dictated by management.

In some cases, an Assistant Lead may also participate as a hiring panel member, particularly for the hiring of another Assistant Lead position. When a hiring decision is made for a core teacher, the Leads are informed of the hiring decision and have no further say or input in the decision.

Generally, Leads do not participate or provide any input into the hiring of core teachers in their specific classroom. Rather Leads are involved in hiring panels for positions in other classrooms or non-teaching positions at their respective centers. For example, Lead Teacher Marguerite participated in a hiring panel for a program coordinator position. She provided input as to the candidate, but was specifically informed that the ultimate hiring decision did not

belong to her. Lead Teacher Wohl neither served on any hiring panels nor had any input regarding the hiring of core teachers into her classroom at Fernald.

There is not a formal process for Leads to participate in decisions to promote employees, although they may be asked for their input. For example, Lead Teacher Wiggins was asked about whether her Teacher I would be a good fit for the Assistant Lead position and she endorsed that idea, but the Interim Executive Director ultimately made the decision to offer the position to the individual. Lead Teacher Winnie was included in an interview that included the Center Director and a parent, regarding a promotional opportunity for a teacher seeking to promote to an Assistant Lead because at the time, Lead Teacher Winnie's classroom did not have an Assistant Lead. Winnie did not have the final say on the promotion, but she did recommend the promotion. The candidate ultimately received the promotion.

2. Hiring Of Student Workers

Some Leads have been involved in independently hiring student applicants. Lead Teachers Castillo and Winnie each hired the student of their choice into their respective classrooms. Lead Teacher Panosyan interviewed and selected student workers as well. However, this practice has not been uniform. Other Leads (in particular, Mac and Marguerite) had no say in the hiring of student workers; instead the Center Director decided who to hire and placed those applicants in their classrooms. Lead Teacher Wohl also had no role in the hiring of student workers. Although Lead Teacher Wohl reviewed the applications of student candidates, the Center Director ultimately hired and assigned them to her classroom. Lead Teacher Wiggins had some involvement in the hiring of student workers in the past, but in recent years, the Center Director unilaterally hired and assigned student workers to the classrooms.

C. Discipline

Leads do not have the authority to issue formal discipline, including written warnings, suspensions, or terminations. Leads also have no involvement in the formal discipline process. Although Leads may raise concerns to the Center Director regarding an employee's performance, they do not provide input on the recommended level of discipline or if discipline is to be issued at all. For example, Lead Teacher Wohl recommended the termination of a student worker, however, the Center Director did not accept the recommendation, but instead transferred the student worker. Additionally, when Lead Teacher Wiggins raised performance-related issues of core teachers in her classroom with her superiors, she never received any follow-up and did not learn if discipline would occur.

D. Performance Evaluations

From 2016 through 2017, Leads have been asked by the University to complete performance evaluations of other core teachers. When Leads complete performance evaluations, a draft copy must be presented to the Center Director—the management reviewer—who must review, make suggested edits, and sign off on the document. If the Center Director approves, the Lead may provide the final version of the performance evaluation to the employee. Alternatively, the Center Director may present the evaluation directly to the employee and the relevant Lead.

E. Setting the Work Schedule

Classroom schedules for core teachers are centrally set by the ECEC. All classrooms have three starting times: 6:45 a.m., 8:30 a.m., and 9:30 a.m. On a regular basis, core teachers must rotate as to which teacher opens, which teacher closes, and which teacher works the mid-shift. These are ECEC's set rules, and no teacher in the classroom is allowed to create separate

start time or dictate a certain individual's starting time each day. Instead, the only issue for the classrooms to decide is who works which shift on which days. All of the core teachers work together to set a schedule that works for everyone. Generally, schedules are based on the individual teacher's availability and their own personal schedules.

Each classroom is required to provide their weekly schedule to the Center Director by Thursday afternoon. This task is not exclusively performed by the Lead because in the absence of the Lead, other core teachers take responsibility for filling out and submitting the schedule to the Center Director. In some cases, the Assistant Lead and Teacher I positions put together the classroom schedule.

If core teachers cannot come to a consensus and work out disputes related to the schedule, the preference is given based on seniority or, alternatively, the dispute is decided by the Center Director. When Wohl served as the Lead at Fernald, the Center Director and Executive Director decided that one of the teachers in Wohl's classroom would only work mid-shift; Wohl was told that she had no control over the decision.

Pursuant to regulations,⁷ the ECEC is required to maintain certain ratios of teachers to children at each classroom. Leads do not have absolute control over scheduling breaks to maintain these required ratios. Because core teachers enforce the ratios, employees must rotate taking breaks to maintain the required ratios. According to Lead Teacher Marguerite, all core teachers work together to accommodate each other for their preferred break time. Further, in her classroom, core teachers have jointly decided to take breaks during nap time, so they agreed to lump their two rest breaks and lunch break into rotating hour breaks during the children's nap time period. The Center Director could ultimately approve or disapprove of this

⁷ Mandatory staffing ratios are covered under California Code of Regulations, title 22, section 101216 and California Code of Regulations title 5, section 18290.

arrangement, however, in Lead Teacher Marguerite's classroom, the core teachers made the break schedules as a team, amongst themselves. No evidence was provided showing that Leads unilaterally directed the break schedules of other core teachers; however, some Leads told a core teacher that they could not take a break at a given time because of the set ratio requirements.

Leads do not have any authority to approve or disapprove the use of vacation time or sick leave; that authority is reserved for the Center Director.

F. Developing Curriculum

ECEC management sets the curriculum at ECEC. ECEC utilizes a curriculum program called "Pathways to Success" that sets the general framework for curriculum throughout the system. Although Leads participate in curriculum development, this is not a task exclusively performed by Leads. There are regular staff meetings that include employees from each classroom to discuss curriculum issues, and there is a separate workgroup to discuss and develop outdoor curriculum. Any core teacher may participate in these meetings, not just the Leads. Indeed, at these curriculum development meetings, some classrooms are represented by either the Assistant Lead or a Teacher I.

Classroom curriculum, including specific classroom activities, is developed collaboratively by core teachers and once a consensus is reached, it is implemented in the classroom. As such, all teachers within a classroom collaborate to develop the curriculum. For example, in Lead Teacher Mac's classroom, her team worked together to develop a curriculum on arthropods based on Lead Teacher Mac noticing the children's interest in spiders and another teacher noticing their interest in crabs. If a teacher raised an idea that may not be age-appropriate or does not fit with their classroom dynamics, the Lead may suggest

other ways to modify the idea such that it would work. The development of the curriculum is not top-down from the Leads, but instead it is created through brainstorming from the entire team. If a consensus on the classroom curriculum cannot be reached, the issue is presented to the Center Director to ultimately decide.

G. Role in Children's Assessment and Parent-Teacher Conferences

Pursuant to regulation, each classroom is required to provide an assessment of each child's progress and achievement. Specifically, the core teachers have to complete the Desired Results Development Profile (DRDP) to assess the children.⁸ The DRDP is information that is put into a computer database which tracks the children's progress. The Center is required to complete the DRDP when the child has been in the program for 60 days and again every six months thereafter. The core teachers also have parent-teacher conferences to inform the parents of the child's progress in conjunction with the timing of the DRDP. The core teachers fill out the Child Development Progress form for the parent-teacher conferences. The core teachers are also required to complete a "Needs and Services" assessment for infants every three months.

The core teachers equally divide the children in their classrooms into thirds, called primary groups. Each core teacher is assigned to a primary group. The core teachers are expected to complete the DRDPs for the primary group and to conduct parent-teacher conferences. Each teacher is individually responsible for completing the DRDPs and scheduling the parent-teacher conferences for the children within their primary group.

The Leads may remind the Assistant Lead and Teacher I when the DRDP and the parent-teacher conferences must be completed based on the required deadlines.

⁸ It appears regulations governing DRDPs are found under California Code of Regulations, Title 5, section 18272.

Because Leads have more experience, they will often review the DRDP entries to ensure accuracy. For example, Lead Teacher Castillo stated, that because of her experience, she serves as a mentor to the new teachers who are still learning to use the DRDP tool. However, other core teachers may also review a Lead's DRDP assessments for accuracy based on all core teachers' interactions with the students. Because all core teachers interact with the children, they work collaboratively to provide DRDP input for each child. While a Lead may change other core teachers' DRDP entries, some Leads have never done so.

Parent-Teacher conferences are conducted by multiple panelists, including the Lead, other core teachers and the Center Director. It is preferable to include multiple panelists in these conferences in order to avoid a "he said, she said" situation with the parent and to provide a different perspective. However, Leads do not always participate in these conferences because of scheduling and coverage issues. Thus, it is possible to include two non-Lead teachers at parent-teacher conferences, but in some cases, Teacher I's conduct these conferences on their own.

H. Role In Classroom Oversight

When the Lead is out of the classroom because of lunch, sickness or vacation, depending on shift start times, the teacher with the next highest rank serves as the acting teacher "in charge." Accordingly, if the only core staff in the classroom is a Teacher I, then that individual is the teacher in charge and person of authority at the time. Some classrooms do not have Leads. Lead Teachers Winnie, Panosyan, Mac and Marguerite testified that they were Assistant Leads in classrooms with no Leads and shared the role of acting Lead with the other Assistant Lead for significant periods.

Day-to-day activities are completed as needed, and whichever teacher is available to perform the task at the time needed is expected to perform the task. Leads are expected to understand what is needed to be completed and execute accordingly.

In accordance with state regulations, staffing ratios in the classroom is dependent on the age of the children in the classroom. For instance, in infant classrooms, the staffing ratio is three children to one staff member; in toddler classrooms, the staffing ratio is six children to one staff member. Leads and core teachers are required to be aware of the staffing requirements and are responsible for ensuring compliance with the ratios.

The core teachers work collaboratively to order classroom supplies, such as diapers, paper towels, etc. This involves discussing, as a group, the necessary items for the classroom. The actual responsibility for ordering supplies in some cases rotates among the core teachers. The Center Director is the ultimate decision-maker on ordering supplies, not the Lead.

I. Role In Grievance Handling

Leads have no role in processing grievances for CX Unit employees.

J. Role At The Center When Center Director Is Offsite

Per state regulations (California Code of Regulations, title 22, section 101215.1), there must always be a person onsite with a Site Supervisor Permit who is in charge to deal with emergencies or be the contact person for licensing. Both Leads and Assistant Leads at ECEC have the required Site Supervisor permit and can fulfill this function. When the Center Director is offsite, a Lead may serve as a designated acting director. In that role, if an emergency occurs, the acting director must notify the Executive Director and the Center Director so that the Center Director will return. Also, if the DSS division of licensing shows up for an inspection, the acting director must talk to the licensing officer while the office

contacts that Center Director to return immediately. The acting director must also walk with the licensing officer while he or she does a visual ratio check. During the inspection, the acting director is also instructed to provide the licensing packet—pre-arranged documents that are always reviewed by the officer. The acting director does not have any authority to go beyond these actions.

ISSUES

- I. Whether the Leads at UCLA are “supervisory employees” within the meaning of section 3580.3 so as to preclude them from the CX Unit.
- II. Whether PERB should reopen the record for the purpose of receiving additional evidence relating to a settlement agreement between the parties regarding the supervisory status of Leads.

CONCLUSIONS OF LAW

Teamsters’ petition is brought under on PERB Regulation 32781, subdivision (a)(1) which permits a recognized employee organization to add unrepresented classifications or positions to the established unit. Accordingly, Teamsters seeks to add the Lead classifications at UCLA to the existing CX Unit.

I. Supervisory Employee Definition And General Principles

Pursuant to section 3580, the Board has ruled that supervisors are generally excluded from PERB’s jurisdiction; however, pursuant to sections 3581.1 through 3581.6, in the higher education context, supervisory employees enjoy some, limited rights to representation and collective bargaining. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, at p. 26 (hereinafter *Trustees*)). Pursuant to section 3581.7, the higher education

employer may also adopt reasonable rules and regulations for administering employer-employee relations.

To avoid conflicting interests, the higher education employer is entitled to a “cadre of employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate wage, hours, and terms and conditions of employment.” (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California* (1983) PERB Decision No. 246b-H, at pp. 7-8 (hereinafter *LLNL*)). The underlying conflict of including supervisors in the same unit as non-supervisory employees has been summarized as follows:

In each case, the overriding concern is to prevent actual or potential conflicts of interest or divided loyalties of supervisors because of their involvement in the collective-bargaining or grievance proceedings of nonsupervisory employees. The potential for conflict stems primarily from supervisors’ authority to control or influence personnel decisions on matters falling within the scope of representation, as opposed to technical or administrative control over work processes. [Citation omitted] The same concerns necessarily apply to the processing of grievances, which is a form of continuing negotiations between the exclusive representative and the employer over the meaning and content of the collectively-bargained agreement. [Citation omitted.] Both California and federal statutory and decisional law point to sound policy reasons for ensuring that those who represent employees in collective bargaining matters, including grievances, are single-minded in their loyalty to the employees’ interests. [Citation omitted.]

Trustees, supra, PERB Decision No. 2384-H, at p. 27. The prevailing interest depends on the application of the statutory definition of a supervisor set forth in section 3580.3. (*Regents of the University of California* (2011) PERB Decision No. 2217-H, adopting Proposed Decision at p. 16 (hereinafter *Regents*)).

HEERA defines “supervisory employee” as any employee having authority “in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing [functions], the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” (§ 3580.3.) However, HEERA provides that employees “whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.” (*Ibid.*) Both PERB and the National Labor Relations Board (NLRB) hold that the burden of proving a claim of supervisory status rests on the party asserting it. (*LLNL, supra*, PERB Decision No. 246b-H, p. 6; *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686, 694 (hereafter *Oakwood*).)⁹

The Board has adopted the disjunctive interpretation of HEERA and will find an employee to be a supervisor where the party seeking exclusion demonstrates that an employee meets one of the specified criteria for exclusion and does no rank-and-file work. (*Unit Determination for Employees of the California State University and Colleges* (1981) PERB Decision No. 173-H (hereafter *CSU*); see also, *Regents, supra*, PERB Decision No. 2217-H.)

HEERA does not specifically exclude supervisory employees from bargaining units that include non-supervisory employees (unlike the Educational Employment Relations Act, at section 3545). Accordingly, the Board has construed HEERA to allow representation units of employees that perform some supervisory duties: (1) if those duties are only “sporadic and

⁹ Additionally, purely conclusory evidence does not satisfy that burden. (*Lynwood Manor* (2007) 350 NLRB 489, 490.) Lack of evidence is construed against the party asserting supervisory status. (See *Dean & Deluca New York, Inc.* (2003) 338 NLRB 1046, 1048.) Supervisory status is not established where the record evidence “is in conflict or otherwise inconclusive.” (*Phelps Community Medical Center* (1989) 295 NLRB 486, 490.)

atypical,” (2) if “their exercise of authority does not require the use of independent judgment, but is merely routine or clerical in nature,” or (3) if, in addition to their supervisory functions, the employees also perform rank-and-file work and are “sufficiently invested with rank-and-file interests to warrant their inclusion in bargaining units.” (*Trustees, supra*, PERB Decision No. 2384-H, at p. 26, citing to *Unit Determination (LLNL), supra*, PERB Decision No. 246b-H, pp. 8-10.) Independent judgment has been characterized by PERB as follows:

[W]here the performance of the duties includes the opportunity to make a clear choice between two or more significant alternative courses of action and the power to make that choice is without broad review and approval. Such functions are characterized by significant autonomy and control over the decision-making or recommending processes. On the other hand, the exercise of authority is of a merely routine or clerical nature where the action is limited to choosing between two or more tightly directed and narrowly defined procedures. In addition, there may be substantial review or prior approval of the alleged supervisory act, either by specific action or existing policy, thereby precluding any finding of independent judgment.

(*Ibid.*; see also, *The California State University* (1983) PERB Decision No. 351-H.) Where a rank-and-file unit employee frequently uses supervisory authority, the supervisory status legally depends on whether that authority exercised involves personnel policies and practices—which are generally managerial decisions—rather than simple control or discretion over the employer’s work process, which affect matters within the scope of representation. (*Trustees, supra*, PERB Decision No. 2384-H, at p. 27, citing to *LLNL, supra*, PERB Decision No. 246b-H, at pp. 8-9.) However, if an employee performs some supervisory duties deriving from greater experience, technical expertise or knowledge of the employer’s mission and tasks, but the majority of the work is similar to those of purported subordinates, then such employees are deemed, “lead employees,” and their inclusion in the disputed bargaining unit is warranted. (*Trustees, supra*,

PERB Decision No. 2384-H, at p. 27, citing to *LLNL, supra*, PERB Decision No. 246b-H, p. 8-9.)

Thus, the inquiry focuses on “the point at which the employees’ supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees.”

[Citation omitted.] (*Regents, supra*, PERB Decision No. 2217-H, adopting Proposed Decision at p. 18.)

This point is not determined merely by quantitative analysis. Even though they spend part of their time performing the work of subordinate, their involvement in one or more supervisory functions may conflict with their participation in rank-and-file unit activity. The existence of such supervisor obligations precludes a finding that the disputed employees’ duties, overall, are “substantially similar” to those of their subordinates.
[Citation omitted]

(*Ibid.*)

To make a unit designation, PERB must review the *actual* duties of the employee sought to be excluded from the bargaining unit. For example, in *The California State University, supra*, PERB Decision No. 351-H, a unit modification case, PERB indicated that a grant of authority alone, without any evidence of its regular exercise, would not provide a basis for excluding employees as supervisors. In that case, the employer’s established grievance procedure invested sergeants in its police force with first level authority to adjust certain types of grievances, but there was no evidence that the sergeants had ever exercised that authority. PERB held:

We decline to conclude that the University has satisfied its evidentiary burden where no evidence establishes that the sergeants regularly act in this capacity. The mere potential to do so, like a job description, is insufficient to remove the sergeants from HEERA’s collective bargaining scheme.

(*Id.* at pp. 10-11.) Accordingly, as practical matter, the Board's policy does not sanction supervisory status where there is a mere showing that an employee has been granted paper authority to perform a particular supervisory function, unless there is also proof that the employee exercises that or other supervisory functions on more than a sporadic and clerical basis.

A. Similarity In Duties

Leads are required to perform identical duties as the other core teachers, including the Assistant Lead and Teacher I. The Leads and other core teachers primarily function as classroom teachers who are responsible for caring for and teaching children assigned to their classroom. Like other core teachers, the Lead's standard duties include: changing diapers, feeding children, playing with children, teaching academic activities to children, and ensuring that the children are safe. Additionally, all classroom tasks are divided equally, and performed as needed, among the three teachers in each classroom. Eighty percent of the Lead's job description relates to common teacher duties that are nearly identical to the job description of the Assistant Lead and the Teacher I. This was consistent with testimony of some Leads regarding their actual work duties. Based on this evidence, I find that Leads perform substantially similar duties to those performed by other core teachers.

B. Authority To Hire

The Board has declined to afford supervisory status to employees who participate in hiring interviews and make recommendations where the ultimate decision remains with their superiors. (*Regents, supra*, PERB Decision No. 2217-H adopting Proposed Decision at p. 19 [sergeants participating in hiring interview panels had no effective authority to hire in terms of making independent, generally adopted recommendations]; *Unit Determination for Service*

Employees, Lawrence Livermore National Laboratory, of the University of California (1983) PERB Decision No. 245b-H, at pp. 6-7; *Unit Determination for the State of California* (1980) PERB Decision No. 110c-S (*State of California*), at p. 11.) As such, participating in the hiring panel does not independently afford supervisory status, unless it can be shown that the disputed position's recommendation is a true exercise of hiring authority or that the position—rather than the panel itself—makes the effective recommendation. (*Ibid.*) A supervisor does not “effectively recommend,” when the recommendation for a personnel action must be reviewed by superiors who conduct their own independent investigation of the recommended action. (*Children's Farm Home, supra*, 324 NLRB 61.)

Leads participate in hiring panels for core teachers in other classrooms and for other positions at the ECEC centers, such as Program Coordinator.¹⁰ However, a Lead—on the hiring panel of three or four members—asks interview questions as dictated by management and provides input along with other panel members that can include Assistant Leads. Leads are not involved in the screening process or successive interviews of the applicants. More importantly, they do not make the ultimate hiring decision.

The University asserts that the Leads are involved in the hiring process for core teachers and provide input in the selection of core teachers which carries significant weight. Although, Leads' input regarding the applicant is given some consideration,¹¹ the Center Director or Executive Director makes the ultimate hiring decision. Given that the University

¹⁰ Generally, Leads do not participate or provide any input into the hiring of core teachers in their specific classroom.

¹¹ Testimony was provided by Center Director Ballantine that deference is given to the Lead's input; however, no evidence was presented regarding the level of deference or any specific examples of this deference. Any deference given to Leads in this process is not unique. For example, deference is also given to Assistant Leads' “opinions” on the hiring process especially when they are involved in the interviewing of candidates for Lead positions.

excludes the Lead from the screening and successive interviews of candidates and that the panel consists of multiple members, the decision-making in the hiring process is subject to independent review of supervisors. It follows that Leads mere participation in a hiring panel does not mean that they “effectively” recommend the hiring of a candidate. Additionally, the record does not reflect what weight the decision-maker gave to a Lead’s recommendations or whether the decision-maker only sought input from Leads and not from other hiring panel members. Hence, it cannot be concluded that Leads effectively recommend hiring.

C. Authority to Discharge, Suspend, Lay-off, or Discipline

The University relies on *Regents, supra*, Decision No. 2217-H to show that Leads have authority similar to the supervisory employees (police sergeants) in that case. However, *Regents, supra*, Decision No. 2217-H is distinguishable. Unlike the present case, the sergeants in *Regents* engaged in independent supervisory duties. For example, sergeants independently issued written reprimands to their subordinates, sergeants could effectively recommend whether a new officer passed or failed probation, and they had authority to place employees on performance improvement plans. (*Ibid.*, adopting Proposed Decision at 12-14.) In the present case, Leads do not have the same level of authority as the sergeants in *Regents*. Leads do not have the authority to issue formal discipline, including written warnings. The Center Director is responsible for placing an employee on a performance improvement plan for work-related performance concerns that are raised by a Lead; the Leads have no such authority. And, there is no evidence that Leads participate in evaluating probationary employees.

While Leads are expected to bring concerns regarding the performance of other staff to the Center Director’s attention, Leads do not provide input on whether discipline should be issued or the level of appropriate discipline. PERB and the NLRB have held that the

responsibility to gather information and refer it to others for action does not necessarily constitute authority to discipline within the meaning of the Act. (*State of California, supra*, PERB Decision No. 110c-S, at p. 13, accord *NLRB v. Dunkirk Motor Inn* (2nd Cir. 1975) 524 F.2d 663.) In this context, a Lead's role in providing input to his/her superior does not indicate supervisory status.

Further, there is no evidence that Leads effectively recommend discipline. The evidence shows that instances where Leads raise disciplinary issues with the Director do not often result in actual discipline of the employee by the Center Director. The Center Director, in lieu of discipline, may provide the employee an improvement plan and work with the Lead to provide mentoring and support to the employee. Informal discipline by a purported supervisor that does not result in an adverse employment action is insufficient to confer supervisory status. (See e.g., *LLNL, supra*, PERB Decision No. 246b-H, at pp. 18-20 [authority in disciplinary matters was limited to issuing verbal warning that would amount to informal counseling, therefore not supervisory]; *State of California, supra*, PERB Decision No. 110c-S at p. 12 [where the supervisor's authority to discipline is limited to informal, oral counseling, it does not meet the standard for exclusion]; *Exceptional Professional, Inc.* (2001) 336 NLRB 234; *Lexington Metal Products Co.* (1967) 166 NLRB 878, 882 [where a lead employee may reprimand other employees but such reprimands do not affect their job status, the lead is not a supervisor].) No evidence was provided that any subsequent coaching and guidance that Leads provide to core teachers amounted to a disciplinary action. For example, there is no evidence that the counseling is documented in an employee's personnel file. (See e.g., *City of Long Beach* (2008) PERB Decision No. 1977-M [a corrective memorandum threatening future disciplinary action and its placement in an employee personnel file

constitutes an adverse action].) Additionally, considering that the Lead receives direction from the Center Director on how to address the subject employee, it does not appear that Leads act with independent judgment on personnel decisions.

There is also no evidence that suggests that the Center Director authorizes Leads to take independent disciplinary action against any employee. While Lead Teacher Wiggins testified that approximately eight or nine years ago, a Center Director once told her that she has the authority to write written warnings for employees, Lead Teacher Wiggins had never previously or since been told that she has that authority, and has never been told how she would take such action. She further testified that she has not issued any written discipline. Additionally, Center Director Ballentine testified that Leads have no authority to issue any formal discipline, including written warnings.¹² In light of the above, I find that Leads do not possess independent disciplinary authority.

D. Authority To Promote

The University contends that Leads effectively promote core teachers by recommending salary increases and that their recommendations are afforded substantial weight.

Leads provide input, including positive feedback, to their superiors regarding employee applicants seeking a promotion (e.g., from a Teacher I to an Assistant Lead), and the Leads are subsequently informed of the Center Director's decision to offer the promotion. However, the Lead does not exercise any degree of autonomy or control over the actual promotional

¹² Leads must also defer to the Center Director's judgment on addressing discipline recommended by core teachers. For example, the Center Director moved a student worker to another classroom (and ultimately to another site), despite the recommended termination sought by core teachers and the Lead. Accordingly, there is no evidence that Leads are exercising independent judgment on personnel decisions concerning employees and student workers.

decision. Accordingly, I do not find that Leads possess independent judgment in promotional decisions.

Additionally, Leads' participation in the promotion of other employees appears to be informal. Their input also does not constitute an effective recommendation because there is no evidence regarding the weight given to a Lead's opinion regarding the Center Director's decision to award a promotion. Absent further evidence, the fact that their recommendation was ultimately effectuated is also irrelevant. (*Children's Farm Home, supra*, 324 NLRB 61.) There was no evidence showing that the Lead's role in promoting other teachers was other than a sporadic and atypical duty.

E. Evaluations

Beginning approximately in 2015 and continuing, Leads were involved in filling out performance evaluations of core teachers. The University asserts that, because the Leads have authority to conduct evaluations, including them in the bargaining unit would cause an unworkable conflict with UCLA's interests. Accordingly, the University asserts that this is evidence of supervisory status.

The preparation of a performance evaluation, by itself, does not per se confer supervisory status on an employee because the definition of "supervisory employee" under section 3580.3 does not include "evaluations" as one of the factors. However, an evaluation can be used as a supervisor's tool to determine whether to promote, reward, discipline, etc. his or her subordinate. However, to demonstrate supervisory status, a purported supervisor's evaluations must be shown to have an impact on the employee's terms and conditions of employment. (See, e.g., *LLNL, supra*, PERB Decision No. 246b-H at pp. 24-25 [supervisory

status met where disputed position conducts performance evaluations that are determinative of employee status as probationary employees].)

Here, there is insufficient evidence to show how the evaluations are used and the level of impact they have on the evaluated employee's terms and conditions of employment. For example, there is no evidence that the evaluations prepared by Leads are used to discipline, for considering probationary status, to effectuate a wage increase, or for any other future personnel action. Even if evaluations that Leads complete could be viewed as recommendations for a personnel action (e.g., promotions), the evidence does not show that such recommendations were "effective." The University did not establish, for example: the process by which an employee receives a wage increase (or passes probation) and how that decision is made; whether the decision is linked to a performance evaluation; and who is responsible for making the ultimate personnel decision. Accordingly, the University has failed to show that Leads "effectively" recommend any personnel actions via the evaluation process.

Leads do not unilaterally complete and issue performance evaluations, but instead must submit them to the Center Director for review, edits, and approval. The preparation of performance evaluations is not evidence of supervisory status where the purported supervisor's participation is subject to substantial review and approval. (*Unit Determination for Service Employees, Lawrence Livermore National Laboratory, of the University of California, supra*, PERB Decision No. 245b-H at pp. 6-7; see also, *CSU, supra*, PERB Decision No. 173-H, at p. 33 [no supervisory status found for department chairs whose authority to recommend salary increases for employees may or may not be subject to independent review by higher authorities].) All the Leads who testified stated that they submitted completed evaluations to the Center Director and all testified that the Center Director made several recommended

changes. In one case, a Lead gave a completed evaluation of a teacher to the Center Director for review, but it was never returned to the Lead, and as far as she knew, it was never presented to the teacher. The Center Director confirmed that the Leads may not present their evaluations to the other core teachers without prior approval, revision and signature by the Center Director. Additionally, the completed evaluation forms all require the signature of the Center Director who must review and agree with the evaluation. Accordingly, a Lead's evaluation of other employees is not marked by independent judgment; rather it is subject to scrutiny by a superior.

Testimony was provided regarding the frequency that Leads were required to complete performance evaluations for core teachers. Lead Teacher Castillo was asked to evaluate her core teachers once in the last seven years, in 2016. Winne has been a Lead since 2014 and was asked to complete performance evaluations for the first time in 2017. Wohl has been a Lead for several years, and 2016 was the first time that she was ever instructed to evaluate core staff. Finally, Lead Teacher Wiggins was first asked to complete performance evaluations in 2016, and she testified that performance evaluations have been very inconsistent in her 25 years at ECEC. As previously discussed, PERB has held that sporadic and atypical exercise of supervisory duties is insufficient to exclude an employee as a supervisor. (*State of California, supra*, PERB Decision No. 110c-S at p. 43.) Accordingly, I find that UC's use of Leads for performance evaluations—even if used to effectuate a personnel action—was sporadic and therefore not sufficient to demonstrate supervisory status under the Act.

F. Authority To Adjust Employee Grievances

The Leads do not have authority or involvement in responding to or resolving grievances filed pursuant to the MOU. Additionally, the University has not presented any

evidence that Leads have any involvement in grievances filed by bargaining unit employees. I find that Leads possess no authority to adjust grievances.

G. Authority To Assign Or Direct Work

In *State of California, supra*, PERB Decision No. 110c-S, the Board held that the authority to “assign” work does not make an employee a supervisor unless the purported supervisor has significant control over the decision-making process. (*Id.* at p. 8.) The standard is not met where the work assigned is “so routine and well-structured as to render the act of assigning that work little more than an exercise of ministerial options.” (*Ibid.*) The NLRB has stated that “assign” in the definition of supervisor *does not* include “choosing the order in which the employee will perform discrete tasks,” or giving an “ad hoc instruction that the employee perform a discrete task.” (*Oakwood, supra*, 348 NLRB 686, 689.) Rather the authority to assign “refers to the ‘act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee In sum to “assign” refers to the . . . designation of significant overall duties to an employee.’” (*Croft Metals, Inc.* (2006) 348 NLRB 717, at p. 721, quoting *Oakwood, supra*, 348 NLRB 686, 689.)

In *Alstyle Apparel* (2007) 351 NLRB No. 92, at the beginning of each shift the company provided its “shift leaders” with forms listing the machines that were to be operated. The shift leaders then “utilized the form and their knowledge of the capabilities of each worker to assign the machines.” (*Id.*, slip op. at p. 19.) The administrative law judge found that these activities by the shift leaders were not “assigning,” but rather were “ad hoc instructions” that the employees “perform a discrete task.” (*Ibid.*) The NLRB agreed with the judge’s conclusion that the shift leaders did not assign work, and added that “even assuming that the

shift leaders assign work to the employees, such assignments do not involve the exercise of independent judgment” necessary to show supervisory authority. (*Id.*, slip op. at p. 1.)

Section 3580.3 also provides that a supervisor has the “responsibility to direct” employees. The NLRB defines this prong as follows: “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” (*Oakwood, supra*, 348 NLRB 686, 692.) The NLRB added:

Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

(*Id.* at p. 692.)

1. General Classroom Duty Assignments And Direction

There is no evidence that Leads have a significant control over the decision-making process in the classroom, including for example, designating the working location and hours of other employees. All core teachers know what tasks have to be done in the classroom on a daily basis and the core teachers perform them as needed, depending on who is available and dividing the tasks equally among all teachers. Any specific tasks that have to be done are based on Center rules and policies or state regulations and are clerical or routine in nature. In particular, because most of the tasks that are purportedly assigned are driven by a ministerial duty i.e., licensing requirements or Center policies, there is almost no discretion over such process. The assignment of daily duties represents control over work processes, consistent with Leads’ professional responsibility to provide guidance in the classroom, and not for the

purpose of controlling personnel decisions. In this context, because Leads have greater experience, their authority to assign classroom duties indicates that they are “lead” employees rather than supervisors. The record does not establish that Leads have the authority to direct the work of others, as there is no evidence that they can take corrective action against other employees for nonperformance or that Leads are subject to any adverse employment consequences for the actions or inactions of other employees.

2. Scheduling Of Shifts And Breaks

There is no evidence that Leads have significant control over scheduling the shifts of other core teachers. The core teachers work collaboratively to decide shift times and dates as schedules are based on the individual teacher’s availability and their own personal schedules. If there is a scheduling dispute that cannot be resolved, then it is determined by seniority or the Center Director resolves it. The Lead does not have significant control over the scheduling decisions as the Lead cannot unilaterally make such decisions. Further, per ECEC policy, all core teachers in a classroom are required to rotate among the three core teachers who start at each time. Therefore, the Lead, in enforcing any control over the scheduling, is not exercising independent judgment but simply deciding who starts an established shift on a specific day. Accordingly, any work schedule assignment appears to be a well-established routine process. Additionally, PERB has held that establishing hours of work generally does not require independent authority. *Unit Determination for Skilled Crafts Employees of the University of California* (1983) PERB Decision No. 242b-H, at p. 13.) Thus, the Lead’s involvement in scheduling does not involve a supervisory function.

Leads do not schedule breaks. Instead, all of the core teachers work collaboratively to determine when breaks are taken. Although Lead Teacher Winnie and Castillo testified that

they could prohibit teachers from taking breaks at certain times, there was no evidence that has ever occurred. However, if they had done so, it would be solely to keep within the ministerial act of maintaining appropriate staffing ratios which, does not require the use of independent judgment as *all* core teachers are responsible for ensuring that the classroom staff-per-student ratios are in compliance with the state licensing regulations.¹³ Ensuring that the schedule breaks are in accordance with the established practices or policies of the ECEC appears to be routine, leaving the Lead with almost no discretionary authority.

Finally, even if the University had delegated authority to determine schedules and breaks to the Leads, there is nothing in the record to show that the University has ever held Leads accountable for failing to take corrective action against core teachers for not adhering to scheduling and break-time rules. Accordingly, there is no evidence that Leads schedule shifts and breaks.

3. Training, Communication and Other Direction

As the most senior and experienced teachers, Leads provide on-the-job training to other teachers in the classroom that consists of reminding the other core teacher to perform certain tasks (e.g., advice on diaper changes). Such functions are done while Leads perform their

¹³ Such a decision does not require making a choice between two alternative courses of action. PERB has held in *The California State University, supra*, PERB Decision No. 351-H that the alleged supervisory sergeants' duty to make staffing decisions based on department staffing requirements is routine or clerical decision-making and does not require independent judgment. (*Id.* at p. 8) It appears that same is true for complying with student-to-teacher ratio requirements, particularly given that Leads do not have any greater responsibility than the other teachers. Indeed, when the Lead is not in the classroom either the Assistant Lead or Teacher I are "in charge" of the classroom and responsible for ensuring that the staffing ratios are met. The University argues that Leads are responsible if any other teacher in the classroom violates the legal requirement for ratios. However, no evidence was presented that a teacher has ever been *exclusively* held accountable for not meeting these ratios because of the actions of other staff who did not also meet the legal requirements, including when the Lead is not physically present in the classroom.

primary function of teaching. Counseling the other core teachers on performing certain functions does not constitute or entail authority to assign work. The Lead's role appears to be indicative of control over work processes and not a personnel decision as there is no evidence that such counseling has any impact on the other teacher's employment status. Leads counsel and give guidance to the other core teachers based on their greater experience teaching at the ECEC and their greater understanding of the processes within the specific classroom. Over time, these teachers become more self-sufficient and require less mentoring and coaching from the Leads. This level of counseling and guidance regarding daily duties—because of their greater experience and expertise—suggests that the Leads are more akin to “lead” employees than to supervisors. (*The California State University, supra*, PERB Decision No. 351-H at p. 14; see also, *LLNL, supra*, PERB Decision No. 246b-H, at p. 14 [supervisory status not established for employees that served as group leaders responsible for day-to-day work activities of employees and provides to employees “‘hands-on’ technical advice and direction”].) These efforts to counsel or direct the other core teachers is to fulfill the Lead's responsibility to ensure the classroom is a safe and healthy educational environment, not to act as a supervisor with the employer's interest in mind. (*Redlands Unified School District* (1982) PERB Decision No. 235 (*Redlands USD*), adopting Proposed Decision at pp. 10-12.)

Core teachers also remind or give guidance to Leads. For example, Lead Teacher Marguerite testified that all core teachers remind the others of NAEYC best practices to ensure that they meet the regulatory and accrediting standards. This demonstrates that core teachers all work collaboratively as a team, reminding and guiding each other, in the interest of providing the best environment for the children and not because any teacher has supervisor

status. Because of these shared responsibilities, it is evident that Leads do not have the authority to assign work to others.

As discussed before, nothing in the record suggests that Leads are specifically accountable or suffer any consequences for the performance of others in their group as a result of the responsibility to guide or counsel those individuals. Accordingly, there is no evidence that Leads have authority to direct the work of other employees.

H. Ordering Supplies And Classroom Budget

The Lead has the responsibility to order supplies that are needed for the classroom, both for basic needs and for activities. However, ordering supplies does not relate to or affect an employee's terms and conditions of employment. Control over this task is related to work processes and not personnel decisions. Core teachers in a classroom collaborate together and jointly determine what supplies are needed, and non-Leads may also order supplies. Leads are in charge of managing the classroom budget, however, this budget appears to be strictly for ordering supplies and is unrelated to personnel management.

I. Developing Classroom Curriculum

The University asserts that there is evidence of supervisory status because the Lead is responsible for developing the curriculum, implementing it and ensuring compliance with it. However, the overall curriculum standards are set by management at the ECEC level, not the classroom level. Development of the specific curriculum for a classroom is a work process and part of a Lead's duty as a teacher, not as a supervisor. There was no evidence showing that creating a curriculum has any impact on rank-and-file employee status or control over personnel policies. Additionally, the development of curriculum is not the sole responsibility of the Leads, but a collaborative effort by a team of teachers. There is no evidence that the

Leads have ever imposed their curriculum decisions on the teacher as a whole. Rather, the evidence shows that the Leads always get consensus on decisions about the curriculum. Accordingly, the process for defining the classroom curriculum does not support a conclusion that Leads are supervisors.

J. Assessing Children's Performance

The University argues that Leads oversee and review the other teacher's assessments, ensure that they are completed, assist and make modifications to other teachers' DRDP reports, and are required to participate in parent-teacher conferences with subordinate teachers. However, the responsibility to assess children's performance results is a work process that is related to the job of teaching, and is unrelated to personnel practices. Therefore, this aspect of the job is not supervisory.

The only leadership or oversight that Leads take is to remind the other teachers when they have to complete the DRDP or when they need to schedule parent-teacher conference. However, these responsibilities appear to be routine and do not require any independent judgment because the timelines are set by regulation.

Although the Lead provides guidance to other teachers on how to use the software assessment tool, and how to talk to parents during conferences, this responsibility is based on the Leads having more experience than other teachers. As newer teachers gain experience completing the assessments and holding conferences, they become more autonomous and require less guidance. In this context, because Leads oversee other employees based on their greater experience and technical expertise, they are considered "lead" employees rather than supervisors.

The assessments, like everything that occurs in the ECEC classrooms, are collaborative and completed as a team. Many of the Leads and core teachers review and provide input on assessments by other teachers because they all have their own experience with the families and children. Further, the goal of the ECEC is to have two teachers attend all parent conferences, even the Lead's conferences, and it can be a Teacher I and Assistant Lead, or any combination of the teachers. The reason for two teachers in such conferences is not for supervisor purposes but instead to provide two perspectives and also so that there is not a "he said, she said" situation which can happen if there are not any additional witnesses in the conference. Additionally, Leads are not always required to sit in on the conferences; it can be any other teacher in the classroom based on the schedule and who has the best connection with the parents.

The role that Leads play in assessing students is identical to that of the other teachers in the classroom and does not require the exercise of independent judgment regarding a personnel matter. Therefore, it is not supervisory function.

K. Lead Teachers Filling In For Center Director

Leads may serve as the acting Center Director if the Center Director is offsite. However, this evidence does not support the conclusion that Leads are supervisors for several reasons. Assistant Leads who have the relevant experience and possess a Site Supervisor Permit may also serve as acting Center Director. Also, serving as acting Center Director does not authorize the Lead to perform any of the enumerated supervisory duties set forth in HEERA. The acting Center Director's duties involve insignificant tasks that do not take away from classroom teaching activities, unless an issue arises (namely, an inspection from a licensing official), at which time, the Center Director must be contacted to return immediately

to address these issues. The acting Center Director's responsibility in that regard does not require independent judgment, but simply requires them to follow set procedures until the Center Director returns. Further, because the information provided during a licensing inspection is pre-arranged, it is related to work process and has nothing to do with personnel matters. Finally, there is no evidence regarding how frequently a Lead may be tasked with serving as acting Center Director. Accordingly, these functions do not confer supervisory status on the Lead when they serve as the acting Center Director.

L. Requests For Time Off

The Board has held that no supervisory status is found where the scheduling of vacations is "essentially ministerial, following a seniority system or other defined policy." (*State of California, supra*, PERB Decision No. 110c-S, at p. 14; see also *LLNL, supra*, PERB Decision No. 246b-H at p. 23 [same].) Nor is there supervisory status where the authority to approve or deny sick leave is based on well-defined departmental standards. (*Ibid.*) Routine granting of time off without the use of independent judgment is a ministerial function which precludes a finding of supervisory status. (See e.g., *Lincoln Unified School District* (1997) PERB Decision No. 1194, adopting Proposed Decision at p. 40.)

Vacation and other leaves for non-Leads are governed by the parties' MOU and are not subject to change. Leads have no involvement in approving vacation, sick leave or other time off requests. All such requests go directly to the Center Director who makes the decision without anyone else's input. In some classrooms, the core teachers will give the Leads a "heads up" but that is done out of professional courtesy and is not a requirement. Even if leave requests were directed to the Leads, there was no evidence to show that a Lead has ever possessed independent judgment to, for example, deny leave requests.

M. Grievance Form Naming Disputed Position As “Supervisor”

In 2014, Teamsters filed a grievance on behalf a bargaining unit employee that named a Lead as the unit member’s “immediate supervisor.” The University argues that there could be an inherent conflict if the Leads are included in the unit with employees they purportedly supervise. First, evidence that Teamsters named one Lead as a supervisor does not, by itself, mean those individuals meet the legal definition of “supervisors” under HEERA. And there is also no legal authority supporting the University’s contention. Secondly, even if Leads are labeled as supervisors in the grievance, the parties cannot divest PERB of its jurisdiction to determine whether employees are supervisors that are properly excluded by statute. (*Hemet Unified School District* (1990) PERB Decision No. 820, at pp. 4-5; *The Regents of the University of California* (1989) PERB Decision No. 722-H.) Finally, Leads are not involved in processing grievances, so even if they are named in a grievance, there is no conflict as there is no evidence that the University would be precluded from addressing such grievances (i.e., those filed against Leads) in accordance with the parties’ MOU.

N. Supervision Of Student Workers

The University argues that Leads supervise UCLA student workers because Leads are involved in assessing, hiring, evaluating, training, directing, and overseeing the work of student workers in the Leads’ classrooms.

The definition of an “employee” under HEERA is set forth in section 3562 subdivision (e), which provides, in part:

The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

The University has not provided any evidence to show that student workers meet the definition of “employees” under this definition. For example, there was no evidence that the student workers’ services are unrelated to educational objectives or that their educational objectives are subordinate to their services.¹⁴ Under HEERA, a disputed position’s supervisory status is necessarily contingent upon whether they supervise other “employees” by performing the supervisory criteria specified in section 3580.3 (e.g., hire, discharge, discipline or direct.) Accordingly, due to this lack of evidence, it cannot be established that Leads are the supervisors of student workers under HEERA.

The student workers are also not in the bargaining unit. Even if the Leads were found to supervise the student workers, the Leads would not be in the same unit as employees they purportedly supervise. Therefore, there would be no conflict of interest if the Leads were included in the unit. Further, PERB has held that “supervising” non-bargaining unit members does not qualify as a supervisory function for exclusion from the bargaining unit. (*CSU, supra*, PERB Decision No. 173-H at p. 44 [supervising librarians are not supervisors when most supervise non-unit employees].)

Even if it were established that student workers are HEERA “employees,” PERB precedent does not support a finding of supervisory status. PERB has held that classroom teachers who oversee and direct activities of teachers’ aides in the classroom are not

¹⁴ Center Director Ballentine’s testified that the students “need to have a job to get their financial award on campus.” Additional testimony was provided that student must be enrolled at UCLA to qualify for work study; however, not all student workers are paid and instead some receive credits for their work. Although it appears the student employment is contingent upon their status as students, there is insufficient evidence to meet the remaining criteria under section 3562, subdivision (e).

supervisors under the Educational Employment Relations Act (EERA)¹⁵ because any supervision is incidental to their professional duties as opposed to promoting the employer's interests as a supervisor. (*Redlands USD, supra*, PERB Decision No. 235, adopting Proposed Decision at pp. 3-4, 12-15 [alleged supervisory authority of a teacher over an aide is actually guidance "derived from his/her greater experience, and thus knowledge of the agency's mission and task"].) Similarly here, the Lead's duties are predominantly as a teacher and not as supervisor. Any level of authority exercised by the Leads is based on greater experience, which is indicative that they are "leads," not supervisors.

Based on the above, the evidence does not support the University's arguments that Leads possess supervisory authority over student workers. Accordingly, the University's arguments that Leads perform supervisory duties under HEERA with respect to student workers are rejected.

O. Supervisory Functions That Pose Conflicts Or Divided Loyalty

PERB held that where a purported supervisor may perform some supervisory functions (e.g., hiring and change of personnel status), if such powers have been effectively diffused among other employees pursuant to the principle of collegiality, the exclusion of the disputed supervisor is not warranted as "their inclusion in the unit will not pose conflicts of interest or divided loyalties." (*CSU, supra*, PERB Decision No. 173-H, at p. 39.)

In the present case all core teachers—including the Leads—share a certain degree of collegiality in their respective classrooms. Core teachers collaborate as a team to develop specific activities in the classroom curriculum in order to achieve a common educational goal; they review each other's DRDP entries for accuracy and to get input from all teachers

¹⁵ The EERA definition of a "supervisory employee" is codified at section 3540 subdivision (m) and is virtually identical to HEERA's definition.

regarding the children in the classroom, they work collaboratively to order supplies; and they decide schedule shifts on a consensus basis. When disputes do occur between teachers, they are usually addressed by the Center Director or by some other well-defined practice. Although Center Directors do not spend considerable time in each classroom overseeing the classroom staff, the core teachers function as team to accomplish the day-to-day responsibilities for providing a safe and healthy learning environment.

Leads carry greater experience in performing the overall responsibilities of the classroom; and they provide the necessary guidance and counseling to less senior staff. However, Leads have no authority to control or influence personnel decisions on matters falling within the scope of representations (i.e., wages, hours, and working conditions) or to adjust grievances. The Lead's primary responsibilities are substantially the same as other core teachers; and as such, the Lead's employment interests (i.e., in matters within scope of representation) are heavily aligned with the interests of core teachers. By excluding Leads from the CX Unit, they will not enjoy their rights to union representation and other contractual rights afforded to other teachers, including grievance and arbitration that is provided in the MOU. Accordingly, I cannot find that by uniting core teachers in the same bargaining unit, the alleged supervisory obligations of Lead would present conflicts of interests or divided loyalties with University management or with Teamsters' union activities.

II. University's Motion To Reopen Record

After the hearing in this matter and the close of evidence, the University discovered a March 2002 Settlement Agreement between the parties that provides that Lead Teachers ". . . shall remain outside of Cx [sic] bargaining unit based on supervisory status." UC's motion requests that PERB receive such settlement agreement into evidence or, in the alternative,

reopen the matter in order to allow testimony authenticating the Settlement Agreement.¹⁶ Teamsters opposes the motion.

In *Hemet Unified School District*, *supra*, PERB Decision No. 820, the union filed a unit modification petition to add the positions of, among others, confidential secretary and office manager positions to the established classified unit of employees. (*Id.* at p. 2.) The union and employer were parties to a negotiated agreement that specified that the office manager position is excluded from the unit. (*Id.* at p. 3.) The parties also reached a settlement agreement that explicitly agreed that the confidential secretary position must remain a confidential position—thereby also excluding it from the unit. (*Id.* at p. 4.) The Board found no merit in the employer’s contention that the parties’ existing agreement must bind the union from petitioning PERB from modifying the unit. (*Id.* at p. 5.) The Board determined that the parties’ agreements do not divest PERB of its authority to resolve any pending unit placement disputes. (*Ibid.*)

The relevant issue in the present matter is whether the Leads at UCLA are “supervisory employees” within the meaning of HEERA. As discussed above, the Leads are found not be statutory supervisors. Even if the 2002 Settlement Agreement was received into evidence (or judicially noticed) by PERB, the proffered evidence that the parties agreed to exclude Leads would not produce a different result than my determination that Leads are not statutory

¹⁶ A decision to reopen a case for further evidence is largely a matter of judicial discretion. (*Lyons v. Lyons* (1961) 190 Cal.App.2d 788). PERB has determined that the standard to be applied to motions to reopen the record and take new evidence is the same as that which governs requests for reconsideration. (*County of Riverside* (2010) PERB Decision No. 2132-M, at p. 6.) PERB Regulation section 32410 provides that reconsideration may be granted by the Board on the basis that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case. The University claims that its motion—which is supported by declaration—has met this standard.

supervisors. Given this conclusion, I find it unnecessary to rule on UC's motion to reopen the record.

CONCLUSION & PROPOSED ORDER

Lead Teachers act as "lead" persons in their respective classrooms, with no true supervisory authority over any fellow employee, no control over personnel policies, but with some control over work processes. The University has not met its burden to prove that the Lead Teachers exercise the requisite supervisory functions within the meaning of HEERA, section 3580.3. Additionally, even if Leads exercise some supervisory authority over core teachers, because their work is substantially similar to that of their purported subordinate core teachers, Leads must not be considered supervisors pursuant to HEERA, section 3580.3.

Based on the findings of fact, conclusions of law and the entire record herein, Teamsters' unit modification petition is **GRANTED**. Therefore, the Child Development Center Teacher II Supervisor classification (i.e., "Lead" or "Lead Teacher") at UCLA is hereby ordered to be added to the CX Unit.

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, 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 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, subds. (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).)