OVERRULED by amendment to EERA section 3540.1, subdivision (e), Stats. 2011, Ch. 674, and Center Unified School District (2014) PERB Decision No. 2379

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CASTAIC UNION SCHOOL DISTRICT, Employer, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 401, Exclusive Representative.	Case No. LA-UM-799-E Administrative Appeal PERB Order No. Ad-384 August 9, 2010

Appearance: Law Offices of Margaret A. Chidester & Associates by Margaret A. Chidester, Attorney, for Castaic Union School District.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Castaic Union School District (District) of a Board agent's administrative determination on a petition for unit modification filed by the California School Employees Association & its Chapter 401 (CSEA). The petition sought to add part-time playground monitor positions, also known as noon-duty aides, to the wall-to-wall classified bargaining unit represented by CSEA. The Board agent found a community of interest between the noon-duty aides and the classifications in the classified bargaining unit and ordered the unit modified to include noon-duty aides.

The Board has reviewed the administrative determination and the record in light of the District's appeal and the relevant law. Based on this review, the Board dismisses CSEA's petition for the reasons discussed below.[1]

[1] The District's request for oral argument is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The District employs 22 noon-duty aides, none of whom holds another classified position within the District. CSEA filed a unit modification petition seeking to add these noon-duty aides to the District's wall-to-wall classified bargaining unit. CSEA asserted the unit modification was appropriate based on a "[c]ommunity of interest between and among the employees and their established practices." The petition provided no facts regarding the job duties or working conditions of noon-duty aides.

The District opposed the petition, asserting it was not appropriate to add noon-duty aides to the unit. The District pointed out that the Education Code precludes noon-duty aides from classified employment status. For this reason, the District contends, noon-duty aides are not covered by the Educational Employment Relations Act (EERA or Act)[2] and therefore CSEA lacks standing to represent noon-duty aides. The District also argued that noon-duty aides lack a community of interest with classified employees because noon-duty aides serve at the pleasure of the District, do not require any particular education or experience, are not entitled to reemployment rights or notice of disciplinary action, work fewer than four hours per day, and are not subject to performance evaluations or hiring tests.

The Board agent denied the District's request for a formal hearing on CSEA's petition and issued an order to show cause why the petition should not be granted. Following the District's response, in which it laid out the same arguments as in its opposition to the petition, the Board agent issued an administrative determination ordering noon-duty aides added to the District's classified bargaining unit.

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

On appeal, the District argues that the Board's holding in *Pittsburg Unified School District* (1976) EERB[3] Decision No. 3 that employees in part-time playground positions have representational rights under EERA should be overturned because PERB case law and legislative enactments since 1976 establish that the Legislature did not intend to grant such rights to noon-duty aides. The District also reiterates its argument that noon-duty aides do not share a community of interest with the District's classified employees.

DISCUSSION

1. Status of Part-Time Playground Positions Under EERA

The District has argued throughout the proceedings in this matter that noon-duty aides have no representation rights under EERA because they are excluded by statute from the classified service. The Board agent rejected this argument based on *Pittsburg Unified School District, supra*, and *Fontana Unified School District* (2004) PERB Decision No. 1623, in which the Board placed noon-duty aides in a classified bargaining unit. Based on our review of relevant statutory provisions, PERB precedent and the legislative history of bills addressing part-time playground positions, we find merit in the District's argument.

a. Statutory Provisions

Education Code section 45103, subdivision (b)(4) provides:

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

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

It is undisputed that the District's noon-duty aides hold "part-time playground positions" and that no aide is simultaneously employed in a classified position with the District. Thus, the District's noon-duty aides are excluded from the classified service.

EERA section 3540.1, subdivision (j) states:

> 'Public school employee' or 'employee' means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

In *Pittsburg Unified School District, supra*, the majority decision addressed the interplay of this definition with the above Education Code provision:

> Unlike the Employer, we do not view Section 13581 of the Education Code,[4] which specifically excludes 'Noon Time Playground Supervisor' from the classified service, as precluding employees so designated from the exercise of rights guaranteed in this Act. In our view, this section of the Education Code must be considered in conjunction with the definition of employee contained in the Act. Employee is defined in the Act as '. . . any person employed by any public school employer except persons elected by popular vote[,] persons appointed by the Governor of this state, management employees, and confidential employees.' This definition is not limited in any way to certificated employees or employees in the classified service.

Member Gonzales dissented from this conclusion on several grounds. Most persuasively in our view, the dissent pointed out that EERA provides no guidance to PERB regarding bargaining unit placement of employees who are neither certificated nor classified. A review of the relevant EERA provisions leads us to conclude that only certificated or classified employees have representation rights under EERA.

EERA section 3540.1, subdivision (e) states:

> 'Exclusive representative' means the employee organization recognized or certified as the exclusive negotiating representative

[4] Section 13581 was renumbered to section 45103 effective April 30, 1977.

> of certificated or classified employees in an appropriate unit of a public school employer.

(Emphasis added.)

We interpret the plain language of the statute to mean that an exclusive representative may only represent a bargaining unit of certificated or classified employees and, therefore, cannot represent employees who do not fall into one of those two categories. The statute also indicates that an appropriate unit is one that contains only certificated or classified employees. Thus, it appears that the definition of "exclusive representative" limits the definition of "public school employee" to certificated or classified employees.

Support for this interpretation is found in EERA section 3545, which sets forth the criteria for determining an appropriate bargaining unit. The section refers to bargaining units of classified, certificated and supervisory employees (who may be either certificated or classified); it provides no guidance as to unit placement of employees who are neither certificated nor classified.

The Act's silence regarding the unit placement of employees who are neither certificated nor classified leads to the conclusion that the Legislature did not intend such employees to have representation rights under EERA. Accordingly, the District's noon-duty aides may not be placed in the classified employee bargaining unit because they do not fall within EERA's definition of a "public school employee."

b. PERB Precedent

As noted, in both *Pittsburg Unified School District*, *supra*, and *Fontana Unified School District*, *supra*, the Board ordered that noon-duty aides be included in a classified bargaining unit. However, the Board has treated short-term employees, who are also excluded from the

classified service by Education Code section 45103, subdivision (b), differently.[5] In *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, the classified employees' union sought to bargain terms and conditions of employment for short-term employees. Addressing the union's bargaining proposals for these employees, the Board reasoned as follows:

> Although this proposal relates to wages and hours, the employees for whom CSEA seeks to negotiate are outside the bargaining unit which it represents. CSEA is certified as the exclusive representative of the classified employees. Section 45103 of the Education Code expressly excludes 'short-term' employees from the classified service. Hence, these proposals do not concern positions over which CSEA has authority to negotiate. The Board, therefore, finds that proposals 17.1.1 through 17.1.5 are nonnegotiable.

(Fn. omitted.)

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[5] Education Code section 45103, subdivision (b) states in full:

> (1) Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be a part of the classified service.
>
> (2) Apprentices and professional experts employed on a temporary basis for a specific project, regardless of length of employment, shall not be a part of the classified service.
>
> (3) Full-time students employed part time, and part-time students employed part time in any college workstudy program, or in a work experience education program conducted by a community college district pursuant to Article 7 (commencing with Section 51760) of Chapter 5 of Part 28 and that is financed by state or federal funds, shall not be a part of the classified service.
>
> (4) Part-time playground positions shall not be a part of the classified service, where the employee is not otherwise employed in a classified position. Part-time playground positions shall be considered a part of the classified service when the employee in the position also works in the same school district in a classified position.

This paragraph is susceptible to two interpretations: (1) CSEA had no authority to bargain on behalf of short-term employees because they were not in the classified bargaining unit; or (2) CSEA had no authority to bargain on behalf of short-term employees because they were statutorily excluded from the classified service. We find the latter interpretation more persuasive in light of the Board's specific mention of Education Code section 45103. Had the Board based its conclusion solely on the fact that short-term employees were not in the CSEA-represented bargaining unit, there would have been no need to reference the Education Code provision. That the Board did so indicates that its conclusion was based on the statutory exclusion of short-term employees from the classified service.

Given that both groups are excluded from the classified service, we see no reason why noon-duty aides should have representation rights under EERA when short-term employees do not. Therefore, following *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District*, *supra*, we conclude that noon-duty aides lack representation rights under EERA because of their statutory exclusion from the classified service.

c. Legislative History

Our view that noon-duty aides are not "public school employees" granted representation rights under EERA is further supported by the legislative history of a series of bills addressing the Education Code's exclusion of "part-time playground positions" from the classified service.

Prior to January 1, 2003, all part-time playground positions were excluded from the classified service. As a result of this blanket exclusion, classified employees who spent part of their workday in part-time playground positions were denied classified status for their playground monitor time. Beginning in 1987, bills were introduced to grant classified

employees classified status for this time. The first four of these bills, Senate Bill (SB) 1270 (1987), Assembly Bill (AB) 2873 (1994), AB 2409 (1998), and AB 1490 (1999) were vetoed by the Governor. In 2000, AB 1780 proposed to remove the exclusion entirely and make all part-time playground positions classified employees. Governor Gray Davis vetoed this bill, stating in relevant part:

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

(Governor's veto message to Assem. on Assem. Bill No. 1780 (Sept. 7, 2000) Recess J. No. 15 (1999-2000 Reg. Sess.) p. 9134.)

AB 2849 (2002) amended Education Code section 45103, subdivision (b)(4) to its current form, which excludes from the classified service only those in part-time playground positions who hold no classified position within the same district. Section 1 of the bill stated:

> It is the intent of the Legislature that, by granting classified service status to employees who serve in part-time playground positions and who also work in the same school district in a classified position, parents and guardians who volunteer in playground positions are not discouraged from volunteering.

(Stats. 2002, ch. 1100, § 1.)

AB 2849 thus extended the classified status of classified employees who perform some playground duty but also continued to encourage community members to volunteer for part-time playground positions. In light of Governor Davis' veto message to AB 1780, we conclude the Legislature intended for school districts to retain their existing flexibility regarding staffing and compensation of part-time playground positions filled by volunteers. Interpreting EERA to grant representation rights to volunteer part-time playground positions would eliminate that flexibility by mandating negotiations over such issues as salary and

benefits, job protections, and the impact of staffing changes. We find no compelling reason to undermine the Legislature's intent and potentially impose significant new expenditures on school districts.

In sum, we hereby overrule *Pittsburg Unified School District*, *supra*, and *Fontana Unified School District*, *supra*, and hold that persons in "part-time playground positions" who do not hold a classified position in the same school district are not "public school employees" under EERA and therefore have no representation rights under the Act. Accordingly, we dismiss CSEA's petition to add the District's noon-duty aides to its classified bargaining unit.

We recognize that classified bargaining units may currently exist which include part-time playground positions. Because of the potential disruption to stable employer-employee relations that would result from application of this decision to such units, PERB will only apply this decision prospectively. (*Palo Alto Unified School District, et al.* (1979) PERB Decision No. 84; *Peralta Community College District* (1978) PERB Decision No. 77.) Consequently, this decision does not affect existing units that include part-time playground positions.

2. Community of Interest

Even if the District's noon-duty aides were entitled to representation under EERA, we would nonetheless dismiss CSEA's petition because the record fails to establish a community of interest between the noon-duty aides and employees in the District's classified bargaining unit.

A finding of community of interest is based on consideration of factors such as the extent employees have similar qualifications, training and skills; job duties, and the extent they are related to or integrated with the functions of other employees; salary and benefits and other compensation relationships; hours of work; supervision; interaction with other employees; and

the existence of purposes common to other employees. No single factor is controlling. (*Los Angeles Unified School District* (1998) PERB Decision No. 1267; *San Francisco Community College District* (1994) PERB Decision No. 1068; *Marin Community College District* (1978) PERB Decision No. 55; *Los Angeles Unified School District* (1976) EERB Decision No. 5.)

In its petition, CSEA states that inclusion of the noon-duty aides in the classified bargaining unit is proper based on a "[c]ommunity of interest between and among the employees and their established practices." In contrast, the District states that differences in supervision, hiring practices, hours of work, salary, benefits, education, experience, reemployment rights and disciplinary action between noon-duty aides and other positions in the classified bargaining unit demonstrate that noon-duty aides do not have a community of interest with employees in the classified unit. There are no other facts included in the record. There is no evidence of job duties, salary schedules, supervision, hiring or disciplinary procedures regarding noon-duty aides and classified employees. The Board agent's determination of community of interest based solely on findings in prior decisions is insufficient to support a community of interest in the present case. Therefore, we find no evidence to support a community of interest between the noon-duty aides that are the subject of this petition and the District's classified employees represented by CSEA. This lack of evidence provides an alternative ground for dismissal of CSEA's petition for unit modification.

ORDER

The unit modification petition in Case No. LA-UM-799-E is hereby DISMISSED.

Member McKeag joined in this Decision.

Member Wesley's concurrence and dissent begins on page 11.

WESLEY, Member, concurring and dissenting: I concur with the majority's determination that the lack of evidence of community of interest between the noon-duty aides and the Castaic Union School District's classified employees represented by the California School Employees Association & its Chapter 401, provides grounds for dismissal of the petition. I respectfully dissent, however, from the majority's ruling that the non-classified status of noon-duty aides[1] renders the position exempt from the Educational Employment Relations Act (EERA or Act) and precludes noon-duty aides from being included in a bargaining unit with classified positions where a sufficient community of interest otherwise exists.

As noted by the majority, Education Code section 45103(a) requires school districts to classify most non-certificated employees and positions. These employees and positions are deemed the classified service under the Education Code. The establishment of the classified service under Education Code section 45103 was intended to impose an obligation to classified

[1] The Education Code refers to noon-duty aides as part-time playground positions. Education Code section 45103 states, in part:

> (a) The governing board of any school district shall employ persons for positions not requiring certification qualifications. The governing board shall, except where Article 6 (commencing with Section 45240) or Section 45318 applies, classify all of these employees and positions. The employees and positions shall be known as the classified service.
>
> (b)(4) Part-time playground positions shall not be a part of the classified service, where the employee is not otherwise employed in a classified position. Part-time playground positions shall be considered a part of the classified service when the employee in the position also works in the same school district in a classified position.

employees that cannot be avoided by use of contracts. (*California School Employees Assn. v. Willits Unified School Dist.* (1966) 243 Cal.App.2d 776.) Consequently, classified employees enjoy a number of benefits guaranteed by statute.[2] (*Seymour v. Christiansen* (1991) 235 Cal.App.3d 1168.)

Education Code section 45103(b)(4) excludes noon-duty aides from these statutory benefits under the Education Code, unless the employee is simultaneously employed in a classified position. However, the Board in *Pittsburg Unified School District* (1976) EERB Decision No. 3 and *Fontana Unified School District* (2004) PERB Decision No. 1623, found that the Education Code does not operate to withhold the rights of all non-classified public school employees under EERA. Moreover, EERA section 3540.1(j) defines a public school employee as:

> [A]ny person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(Emphasis added.)

While the Education Code and the cited legislative history of Assembly Bill 2849, operate to limit the burden on school districts by limiting the guarantee of certain statutory benefits to noon-duty aides, neither suggests that this was intended to overturn the holdings in *Pittsburg Unified School District, supra,* and *Fontana Unified School District, supra,* or otherwise restrict non-classified employees rights under EERA.

[2] For specific benefits guaranteed to classified employees by statute see, for example, Education Code sections 45203 (paid holidays), 45197 (paid vacation), 45191 (sick leave), 45128 (increased pay for overtime) and 45113 (job security).

The definition of "exclusive representative" under EERA section 3540.1(e)[3] does not serve to negate representation rights to all public school employees defined under the Act unless those employees are certificated or classified.

Consequently, I would find that EERA and the Education Code can be harmonized to grant noon-duty aides collective bargaining rights under EERA. Therefore, I conclude that noon-duty aides may properly be included in units with classified service employees where a sufficient community of interest otherwise exists.

[3] EERA section 3540.1(e) defines "exclusive representative" as:

> [T]he employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.