STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ARCADIA UNIFIED SCHOOL DISTRICT, Employer, and ARCADIA TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and ARCADIA PUPIL SUPPORT SERVICES ASSOCIATION, Employee Organization.	)	Case Nos. LA-R-278 LA-UC-17 PERB Decision No. 93 May 17, 1979

Appearances: Daniel C. Cassidy, Attorney (Paterson & Taggart) for Arcadia Unified School District; Charles R. Gustafson, Attorney for Arcadia Teachers Association, CTA/NEA; Thomas C. Agin (California Pupil Services Employment Relations Corp.) for Arcadia Pupil Support Services Association.

Before Gluck, Chairperson; Gonzales, Member.

DECISION

This case comes before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Arcadia Unified School District (hereafter District) to the attached hearing officer proposed decision. For the reasons set forth below, the Board affirms the hearing officer's finding that a unit consisting of counselors, psychologists, nurses, speech therapists, and reading specialists is appropriate within the meaning of section 3545(a) of the

Educational Employment Relations Act (hereafter EERA).[1] The Board also denies the District's request for oral argument and reopening the record.

DISCUSSION

In this case, the Arcadia Pupil Support Services Association (hereafter APSSA) filed a request for recognition in a proposed unit of counselors, psychologists, nurses, speech therapists, and reading specialists on April 1, 1976. No other employee organization intervened, but the District contested the appropriateness of APSSA's proposed unit. On September 30, 1976, the District and the Arcadia Teachers Association (hereafter ATA) jointly petitioned PERB for a unit modification. The petition sought to add the classifications of counselor, psychologist, nurse, speech therapist, and reading specialist to the existing unit of full-time teachers, librarians, and temporary teachers, in which ATA had been voluntarily recognized as the exclusive representative by the District on August 2, 1976. A hearing was held on March 21 and

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

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

30, 1977, on APSSA's petition for recognition and the unit modification petition filed jointly by ATA and the District, in which all three parties participated.[2]

This case poses two issues. First, there is a threshold question as to whether the unit modification petition filed by the District and ATA, which seeks to add classifications covered by APSSA's request for recognition, should be entertained by the Board. The Board must decide if, when one employee organization has filed an original request for recognition covering specific classifications pursuant to section 3544,[3] another organization can appropriately assist a claim to represent those classifications by filing a unit modification petition seeking to add them to its unit. The

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[2]The procedural history of this case is more fully set forth in the attached proposed decision of the hearing officer. The Board hereby adopts that procedural history.

[3]Section 3544 provides in pertinent part:

> An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees.

second issue is the unit placement of the counselors, psychologists, nurses, speech therapists, and reading specialists.

With respect to the first issue, although the applicable statute[4] and PERB regulation[5] provide no explicit

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[4]Section 3541.3(e) provides that the Board shall have the power and duty:

> To establish by regulation appropriate procedures for review of proposals to change unit determinations.

[5]PERB rules are codified at California Administrative Code, title 8, section 31000 et seq.

Former PERB rule 33260, applicable at the time the present unit modification petition was filed, provides:

> (a) An employee organization, an employer, or both jointly, may file with the regional office a petition for a change in unit determination pursuant to Section 3541.3(e) of the Act.
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> (b) The petition shall contain the following information:
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> (1) The name, address and county of the employer;
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> (2) The name and address of the employee organization, and the name, address and telephone of the agent to be contacted;
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> (3) A description of the established unit;
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> (4) The approximate number of employees in the established unit;
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> (5) The date voluntary recognition was

limitations on unit modification procedures,[6] the Board finds that such proceedings are implicitly limited by the statutory and regulatory scheme for initial unit determination proceedings. When an employee organization wishes to assert a claim to represent employee classifications covered in another

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extended or the existing certification was issued;

(6) A description of the proposed unit;

(7) The approximate number of employees in the proposed unit;

(8) The name and address of any other employee organization known to claim to represent any employees affected by the proposed change in the established unit;

(9) A concise statement setting forth the reasons for the request to change the unit determination.

(c) A copy of a petition filed by an employee organization or an employer alone shall be concurrently served on the other party. A statement of service shall be sent to the regional office with the petition.

(d) The employer shall post a copy of the notice conspicuously on all employee bulletin boards in each facility of the employer in which members in the established unit and in the unit claimed to be appropriate are employed. The notice shall remain posted for at least five workdays.

On January 18, 1979, this rule was replaced by PERB rules 33260-32265.

[6] In contrast, the recently adopted PERB rules on unit modifications set forth, in detail, the circumstances under which unit modification petitions may be filed in rule 33261(a) and (b):

(a) A recognized or certified employee organization may file with the Regional Office a petition for a change in unit

determinations pursuant to section 3541.3(e) of the Act.

(1) To add to the unit classifications which existed prior to the recognition or certification of the current exclusive representative of the unit, provided such petition is filed at least 12 months after the date of said recognition or certification;

(2) To add to the unit new classifications created since recognition or certification of the current exclusive representative.

(3) To reflect changes in the identity of the exclusive representative other than a new or different representative.

(4) To divide an existing unit into two or more appropriate units.

(b) A recognized or certified employee organization, an employer, or both jointly may file with the Regional Office a petition of change in unit determination pursuant to selection 3541.3(e) of the Act.

(1) To delete classifications no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit;

(2) To update classification titles where the duties are not changed sufficiently to cause deletion from the established unit;

(3) To make technical changes to clarify the unit description.

Also see Board Resolution No. 6, adopted by PERB at its July 6, 1976, public meeting and cited by the District and ATA in filing their unit modification petition. It provides:

> Petitions for changes in unit determinations pursuant to Section 3541.3(e) of the Act will be entertained by the Educational Employment Relations Board under the following circumstances:
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> 1. Where both parties jointly file the petition; or

organization's original request for recognition, section 3544.1(b) provides that it may do so by submitting a competing claim of representation within 15 workdays of the posting of notice of the original request.[7] Or, if the organization has already filed a request for recognition, it may, pursuant to PERB rule 33100(b), amend it to cover other classifications,

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2. Where there has been a change in the circumstances which existed at the time of the initial unit determination.

This resolution does not bind the Board in deciding whether a unit modification petition is appropriately filed. El Centro School District (1/2/79) PERB Order No. Ad-51.

[7]Section 3544.1(b) provides:

> The public school employer shall grant a request for recognition filed pursuant to section 3544 unless:
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> . . . . . .
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> Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Section 3544.7, unless subdivisions (c) or (d) of this section apply;. . .

provided that it does so before it receives the employer's decision on the original request.[8]

It is thus clear that under the EERA and applicable rules, all claims to represent employees who have already been petitioned for by another organization must be filed within a limited period after the initial petition has been filed. This indicates a basic intent to place a time limit on the filing of competing petitions. Claims to represent the same employees should be resolved simultaneously; the time limits imposed on interventions preclude the possibility of litigating conflicting claims at different times. This statutory scheme would be thwarted if a competing organization could make a formal claim of representation at a later time through some other procedure.

In the present case, ATA used none of the available initial representation procedures to indicate its interest in representing the classifications requested in APSSA's initial petition for recognition, although nothing prevented it from doing so. Instead, weeks after it should have made its purported competing claim of representation known, it joined the District in filing a unit modification petition seeking to add those positions to its newly recognized unit. In essence, ATA attempted to intervene in APSSA's requested unit without

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[8]Rule 33100(b) provides in pertinent part:

> A request for recognition or intervention may be amended to add new job descriptions to a proposed unit at any time prior to receipt by the requesting party of the employer decision served pursuant to section 33190. . . .

following the intervention procedures set forth in the EERA and the Board's rules.

If the Board allowed unit modification procedures to be used in this way, an employee organization, with the cooperation of the employer, could nullify the statutory 15 workday time limit for filing competing claims of representation. The Board will not allow this use of unit modification procedures to circumvent the statutory requirements for interventions.

The Board also notes that unit modification procedures, under former PERB rule 33260, do not provide for notice to or participation by any employee organization other than the exclusive representative. For example, in this case APSSA, although vitally concerned with the representation of the classifications it petitioned for, was not technically a party to the procedure chosen by the District and ATA for resolving the unit question. This significant omission in the rule governing unit modification procedures provides an additional indication that such procedures were not intended to be used to add classifications which another employee organization formally claims to represent through an original petition for recognition. The procedures initiated by original recognition petitions, which provide protection for all interested parties,[9] were intended to and should be used to resolve

[9]See PERB rules 33050-33235. See specifically rules 33050(c), 33070(c), 33090, and 33100(h), all of which require that notice be given to all parties, and compare with former PERB rule 33260(c) which required that notice be given only to "the other party."

competing representational claims such as that in the present case.

El Centro School District, supra, PERB Order No. Ad-51, PERB's most recent decision on unit modifications, provides another indication that the situations in which a unit modification petition seeking to add classifications is appropriate are limited. Although the Board said that a unit modification petition "must be entertained by the regional director when the requirements of rule 33260 and those imposed by statute have been satisfied," it went on to state that the fact that the employee organization "did not originally seek to represent certain of the subject employees now sought in its petition should not automatically bar the current petition," and continued with a careful analysis of the specific reasons in the case for allowing the exclusive representative to add classifications it could have requested in its original petition for representation. Among them were that:

> More than a year and a half has passed since the original voluntary recognition occurred . . . No other employee organization has filed a petition to represent any certificated employees in the District. There is no evidence presented to the Board that either the original petiton or the instant petition for change was designed to or does interfere with any employee's right of self organization.10

The situation in the present case falls outside of those limitations. Not only were the voluntary recognition and the

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[10]El Centro School District, supra, PERB Order No. Ad-51, at pp. 6-7.

petition for unit modification almost simultaneous, but another employee organization had already petitioned to represent the very classifications sought to be added.

For the foregoing reasons, the Board finds that a unit modification proceeding is not an appropriate means of asserting a claim of representation in the face of an outstanding petition for recognition. It therefore dismisses the unit modification petition filed by the District and ATA.

II

There remains the issue raised by APSSA's original request for recognition and the District's continued doubt of the appropriateness of the unit. Since a record on the classifications in question has been made and APSSA and the District had a full opportunity to participate in the hearing,[11] the Board will treat this case as a unit determination proceeding on APSSA's petition for recognition.[12]

This case differs from many early unit determination cases

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[11]ATA was also represented at the hearing. However, since the unit modification petition has been dismissed, and ATA did not intervene in APSSA's petition for recognition, ATA was not formally a party in the proceeding. Hence, under PERB rule 33480, which provides that any employee organization which was a party to the representation hearing may appear on the election ballot, ATA is not eligible to appear on the election ballot in this unit.

[12]The Board takes this action pursuant to PERB rule 32320(a)(2), which provides that the Board itself may:

> Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers appropriate.

in that the Board is faced with an already existing unit, created by the District's voluntary recognition of ATA. The Board will not disturb an existing unit when its composition is not at issue.[13] In this case, the composition of ATA's unit is not before the Board at this time since the validity of the voluntary recognition has not been placed at issue and the petition for unit modification has been dismissed. Therefore, the Board will not examine the make up of ATA's unit, nor will it, on its own motion, add classifications to such an already established unit.

Thus, the only issue before the Board at this time is whether a unit consisting of counselors, psychologists, nurses, speech therapists, and reading specialists is appropriate within the meaning of section 3545(a). In examining past Board decisions on the unit placement of non-teaching certificated employees, it is readily apparent that the majority of the Board has consistently, when presented with a choice, found a unit which includes both classroom teachers and pupil support

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[13]See Palo Alto Unified School District (1/9/79) PERB Decision No. 84, in which the majority of the Board, although acknowledging that an overall unit of classroom teachers and substitutes would be appropriate, refused to interfere with the already established unit of regular classroom teachers by adding substitutes.

Member Gonzales notes that he dissented from the majority's decision in Palo Alto that either an overall unit of teachers including substitutes or a separate unit of substitutes is an appropriate unit. However, he agrees that the Board should not interfere with the composition of established units in the absence of a unit modification petition or some allegation that the unit was established unlawfully.

services personnel to be appropriate,[14] just as the Board, when presented with a choice of more than one requested grouping of employees, has generally tended to hold the larger homogeneous group appropriate.[15]

But when the only issue before the Board is whether one particular requested unit is appropriate, the Board must decide whether that proposed unit, standing on its own, meets the statutory criteria for an appropriate unit for negotiating. This comports with the Board's procedure in Palo Alto Unified School District, supra, PERB Decision No. 84; after the majority of the Board decided that it could not place the

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[14]See Los Angeles Unified School District (11/24/76) EERB Decision No. 5; Grossmont Union High School District (3/9/77) EERB Decision No. 11; Oakland Unified School District (3/28/77) EERB Decision No. 15; Pleasanton Joint Elementary School District (9/12/77) EERB Decision No. 24; Placer Union High School District (9/12/77) EERB Decision No. 25; Washington Unified School District (9/14/77) EERB Decision No. 27; Paramount Unified School District (10/7/77) EERB Decision No. 33.

Member Gonzales notes that he has consistently dissented from these decisions. He believes, as set forth in detail in his dissent in Grossmont, supra, that pupil support service employees have a separate community of interest from other certificated employees which warrants their inclusion in a separate unit. Therefore, he would find a separate unit appropriate in this case even if the Board had the option of including the disputed positions in the established unit.

[15]See Sacramento City Unified School District (9/20/77) EERB Decision No. 30, in which the Board stated:

> A separate unit is not warranted merely because a group of employee share a community of interest among themselves, when that homogeneous group forms only a part of a larger essentially homogeneous group sharing similar conditions of employment and job functions.

substitutes in the overall teachers unit, it examined the substitutes as a group to determine whether they met the statutory standards for an appropriate unit. Thus, the fact that the majority has, in previous decisions, found an overall certificated unit appropriate does not preclude the Board from finding a separate unit of non-instructional certificated employees appropriate under the circumstances of this case.

In the present case, the hearing officer found, and the Board agrees, that the proposed unit of counselors, psychologists, nurses, speech therapists, and reading specialists is appropriate within the meaning of section 3545(a). This section sets forth three criteria for finding a proposed unit appropriate: (1) community of interest, (2) past practices, including the extent to which the employees belong to the same employee organization, and (3) the effect of the size of the unit on the efficient operation of the district.[16]

The hearing officer found that the classifications in question share a community of interest among themselves, and the Board affirms that finding.

The record contains little evidence on past practices and there are no membership figures in the record. However, the overwhelming majority of the employees in the disputed classifications appear to support APSSA, as evidenced by APSSA's 80 percent showing of interest. In addition, the record indicates that the majority of employees in each of the classifications in question support APSSA.

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[16]Section 3545(a) is quoted in full at note 1, ante.

The District claims that its efficiency of operations will be impaired if a separate unit is formed. However, given the speculative nature of the District witness' testimony and the fact that the record indicates that at one point the District was willing to recognize APSSA if it would restrict its claim to counselors and psychologists, the Board finds that the proposed unit will not impair the District's efficiency of operations. Negotiating with a unit of 33 employees is surely not more burdensome to the District than negotiating with a unit of 18 counselors and psychologists, which the District was previously willing to do.

Given the community of interest among the employees in that proposed unit and the fact that the evidence with respect to the other two stationary criteria does not go against finding the proposed unit appropriate, the Board finds that a unit consisting of the classifications of counselor, psychologist, nurse, speech therapist, and reading specialist is an appropriate unit within the meaning of section 3545(a).

The District argues that the pupil support services employees should not be placed in a separate unit merely because the District made a "procedural error" in recognizing ATA before the unit question was resolved. First, the District's so-called "procedural" action had the substantive effect of resolving the unit question with respect to those employees in the voluntarily recognized unit. A unit in place in a district cannot help but have an impact on the configuration of remaining units in that district.

Further, the District does not sufficiently appreciate the fact that the dispute in this case involved not merely the unit placement of the five classifications in question but also the question of who would represent them. When the only issue is a dispute between one employee organization and an employer as to the appropriate unit configuration, a consensual unit modification procedure, following a voluntary recognition, may be a reasonable means of expediting negotiations.[17] But when more than one employee organization is competing to represent the same employees, the statutory procedures designed for this purpose and which protect the rights of all the employee organizations should be used in the absence of an agreement among all parties. The District's "procedural error" was made in an effort to circumvent such procedures, and the Board, as discussed above, will not condone such circumventions.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

1. A unit consisting of counselors, psychologists, nurses, speech therapists, and reading specialists is appropriate for negotiating in the Arcadia Unified School District provided that an employee organization becomes the exclusive representative.

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[17]See, e.g., Campbell Union High School District (8/17/78) PERB Decision No. 66, in which, pursuant to a consent election agreement, disputes as to the supervisory and confidential status of certain classifications were resolved in a unit modiification hearing. There was no dispute as to which employee organization would represent the classifications if they were not found to be confidential or supervisory.

2. If the Arcadia Unified School District does not grant voluntary recognition to the Arcadia Pupil Support Services Association, the regional director shall conduct a representation election in the unit found appropriate in this decision. Because the composition of the unit the Board has found appropriate is the same as that which the Arcadia Pupil Support Services Association seeks, no new showing of support by that organization will be necessary.

By Raymond J. Gonzales, Member

Harry Gluck, Chairperson

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: ARCADIA UNIFIED SCHOOL DISTRICT, Employer, and ARCADIA TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and ARCADIA PUPIL SUPPORT SERVICES ASSOCIATION, Employee Organization.	CASE NOS. LA-R-278 LA-UC-17 PROPOSED DECISION CONSOLIDATED UNIT CLARIFICATION AND REPRESENTATION DECISION February 24, 1978

Appearances: Daniel C. Cassidy, Attorney (Paterson & Taggart), for Arcadia Unified School District; Charles R. Gustafson, Attorney, for Arcadia Teachers Association, CTA/NEA: Thomas C. Agin (California Pupil Services Employment Relations Corp.) for Arcadia Pupil Support Services Association.

Proposed Decision by David Schlossberg, Hearing Officer.

PROCEDURAL HISTORY

Arcadia Unified School District (hereinafter "District") is comprised of eight elementary schools, three junior high schools and one high school and continuation school. The average daily attendance is approximately 10,000. There are approximately 435 certificated employees, including 14 counselors, four psychologists, two nurses, four speech therapists and nine reading specialists.

On April 1, 1976, the Arcadia Teachers Association, CTA/NEA (hereinafter ATA), filed with the District a request for recognition as the exclusive representative for a unit consisting of all certificated employees excluding management, confidential and supervisory employees, high school counselors, junior high counselors, elementary counselors, psychologists, nurses, speech therapists and reading specialists.

Also on April 1, 1976, the Arcadia Pupil Support Services Association (hereinafter APSSA), filed with the District a request for recognition as the exclusive representative for a unit consisting of counselors, psychologists, nurses, speech therapists and reading specialists.

On April 12, 1976, the District posted notices of both requests.

On May 3, 1976, the District advised the Public Employment Relations Board (hereinafter PERB, formerly known as the Educational Employment Relations Board or EERB) that it doubted the appropriateness of the units described in both petitions. The District has consistently maintained that there is one appropriate unit, consisting of all certificated employees except management, confidential and supervisory employees.

On June 29, 1976, ATA petitioned PERB for a hearing to determine the appropriateness of its proposed unit. APSSA made a similar request on July 2, 1976.

In a letter to the District dated July 30, 1976, ATA suggested that an attached recommended resolution would enable the District to grant ATA recognition while providing a means of resolving the

dispute regarding the appropriateness of the units proposed by ATA and APSSA. This recommended resolution provided that the District would recognize ATA as the exclusive representative for the contract certificated employees in the unit, including classroom teachers, librarians and temporary teachers, and excluding certain specified employees.[1] The resolution further provided that ATA and the District agreed to jointly petition PERB for a unit clarification hearing to determine if counselors, psychologists, nurses, speech therapists and reading specialists should be included in the unit with classroom teachers, librarians and temporary teachers.

During its regular meeting on August 2, 1976, the District's Board of Education, citing PERB's July 6, 1976 resolution regarding unit determination,[2] voted to recognize ATA as the

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[1] The exclusions are: superintendent, associate superintendent; assistant superintendent, elementary education and personnel; assistant superintendent, business services, instructional consultant; instructional materials consultant; elementary curriculum and MGM coordinator; special services consultant; district librarian; school principals; assistant school principals; director of child welfare and attendance; director of accounting and budgeting; director of purchasing; director of food services; director of operations; director of maintenance; director of transportation; district music coordinator; day-to-day substitutes; non-contract summer school and extra curriculum employees; and non-contract hourly employees.

[2] EERB Resolution No. 6, adopted on July 6, 1976, states:

"Petitions for changes in unit determinations pursuant to Section 3541(e) of the Act will be entertained by the Educational Employment Relations Board under the following circumstances:

1. Where both parties jointly file the petition; or
2. Where there has been a change in the circumstances which existed at the time of the initial unit determination."

exclusive representative and to continue to seek a PERB determination of the appropriateness of APSSA's proposed unit, in accordance with the July 30, 1976 ATA letter.

In a letter dated August 3, 1976, the District, citing PERB's July 6, 1976 resolution, advised the PERB Regional Office of the Board of Education's August 2, 1976 action; petitioned PERB for a unit clarification to determine whether counselors, psychologists, nurses, speech therapists and reading specialists should be included in the unit with the teachers; stated that it continued to doubt the appropriateness of the unit requested by APSSA; and indicated that it did not desire a representation election. This letter included a copy of the Board of Education's August 2, 1976 motion and ATA's July 30, 1976 letter (including the attached recommended resolution).

In a letter dated August 26, 1976 to the Board of Education, APSSA objected to the District's August 2, 1976 action on the basis that PERB's July 6, 1976 resolution required the mutual consent of all parties involved and APSSA had not been consulted. This letter also indicated that APSSA would be willing to meet with the District and ATA to attempt to reach an interim agreement of mutual consent.

On September 30, 1976, the District and ATA jointly filed with the PERB Regional Office a petition for unit clarification, seeking a determination whether counselors, psychologists, nurses, speech therapists and reading specialists should be included in

the established unit. The established unit as described in this petition is the same unit described in ATA's July 30, 1976 recommended resolution, except that the director of data processing is listed as an additional exclusion in the petition for unit clarification.

This matter was heard by Hearing Officer Jim Romo on March 21 and 30, 1977, in Arcadia, California.

At the hearing APSSA initially moved to set aside the hearing on the basis that a hearing on the appropriateness of the unit petitioned for by APSSA was out of order since the District had previously recognized ATA as the exclusive representative of the other employees not covered in APSSA's petition. In the alternative, APSSA moved that if a hearing was to be held on the appropriateness of the unit proposed by APSSA, then ATA should be dismissed as a party to the hearing. Hearing Officer Romo denied both motions.

At the start of the second day of hearing, APSSA indicated agreement that the proceeding was properly classified as a unit clarification hearing. It maintained, however, that when the District recognized ATA as exclusive representative for the teachers, it in essence established two separate units; and whereas APSSA and the District had held discussions and negotiations as well, there was no reason to collapse these two presently separate units into one.

During the hearing the District moved for "judgment on the pleadings" on the basis that the facts in this matter did not differ from those set out in Grossmont Union High School District, EERB Decision No. 11 (March 9, 1977), in which the Board included pupil services employees in the same unit with teachers. Hearing Officer Romo deferred ruling on this motion. This motion is hereby denied.

ISSUE

The issue is whether counselors, psychologists, nurses, speech therapists and reading specialists should be included in the same negotiating unit as teachers, or whether they should be placed in a separate negotiating unit.

DISCUSSION

Counselors, psychologists and nurses are classified by Education Code Section 33150(3) as "pupil services employees." The decisions rendered by the Board itself have consistently held that pupil services employees should be placed in the same negotiating unit as regular classroom teachers.[3] Speech

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[3] See Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976; Grossmont Union High School District, EERB Decision No. 11, March 9, 1977; Oakland Unified School District, EERB Decision No. 15, March 28, 1977; Pleasanton Joint Elementary School District, EERB Decision No. 24, September 12, 1977; Placer Union High School District, EERB Decision No. 25, September 12, 1977; Washington Unified School District, EERB Decision No. 27, September 14, 1977; and Paramount Unified School District, EERB Decision No. 33, October 7, 1977.

therapists and reading specialists are not pupil services employees, but like such employees they work with teachers as well as students in the overall educational development of students outside of a typical classroom setting.

Nevertheless, for the reasons set out below, it is found that the circumstances of this case warrant a conclusion that a separate unit is also appropriate, and that the unit placement of counselors, psychologists, nurses, speech therapists and reading specialists should be determined by a vote of these employees themselves.

The rights guaranteed by the Educational Employment Relations Act (hereinafter EERA)

Under the statutory and regulatory scheme, an employee organization has, among others, the following rights:

1. It may file a request for recognition and become the exclusive representative of a negotiating unit if (1) the request is accompanied by proof of at least majority support for the organization; (2) no other employee organization has filed a timely intervention for the same or an overlapping unit; and (3) the public school employer desires to grant voluntary recognition.

2. It may file an intervention for the same or an overlapping unit described in a request for recognition if such intervention is accompanied by at least 30 percent support for the organization.[4]

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[4] See Section 3544.1(b) and PERB Regulation 33070.

3. If it has filed a request for recognition or an intervention, it may file a petition with the PERB to resolve a dispute concerning the appropriate negotiating unit.[5]

4. If it is a party to a unit determination hearing, its representative may appear at the hearing, call, examine and cross-examine witnesses, introduce documentary and other evidence on the issues,[6] make oral argument and file a written brief.[7]

5. If it was a party to the hearing, and the decision directs an election, it may appear on the ballot if it can demonstrate 30 percent proof of support in the unit found to be appropriate.[8]

APSSA, desiring to represent counselors, psychologists, nurses, speech therapists and reading specialists, complied with the PERB rules and regulations in filing a request for recognition and later a petition for a unit determination hearing. There was nothing more at that point in time which it could have done to protect its right to become the exclusive representative for these employees.

Yet, if this decision places the counselors, psychologists, nurses, speech therapists and reading specialists in the teacher

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[5] See Sections 3544.5(b) and (c) of the EERA and PERB Regulation 33230.

[6] See PERB Regulation 32180.

[7] See PERB Regulation 33360.

[8] See PERB Regulation 33440(e).

unit recognized by the District, the result will be that APSSA will have been denied one of its important rights -- viz., the opportunity to establish a showing of interest to appear on the ballot in an appropriate unit.

Perhaps it might be argued that it was similar to mere "harmless error" for the District to recognize ATA as exclusive representative and then to petition, with ATA, for a unit clarification hearing. After all, only 33 of the approximately 435 certificated employees are counselors, psychologists, nurses, speech therapists or reading specialists, whereas ATA's request for recognition presumably was supported by at least approximately 218 employees.[9]

It may appear to be harmless in this case. However, the situation could have just as easily been reversed. Hypothetically, the District could have recognized APSSA as the exclusive representative of the counselors, psychologists, nurses, speech therapists and reading specialists; then the District and APSSA could have petitioned PERB for a unit clarification hearing; and then the District and APSSA could have entered into a three-year written agreement.[10] Should it then be found that a single unit

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[9] ATA's request for recognition indicates that there were 324 authorization signatures supporting the request.

[10] See Section 3540.1(h) of the EERA. The hearing officer takes official notice of the written agreement executed by ATA and the District on August 1, 1977 and which is effective from August 1, 1977 through June 30, 1980.

is appropriate? If so, then ATA would have to wait until 120 days prior to the expiration of the written agreement in order to initiate a decertification proceeding to become the exclusive representative.[11]

Hypothetically or in actuality, this kind of procedural arrangement is difficult to accept because of its effect in denying voting and election rights of employees and employee organizations.

The meaning of EERB Resolution No. 6

This resolution (set out in full in footnote 2, supra) provides that a petition for a change in unit determination will be entertained by the PERB where both parties jointly file the petition or where there has been a change in the circumstances which existed at the time of the initial unit determination

Certainly, the basis of the filing of the petition for unit clarification is not that there was a change of circumstances. There is no evidence of a change of circumstances in the work force since the date of voluntary recognition.

The basis for the unit clarification petition is apparently that the District and ATA are the only parties who were involved with the teacher unit, and, therefore, the only parties who were required to join in the filing of the petition. If this

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[11] See Section 3544.7(b) of the EERA.

interpretation is correct, then the arrangement between the District and ATA would be technically proper. Such an interpretation, however, is simply not reasonable.

Unit clarification hearings involve a situation where there is only one employee organization (i.e., the exclusive representative) seeking to include within the unit job classifications the status of which is uncertain. Certainly, it would be unreasonable to apply EERB Resolution No. 6 in a manner which would deprive employees of their right to participate in the selection of an exclusive representative and employee organizations of their opportunity to appear on the ballot.

Based upon the foregoing discussion, while the employer and ATA contend that the unit clarification petition is appropriate, such a proceeding limited to clarification of the existing unit would be clearly inappropriate because there is in fact an outstanding petition concerning representation (see LA-R-278) covering the same pupil services employees sought to be added to the existing unit. Nevertheless because a complete record has been made, in lieu of dismissing the unit clarification petition as being inappropriate, the unit clarification proceeding will be considered as having been necessarily consolidated with the outstanding representation petition. This consolidation is required so that all necessary parties can participate in the disposition of the interrelated issues herein.

This procedure is used only in extraordinary circumstances to avoid the potentially inequitable results that the interpretation

of EERB Resolution No. 6, urged by the employer and the exclusive representative herein, would cause.

This decision is not intended to impute bad faith to the District or ATA, but only to stress the inequitable result of the interpretation they would place on EERB Resolution No. 6.[12]

Criteria for unit determination

Section 3545(a) of the EERA states:

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

A review of the cases cited in footnote 3 discloses that the Board has relied on the similarities between pupil services employees and regular classroom teachers in reaching the conclusion that they all belonged in the same unit. They were all required to attend faculty and staff meetings. They received the same fringe benefits. They were compensated in accordance with the same salary schedule, with pupil services employees receiving pro-rata greater pay for extra days worked. For the most part they were supervised by the school principal. They were evaluated under closely related systems under the Stull Act. Their credential requirements, although different, were substantially similar.

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[12] The District advised PERB in writing of its August 2, 1976 action in granting recognition to ATA, attaching to this letter a copy of ATA's July 30, 1976 letter and accompanying resolution. The District's notice to PERB in this manner is supportive of a finding that there was no bad faith. The hearing officer also takes official notice of an unfair practice charge filed by APSSA against the District (LA-CE-29) in which there are allegations which, if proved, would support a conclusion that the District acted in bad faith. However, the hearing on that charge is being held in abeyance pending the decision of this hearing.

An examination of the facts in this case would reveal essentially the same similarities. Certainly, a comprehensive unit of regular teachers, counselors, psychologists, nurses, speech therapists and reading specialists would, based on the Board's precedent, be the presumptively appropriate unit.

Yet, the Board has specifically rejected the strict application of either "an" appropriate unit or a "most" appropriate unit test as being inconsistent with a fair and rational application of the unit criteria.[13] Rather, the Board has been concerned with striking the proper balance between the harmful effects on an employer of excessive unit fragmentation and the protection of the employees' right to effective representation in appropriate units.[14] It is not unreasonable to assume that the Board would apply this flexible approach in order to protect other important rights of employees and employee organizations.

This flexible approach would permit a finding that a separate unit of counselors, psychologists, nurses, speech therapists and reading specialists is appropriate. The essence of the Board's decisions placing pupil services employees in the same unit as regular teachers is not the absence of a community of interest among the pupil services employees themselves, but rather its placement of a higher priority on the additional interests which they have in common with regular school teachers. As the Board stated in Grossmont, at 7-8:

> Therefore, the record as a whole establishes that teachers and the four disputed classifications

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[13] See Antioch Unified School District, EERB Decision No. 37, at pp. 5-8, November 7, 1977.

[14] See San Diego, at p. 8, and Antioch, at p. 7.

> [counselors, psychologists, nurses and social workers] share common purposes and goals in their mutual interaction with each other and the community they serve. We are mindful that there are some minor differences between teachers and the four disputed classifications, such as the length of their work day and work year. However, we do not view these differences as sufficient to establish a separate community of interest.

The fact remains that counselors, psychologists, nurses, speech therapists and reading specialists do have a community of interest among themselves when viewed aside from their relationship with regular teachers. They are required or expected to attend faculty meetings. Except for the psychologists, they are on the same salary schedule. They receive the same fringe benefits. They all obtain tenure. They are all subject to the same personnel policies. Although psychologists and speech therapists are evaluated by the consultant, special services, and counselors, nurses and reading specialists are evaluated by the principal, they are all evaluated under the same procedure. In addition, the involvement which all of these employees have with students is outside the typical classroom setting. Together they are concerned with the educational development of students in ways other than direct instruction in specific academic subjects. They do not assign grades. They consult with teachers about the progress of the students with whom they have contact. Also, when one of these employees is absent, no substitute is hired for that employee. While these factors might not in a normal setting be sufficient to meet the Board's precedential criteria for a separate unit, they are sufficient to meet the statutory criteria for an appropriate unit.

The Board has not had occasion to examine, in the context of a unit determination proceeding, the situation where employees have

been denied the opportunity to vote for an exclusive representative and an employee organization, having complied with the rules and regulations governing the selection of an exclusive representative, has been denied the opportunity of qualifying for the ballot. However, the National Labor Relations Board (NLRB) has under certain circumstances placed a lesser emphasis on unit criteria in order to protect important interests of employees and employee organizations.

In The Zia Company, 108 NLRB 1134, 34 LRRM 1133 (1954), a union sought an election and certification in a unit which not only included the employees in the unit of which it was the exclusive representative, but also included other employees who had previously been omitted from the existing unit. The NLRB noted that the group of employees which had been omitted from the existing unit did not constitute an appropriate bargaining unit under the Board's established precedent. Nevertheless, the NLRB ruled that these employees should not be placed into the established bargaining unit without first being extended the opportunity to vote as to whether or not they desired to be represented by the current bargaining agent of the existing unit.[15]

In Felix Half & Brother, Inc. 132 NLRB 1523, 48 LRRM 1528 (1961), the existing unit consisted of 11 office-clerical employees. The exclusive representative desired to represent these 11 employees only, while a competing union wished to include two additional employees. The NLRB found that the additional employees would normally be placed

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[15] While The Zia Company was subsequently modified by D.V. Displays Corp., 134 NLRB 568, 49 LRRM 1199 (1961), the holding in that case is not applicable to the facts in Arcadia Unified School District.

in the established unit. However, the Board directed that two elections be held in order to permit the current exclusive representative the opportunity of retaining its representative status as to the 11 employees in the existing unit.

If the NLRB has deviated from its established precedents in order to afford employees an opportunity to select or reject an exclusive representative or to allow an employee organization the opportunity of retaining its existing unit composition, then certainly PERB's flexible approach to unit determination emphasized in Antioch should be applicable to the facts of this case, where employees have been denied the opportunity to vote and an employee organization has been denied the opportunity of qualifying for the ballot.

Accordingly, under the circumstances of this case, it is found that a separate unit of counselors, psychologists, nurses, speech therapists and reading specialists is appropriate and that a comprehensive unit including these employees and regular teachers is also appropriate. The determination of the unit placement of counselors, psychologists, nurses, speech therapists and reading specialists will be determined by a vote of these employees themselves, as described below.

The election

Under the doctrine long ago established by the NLRB in Globe Machine and Stamping Co., 3 NLRB 294, 1-A LRRM 122 (1937), where

certain employees are found to be appropriate as either a unit of themselves or as part of a larger unit, an election is held among the employees and the unit determination is dependent upon their selection of which union, if any, is to be their exclusive representative.

As applied to the situation in Arcadia Unified School District, the procedure and certification of a Globe-type self-determination election would be as follows: A voting group is established, consisting of counselors, psychologists, nurses, speech therapists and reading specialists (but not including management, supervisory or confidential employees). Because of the unique procedural history in this case and in order to protect to the fullest extent possible the right of the unrepresented employees to participate in the selection of their exclusive representative, if any, both APSSA and ATA are deemed to be qualified to appear on the ballot and participate in the election. If APSSA is selected as the exclusive representative, then counselors, psychologists, nurses, speech therapists and reading specialists will be represented by APSSA in a unit separate from teachers. If ATA is chosen as the exclusive representative, then the counselors, psychologists, nurses, speech therapists and reading specialists will be considered to have indicated their desire to be represented by ATA in the same unit with the other certificated employees already represented by ATA.

If the voting group selects "no representation," then the counselors, psychologists, nurses, speech therapists and reading specialists will not be represented by an exclusive representative.

PROPOSED DECISION

It is the Proposed Decision that:

1. The voting group for the purpose of holding an election consists of counselors, psychologists, nurses, speech therapists and reading specialists; and excludes management, supervisory and confidential employees.

2. There shall be an election of the voting group at a time and place determined by the Regional Director.

3. If APSSA is selected by the voting group, then APSSA will be the exclusive representative of a separate "pupil services employees" unit (excluding management, supervisory or confidential employees), for the purposes of meeting and negotiating.

4. If ATA is selected by the voting group, then ATA will be the exclusive representative of a comprehensive certificated unit, including counselors, psychologists, nurses, speech therapists, reading specialists and those employees in the certificated negotiating unit in which the District has previously recognized ATA as the exclusive representative; and excluding management, supervisory and confidential employees.

5. If the voting group selects "no representation," then the counselors, psychologists, nurses, speech therapists and reading specialists shall not be represented by an exclusive representative.

The parties have seven (7) calendar days from receipt of this Proposed Decision in which to file exceptions in accordance with PERB Regulation 33380. If no party files timely exceptions, this Proposed Decision will become final on March 10, 1978 and a Notice of Decision will issue from the Board.

DATED: February 24, 1978

David Schlossberg
Hearing Officer