

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



OAKLAND UNIFIED SCHOOL DISTRICT,

Employer,

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS DISTRICT LODGE NO. 190,

Petitioner,

and

OAKLAND EDUCATION ASSOCIATION,  
CTA/NEA,

Exclusive Representative.

Case No. SF-SV-113-E

PERB Decision No. 1464

October 4, 2001

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for International Association of Machinists District Lodge No. 190; Priscilla Winslow, Attorney, for Oakland Education Association, CTA/NEA.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the International Association of Machinists District Lodge No. 190 (IAM) to a Regional Director's proposed decision (attached) denying its severance petition. The petition sought to establish a separate unit of full-time and regular part-time psychologists employed by the Oakland Unified School District. The psychologists were included in a bargaining unit represented by the Oakland Education Association, CTA/NEA (OEA).

The Board has reviewed the entire record in this case, including the severance petition and the responses thereto, the hearing transcript, the briefs of the parties, the Regional Director's proposed decision, IAM's exceptions and OEA's response to the exceptions. The Board finds the Regional Director's proposed decision to be free from prejudicial error, and adopts it as the decision of the Board itself.

ORDER

The severance request in Case No. SF-SV-113-E is hereby DENIED.

Members Amador and Baker joined in this Decision.



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REPRESENTATION  
CASE NO. SF-SV-113-E

PROPOSED DECISION  
(3/7/2001)

Appearances: Rumi Ueno, Director, Human Resources, for Oakland Unified School District; Van Bourg, Weinberg, Roger & Rosenfeld, by Stewart Weinberg, Attorney, for International Association of Machinists District Lodge No. 190; Priscilla Winslow, Attorney, for Oakland Education Association, CTA/NEA.

Before Les Chisholm, Regional Director.

**PROCEDURAL HISTORY**

On February 22, 2000, the International Association of Machinists District Lodge No. 190 (IAM or Petitioner) submitted to the Oakland Unified School District (District) and the Public Employment Relations Board (PERB or Board) a severance request seeking to establish a separate unit of full-time and regular part-time psychologists employed by the District. The psychologists are presently included in a bargaining unit represented by the Oakland Education Association, CTA/NEA (OEA).

By letter dated March 14, 2000, OEA opposed the severance petition based on community of interest factors, representation history, detrimental effect on the operations of the District, and PERB precedent. OEA's opposition relied in part on the Board decision that created the established unit. (Oakland Unified School District (1977) EERB<sup>1</sup> Decision No. 15 (Oakland).)

The District, in a letter dated March 16, 2000, also opposed the severance petition. The District's letter cited the long negotiating history of the parties, the common mission and professional goal shared by psychologists and other certificated employees, shared community of interest factors, and, especially, the detrimental effect creation of another bargaining unit would have on the District. However, the District filed a second response, dated April 6, 2000, indicating the District did not oppose the petition.

A settlement conference held April 28, 2000, failed to resolve the unit appropriateness dispute. A formal hearing was held on September 12 and 13, 2000. The Petitioner and OEA filed briefs, the District served notice that it would not file a brief, and the matter was submitted for decision on October 30, 2000.

### FINDINGS OF FACT

#### Background

Employees of the District are currently placed in a total of 12 bargaining units, and the District negotiates 11 separate contracts.<sup>2</sup> Contracts are negotiated for the District by a director of labor relations, four human services coordinators and a labor relations analyst.

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<sup>1</sup> Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

<sup>2</sup> Two classified employee units have the same exclusive representative and currently negotiate a single contract covering both units.

The current OEA-represented bargaining unit totals over 3,500 employees, including 47 psychologists in 40 full-time equivalent positions. The unit includes all certificated employees of the District except hourly adult education employees, who are represented by another employee organization. While more than one decertification election has been conducted in the unit since 1977, OEA has been the exclusive representative continuously since that time. The collective bargaining agreement for the unit provides for an agency shop arrangement.

#### Community of Interest

Everal Mitchell, a psychologist with the District since 1968, was formerly a member of OEA and now pays an agency fee. She, like many other psychologists in the District, belongs to two professional organizations, the California Association of School Psychologists and the National Association of School Psychologists. Mitchell holds a pupil personnel credential with authorization in school psychology; the highest given with the credential.

Mitchell testified that, since 1977, the major changes to psychologists' job duties are in the areas of crisis intervention and grant writing, both of which now involve a greater portion of their time. Teachers also write grants, and both teachers and counselors are also involved in crisis intervention. The psychologists' duties involving assessment, diagnostic services, consultation, counseling and referrals to outside agencies remain unchanged since 1977.

Psychologists work ten days more per year than classroom teachers and also have an hour longer workday.<sup>3</sup> Psychologists are compensated on a separate salary schedule from other certificated employees,<sup>4</sup> but they advance on the schedule based on training and

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<sup>3</sup> Counselors also work ten more days per year than teachers but their workday is the same as that of teachers.

<sup>4</sup> The only other group in the unit with a separate salary schedule is the Child Development Center teachers.

experience as do other certificated employees. Psychologists receive the same negotiated fringe benefits as other unit employees, are subject to the same probationary period and tenure rights, and are covered by the same retirement system.

Psychologists are evaluated, like all certificated employees, under the Stull Act. However, while teachers are evaluated by a site principal, psychologists are evaluated by the coordinator for psychological services. The coordinator for psychological services reports to the director of special education, who is also administratively responsible for special education teachers. The District utilizes a different evaluation form for psychologists than it uses for other certificated employees and certain factors differ on the two forms.<sup>5</sup>

Psychologists interact with teachers, counselors and other certificated employees on a regular basis. This interaction is both job-related and social, including eating lunch together. Mitchell also testified that "a goal for anyone who works in the schools" is to "assure that all students [in the District] succeed to the best of their abilities." A regular part of their duties involves meetings with special education teachers regarding the development of individual education plans (IEPs) for students. These meetings can also involve regular classroom teachers and school nurses.

While psychologists do not have supervisory authority over special education teachers, disputes can and do arise with special education teachers over the severity of a student's problem, quality of placement issues or what services are appropriate. Disagreements can even surface over whether the special education teacher is appropriately implementing an IEP and, if not resolved by the teacher and psychologist, may be taken to the administrator. Valerie

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<sup>5</sup> For example, the psychologists are not subject to classroom observation.

Lopes, a District psychologist since 1991, testified regarding instances of such disputes.

Mitchell, however, testified that she has had occasion to express such dissatisfaction only three or four times in her 30-plus years at the District.

While some schools in the District have a full-time psychologist, most psychologists are itinerant. Most classroom teachers are assigned to a single school site, but certain other certificated employees, including some counselors, nurses and resource teachers, are also itinerant.

### Bargaining and Representation History

In the Spring of 1996, the District and OEA settled their contract negotiations only after protracted negotiations, issuance of a factfinding report and a strike. The 23-day strike that preceded the agreement occurred in March 1996. The agreement reached covered the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

The factfinding panel's report, issued in the Fall of 1995, discussed combining the psychologist and general certificated salary schedules as a proposal advanced by OEA. Psychologists first learned of this proposal from the report.<sup>6</sup> Psychologists then sought meetings with OEA staff and leadership to protest the proposal and to point out their longer workday and year. OEA representatives appeared to the psychologists to be unaware of the different workyear and workday. They stated that psychologists would not lose money, and that reduction of their salaries was not the goal of the proposal, because the psychologists could receive overtime for their extra days and hours. The psychologists still objected, fearing

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<sup>6</sup> There was no psychologist on the bargaining team in 1995-96, and OEA's bargaining team has never had a psychologist as a member.

they would lose pension credits under State Teachers Retirement System rules as well as current income.

In the first year of the agreement, psychologists were given a 3.73 percent raise and a 1.27 percent bonus, which totaled less than the 7.4 percent bonus negotiated for teachers that year. Petitioner notes that the amount of a first year teacher's bonus exceeded the combined salary increase and bonus of a 30-year psychologist. Ben Visnick, then the president of OEA, and the OEA bargaining chair, Frenchie Alford, stated to unit members that psychologists "made too much money anyway."<sup>7</sup>

In the second year of the contract, teachers received between \$4.75 and \$6.46 per hour increases while psychologists received a maximum of \$1.62 per hour. However, the raises granted during the subsequent two years of the agreement were the same for psychologists as for other certificated employees. This equal treatment in the latter two years of the agreement was consistent with how psychologists' salary increases had traditionally been handled.

Psychologists have served as members of OEA's representative council and board of directors. Valerie Lopes, for example, became a representative in 1995 and a board member in 1997. During the 1995-96 negotiations, Lopes tried to meet with and talk to OEA officers and California Teachers Association (CTA) staff about the salary proposals. She did talk with a CTA staff representative who would only acknowledge that the retirement issue might be valid. She also helped circulate a petition to protest OEA's stance when OEA officials would not meet with psychologists. Lopes had not had prior occasion to take complaints to OEA.

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<sup>7</sup> However, Visnick argued at the time that the psychologists' increase would, since the larger portion was on the schedule, be more equal to that of teachers in the long run.



According to Lopes, psychologists still participated in the March 1996 strike in about the same proportion (50 percent) as did other certificated employees. Despite this, Visnick stated to Lopes after the contract settlement that psychologists had fared as they did because they did not strike in large enough numbers. Visnick also reiterated his belief that psychologists "made too much money in comparison to other certificated staff."

Remarks were also attributed to Visnick by a labor relations journal, the California Public Employee Relations, that the gap between teacher and psychologist salaries was greater in the District than in other school districts, and that his goal in trying to consolidate the salary schedules was to increase teacher salaries.

During the strike, layoff notices were sent to all psychologists, cosmetologists, counselors, nurses and librarians. Following the settlement, the District sent OEA a letter that read, in relevant part:

Please be advised nurses, librarians, cosmetologists, and psychologists shall not be laid off as a result of the recent settlement between the Oakland Education Association and the Oakland Unified School District.

This letter was relied upon by OEA in advising psychologists and other affected employees that they could ignore the layoff notices and not pursue hearings. However, the psychologists interpreted the letter as being short of a guarantee of no layoffs. While no psychologist, librarian, nurse or cosmetologist was laid off in 1996, the layoff notices were not formally repealed by the District's board of trustees for several weeks.

In August 1996, 40 District psychologists filed an unfair practice charge against OEA (Unfair Practice Charge No. SF-CO-516). The facts alleged in the charge focused on the bargaining history of the 1996 agreement and Visnick's statements. A complaint issued in the

case in January 1997, alleging that OEA had breached its duty of fair representation toward the charging parties. In March 1997, the parties reached a settlement agreement. The settlement included provisions for the OEA to adopt bylaws amendments to add a position to its Board of Directors to be filled by election from and to represent the interests of speech therapists, counselors, psychologists and occupational therapists. The settlement further provided for OEA to adopt a procedure to designate "negotiation team consultants," to enable interest groups including psychologists to select persons to advise the OEA negotiations team "at all stages of the negotiating process." These consultants were to draft and explain proposals, attend negotiation sessions where items of particular interest to their interest group were to be discussed, and to assist the negotiations team in presenting OEA positions.

OEA subsequently adopted the bylaws amendments referenced by the settlement agreement. Visnick filed objections with OEA to the agreement and the election in which the amendments were ratified. In responding to Visnick's objections, OEA's then-executive director, Peter Haberfeld, wrote on July 10, 1997, to Visnick in pertinent part as follows:

Your challenge to the election reveals that you do not like the Settlement Agreement. However, please remember, OEA entered the settlement to avoid what was likely to be a lengthy, costly hearing and the potential of a humiliating ruling against OEA.

The allegations by [the psychologists] which convinced the Regional Attorney to issue an Unfair Practice Complaint against OEA were statements by you and Frenchie Alford. Your remarks, if made, manifested unlawful hostility toward psychologists. Other information could have been introduced to undermine your credibility and that of Ms. Alford during a hearing. This danger raised an unacceptably high risk of an unfavorable ruling by the administrative law judge.

OEA leaders were involved in a strike that resulted in litigation. They settled that litigation, like they settled the strike, effecting a compromise based on their assessment of OEA's strengths and

weaknesses. They chose not to risk exposing two key witnesses to direct and cross-examination for fear of losing the PERB case. Instead, they settled the Unfair Practice proceeding amicably in a manner designed to promote on-going, harmonious involvement of psychologists and counselors in the direction of the organization.

As previously noted, Lopes was elected to OEA's board in 1997. However, she was elected by the membership at large and not for the seat created by the bylaws amendments, which was filled by another psychologist, Rose Velasquez. There was also one counselor on the OEA board at that time.

However, Lopes and Velasquez testified that, because the meeting times of both the representative council and OEA board commenced prior to the end of their work day, they were never able to attend a full meeting. OEA's elected representatives are entitled to use release time to attend such meetings, but the psychologists felt it more important that they complete their work, particularly as IEP meetings are often held following the normal school day. OEA did make certain changes in the starting times but did not delay the start times sufficiently to allow Lopes or Velasquez to attend the beginning of the meeting without using release time.

The most recent negotiated agreement between the District and OEA, ratified in May 2000 and covering the 1999-2000, 2000-2001 and 2001-2002 school years, provides for salary increases totaling 22.5 percent over the three year period for all employees in the certificated unit. Prior to the negotiations, the psychologists met in March 1999 with OEA officials after developing a list of 13 contract concerns.<sup>8</sup> Regarding the list of 13 issues, the only

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<sup>8</sup> Testimony by OEA staff representatives indicated that, for each contract cycle, OEA distributes a contract survey to all employees in the unit before developing proposals.

commitment the psychologists received from the negotiations team chair was that OEA would seek the same salary increase for all employees.

Rose Velasquez was named as a consultant to the negotiations team to represent the psychologists' interest group. She did not participate in all aspects of negotiations and was only invited to attend three negotiations sessions, one of which was canceled. Velasquez did participate in a meeting having to do with buy back days<sup>9</sup> and in a second meeting was asked to describe working conditions of psychologists and to talk about subcontracting. The working conditions discussion focused on the issue of allocation of office space, which was one of the psychologists' 13 issues. OEA presented a proposal calling for priority in assignments of office space for speech therapists, psychologists and certain other classifications, but ultimately settled the issue on the basis of the District's counter-proposal that allows site councils to make these decisions.

#### ISSUE

Is a separate unit of psychologists an appropriate unit for purposes of meeting and negotiating pursuant to EERA?

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<sup>9</sup> The negotiations over "buy back days" addressed the subject of attendance at staff development days outside of the normal school year as well as the use of state funds received by the District to cover compensation of staff for these days. Though the District does not receive funds to compensate staff other than classroom teachers, the OEA contract provides for a salary increase for staff development days that treats psychologists and classroom teachers the same.

## POSITIONS OF THE PARTIES

### Petitioner

IAM acknowledges that some factors considered by the Board in Oakland have not changed since 1977 but contends that other factors were either not considered at that time or have changed. Petitioner's argument summarizes these factors as follows:

1. Psychologists are still compensated on a separate salary schedule from that of classroom teachers.
2. Psychologists still have a Pupil Personnel Services Credential required only of them and counselors, but the psychologists' credential has different authorization in addition to those held by counselors, a fact not noted in 1977.
3. The work year is still ten days longer than a teacher's school year. The work day is still one hour longer for psychologists than for classroom teachers, as it was in 1977, but not raised or noted in the decision.
4. Psychologists still share the same fringe benefits as other certificated employees.
5. Psychologists are still evaluated under the Stull Act as are other certificated employees, but the procedure forms [sic] and evaluators are different, facts which were not noted in the 1977 decision.
6. Psychologists still achieve tenure under the same statutory standards as other certificated employees.
7. Psychologists still interact with other certificated employees, but sometimes on a basis inconsistent with the interests of those employees.

Petitioner further asserts that, while bargaining history was absent from the 1977 decision, recent collective bargaining history in the District demonstrates that psychologists have been "adversely impacted" by OEA practices.

Petitioner argues that many of the facts in Pleasanton Joint School District/Amador Valley Joint Union High School District (1981) PERB Decision No. 169 (Pleasanton) are similar, if not identical, to the instant case. Petitioner notes that the Board approved a separate psychologists unit in Pleasanton despite finding elements of a community of interest shared by psychologists and the existing certificated unit in that district.

A separate and distinct community of interest is established, according to the Petitioner's argument, in part by differences between psychologists and other certificated personnel in such areas as evaluation, credential, interaction, and layoff. With respect to evaluation, IAM calls attention to the use of different forms and standards, and further notes that teachers are evaluated by school site administrators while psychologists are evaluated by the coordinator for psychological services. In addition, while both counselors and psychologists are required to have a pupil services credential, the authorization conveyed by the psychologists' credential is different than that of counselors.

Petitioner acknowledges that psychologists and teachers have work-related interaction but contends that the interaction can be of an adversarial nature. Disagreements between teachers and psychologists over such issues as the severity of a student's problem, the quality of placement or the kind of program that is appropriate to the need, and even the appropriateness of a classroom teacher's work or interaction with a student, can arise. If the psychologist and teacher are unable to resolve such disputes, the psychologist takes his or her concerns to the teacher's administrator/supervisor.

With respect to layoff, Petitioner argues that, under Gallup v. Board of Trustees (1996) 41 Cal.App.4<sup>th</sup> 1571 [49 Cal.Rptr.2d 289], psychologists, unlike classroom teachers, can be replaced by independent contractors. However, Petitioner also notes that counselors may be

subject to similar exposure, under San Jose Teachers Association v. Allen (1983) 144 Cal.App.3d 627 [192 Cal.Rptr. 710].

Petitioner's argument emphasizes heavily the alleged non-representation of psychologists by OEA, especially during the most recent five-year period. When the OEA negotiated a new agreement in 1995-1996, according to Petitioner, OEA first proposed the merger of the psychologists' salary schedule with that of classroom teachers, ignoring potential negative effects on psychologists, and ultimately agreed to salary increases for the first and second years of the agreement that treated psychologists different from, and not as well as, classroom teachers. Further, OEA's elected leaders expressed hostility toward psychologists.

In addition, a psychologist has never been included on OEA's negotiations team. One psychologist was appointed as a "consultant" to the team in 1998, but she was invited to only three meetings, one of which was canceled, and was never able to discuss a list of concerns developed by the psychologists. While psychologists have served on OEA's board and representative council, the times that these bodies meet have precluded full participation by psychologists due to their longer work day.

#### OEA

OEA contends that IAM has failed to demonstrate that a separate unit of psychologists would be more appropriate than the established unit represented by OEA, and thus the severance request should be denied. (Los Angeles Unified School District (1998) PERB Decision No. 1267.)

OEA supports this contention first by arguing that psychologists continue, as the Board held in Oakland, to share a community of interest with other certificated employees. OEA points to the fact that psychologists possess a pupil services credential, as do school

counselors, and that both groups of employees work ten more days per year than teachers. Further, while psychologists are on a separate salary schedule, they advance on the schedule based on experience, as do other certificated employees. OEA also asserts that psychologists interact regularly with counselors and teachers toward "the same basic professional goal of promoting student welfare as other certificated employees."

OEA notes that psychologists, like other certificated employees, are evaluated under the Stull Act, albeit with different forms used for the evaluation. OEA further notes that, while psychologists are evaluated by the coordinator of psychological services and special education teachers are evaluated by their site administrator, both psychologists and special education teachers are ultimately responsible to the director of special education.

OEA cites the testimony of Everal Mitchell to the effect that the primary change in work duties of psychologists since 1977 is in the areas of crisis intervention and grant writing. OEA adds, however, that the record also shows that teachers write grant proposals and both teachers and counselors are involved in crisis intervention.

The second argument advanced by OEA is that, looking at their 23-year bargaining relationship with the District and not just one contract period, OEA has adequately represented the interests of psychologists. OEA asserts that the psychologists have always, with the exception of 1995-1996 and 1996-1997, received the same percentage increase in salary as have other certificated employees. This pattern of equal treatment continued with the agreement negotiated most recently for the period 1999-2002.

OEA further argues that the lower percentage increases negotiated in 1996 were the result not of a "willful effort by OEA to disadvantage psychologists" but a result of District



insistence on lower compensation for psychologists and OEA's need to make the best deal it could to end a 23-day strike. OEA contends that

If severance petitions were granted whenever a group within a larger bargaining unit feels disadvantaged, there would be no such thing as a "community of interest," or presumptively appropriate units. Instead, employers would be forced to deal with a proliferation of units, based not on a true community of interest or other rational factors, but rather on which groups are disgruntled with the former exclusive representative. Unions would be faced with the spectre of eroding strength and numbers whenever a disaffected group complains about unfair representation. Stable labor relations could not exist in a world in which every duty-of-fair representation complaint can be transformed into a successful severance petition.

OEA acknowledges that psychologists were "justifiably upset" with statements made in 1996 by OEA officials that psychologists were overpaid and that psychologists did not strike in large enough numbers. OEA contends, however, that these concerns were "adequately resolved" by the settlement of the subsequent unfair practice charge filed by the psychologists against OEA and the implementation of the terms of the agreement. OEA also contends that the psychologists' other complaints about the 1995-1996 negotiations, including the proposal to merge salary schedules, their lack of representation on the bargaining team, and the response to layoff notices in March 1996, were adequately responded to by OEA.

The second prong of this argument is that the psychologists' "transitory dissatisfaction" is insufficient to justify approval of the severance request. OEA relies here on State of California (Department of Personnel Administration) (1993) PERB Decision No. 988-S and Los Angeles Unified School District, supra, PERB Decision No. 1267.

Third, OEA contends that a separate unit of psychologists would be detrimental to the efficient operation of the District, relying on San Diego Unified School District (1981) PERB

Decision No. 170 and Sweetwater Union High School District (1976) EERB Decision No. 4 for the proposition that PERB precedent disfavors excessive bargaining unit fragmentation. OEA also cites Los Angeles Unified School District, *supra*, PERB Decision No. 1267 as expressing the Board's preference for the "largest reasonable unit." OEA notes that the District already negotiates 11 agreements covering 12 bargaining units, and that the District's labor relations director testified that negotiations in the existing units can pit the interests of one unit against another, require coordination, and make effective contract administration difficult.

Finally, OEA argues that distinguishable factual circumstances render Arcadia Unified School District (1979) PERB Decision No. 93 and Pleasanton Joint School District/Amador Valley Joint Union High School District (1981) PERB Decision No. 169 inapplicable to this case, and that IAM lacks experience representing psychologists in public education.

#### RULE OF LAW

##### Prior Oakland Decision

As noted, the unit placement of the District's psychologists was determined by the Board itself in Oakland. There, various parties asserted that psychologists were appropriately excluded from any unit as management employees within the meaning of the Educational Employment Relations Act (EERA),<sup>10</sup> or that they should be placed in a separate unit with counselors, or that they should be included in a general certificated employee unit.

The duties of psychologists were summarized in Oakland as follows:

They evaluate and diagnose learning and behavior problems of district pupils, decide on a program to meet the students' needs and then make a placement recommendation to an admissions committee. They consult with administrators, teachers, parents, children, and act as liaisons to various public and private agencies

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<sup>10</sup> EERA is codified at Government Code section 3540 et seq.

in the evaluation and treatment of these problems. Some psychologists write and submit proposals to government agencies for funding, but in doing so they do not have authority to independently bind the district.

The Board determined the psychologists were not management employees as their discretion and authority was exercised on a localized, not district-wide, basis, was exercised within their area of expertise, and was not exercised to formulate District policy. (Oakland.) The Board, despite the psychologists' different salary schedule, work year and credential requirements, found that psychologists shared a sufficient community of interest with other certificated employees to place them in the same unit. The shared community of interest factors relied upon included fringe benefits, evaluation under the Stull Act, tenure standards, and constant interaction with other certificated employees "in their common concern for the welfare of the students." (Oakland.)

Petitioner in this case bears the burden of demonstrating that its proposed unit is more appropriate than the Board-established unit. (State of California (Department of Personnel Administration) (1990) PERB Decision No. 794-S.)

#### Statutory Criteria and Other Precedent

The statutory criteria relevant to this case are set forth in EERA at section 3545(a):

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

Applying these criteria, the Board has consistently held that inclusion of pupil services personnel with other certificated employees is appropriate. (Los Angeles Unified School

District (1976) EERB Decision No. 5 [counselors found to share community of interest with other certificated staff]; Grossmont Union High School District (1977) EERB Decision No. 11 (Grossmont) [counselors, psychologists, school nurses and social workers placed in certificated unit]; Placer Union High School District (1977) EERB Decision No. 25 [counselors and psychologists placed in certificated unit]; Washington Unified School District (1977) EERB Decision No. 27 (Washington) [psychologists included in certificated unit]; Kings County Office of Education (1990) PERB Decision No. 801 (Kings COE) [modification of certificated unit to include nurses approved] and, as previously discussed, Oakland.<sup>11</sup>)

In Grossmont, the Board considered a record where psychologists worked 30 more days than teachers and nurses, counselors worked 6 more days than teachers, and counselors, nurses and psychologists worked one hour more per day than teachers. The Board concluded that the pupil services classifications had many things in common with teachers, including fringe benefits and eligibility for tenure, and that the similarities in evaluation and credentials outweighed the differences. (Ibid.)

The concurring opinion of Member Cossack in Washington held in part that

any differences between pupil services employees and teachers are no greater than those which exist between various categories of teachers and are not sufficient to outweigh the functional coherence and interdependence of pupil services employees with the larger certificated unit.

Kings COE cited Grossmont in holding that

due to the similarities in education, training, salaries, fringe benefits, assignments, Stull Act evaluations, credentials,

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<sup>11</sup> The Board also dismissed a severance petition seeking a separate unit of State psychologists, previously included in a unit with other health and social service professionals, in State of California (Department of Personnel Administration), supra, PERB Decision No. 988-S.

supervision, interaction with other certificated employees, and the sharing of common goals, a unit including pupil services employees together with certificated instructional personnel was warranted.

The Kings COE decision also found that "differences in format and evaluation criteria" constitute differences that are "insignificant according to the rationale in Grossmont."

The only decisions where a separate unit of psychologists was approved involved factual circumstances where denial of the requested unit would leave the psychologists unrepresented. (Arcadia Unified School District (1979) PERB Decision No. 93 (Arcadia) and Pleasanton.) In Arcadia, the Board found appropriate a proposed unit of counselors, psychologists, nurses, speech therapists and reading specialists where the existing teachers unit had excluded them and a unit modification petition filed by the representative of the teachers was held not appropriate due to the pending representation petition.

In Pleasanton, a hearing officer's proposed decision was reversed and a unit consisting only of school psychologists was approved even though the Board found the psychologists "may share a community of interest with the preexisting unit of certificated employees." In that case, the psychologists had been designated as management employees when the certificated unit was first formed, and the exclusive representative did not file to represent psychologists even after the employer designated them as non-management. The Board approved the unit, holding that rejecting the petition would "effectively deny the psychologists' right to representation." (Ibid.)

The Board has also noted that a "severance setting is factually different from an initial unit determination because negotiating history must be considered when evaluating a severance request." (Livermore Valley Joint Unified School District (1981) PERB Decision

No. 165.) However, negotiating history, while an "important factor," is but one of several statutory criteria to be considered. (Ibid.)

### DISCUSSION

Under applicable Board precedent, the IAM can only secure approval of its petition if the proposed unit is found to be more appropriate than the existing, Board-established unit. (State of California (Department of Personnel Administration), supra, PERB Decision No. 794-S). IAM argues that approval of the proposed unit is warranted on community of interest grounds and because of the representation history affecting psychologists.

However, the facts of this case, considered in light of prior cases, do not support finding that the psychologists have a community of interest that is separate and distinct from that shared with teachers and other certificated employees. Though psychologists are compensated on a different salary schedule than other certificated employees, they have in common fringe benefits, tenure, and retirement benefits. Further, their job duties overlap with those of other unit members in the areas of crisis intervention and the development of IEPs. Psychologists and other certificated employees are subject to the Stull Act for evaluation and, as in Grossmont and Kings COE, the differences in evaluation form and criteria do not outweigh the similarities.

The lines of supervision are not sufficiently distinct to support a contrary finding, particularly given that the supervisors of both psychologists and special education teachers report to the director of special education. The psychologists work under a pupil services credential, as do certain other certificated classifications, and the different level of authorization is no more persuasive for a separate unit than it was in this unit in 1977, or in Grossmont. Likewise, while psychologists are largely assigned to work at multiple sites, the

sites most often are school sites where the psychologists have both work related and social interaction with other certificated employees. In addition, other classifications also are assigned to multiple work locations.

The psychologists work a longer day than other certificated employees and a longer year than classroom teachers, but not a longer year than counselors. These factors have also not changed since the earlier Board decision in Oakland, and similar or greater differences in work year were considered in Grossmont.

Further, the psychologists share a common goal, student success, with other employees in the bargaining unit. In this context, Petitioner's reliance on conflicts between psychologists and teachers over the development and implementation of IEPs as grounds for its position is unpersuasive. First, the witnesses for IAM testified to few such instances relative to their years of experience with the District. Second, there is no support in Board precedent for the proposition that disputes among employees over how to best achieve a common goal requires placement of employees with interdependent functionality in separate units.

In sum, the criteria do not support finding that the psychologists have a unique or separate and distinct community of interest. It is not enough, for approval of a separate unit, to show that a group possesses a community of interest, as the psychologists surely do. It is also necessary to establish that their community of interest is not shared with the larger group. (San Diego Unified School District, supra, PERB Decision No. 170.)

Thus, approval of the instant severance request is only justified if the bargaining history supports a finding that psychologists would be effectively denied the right to representation by their continued inclusion in the established unit. As even the OEA argument acknowledges, the dissatisfaction of the psychologists in this case is understandable. However, such

employee dissatisfaction is not enough to find in favor of the Petitioner. (Los Angeles Unified School District , supra, PERB Decision No. 1267.)<sup>12</sup>

While the Petitioner relies on other factors, such as the extent of the role of interest group consultants in negotiations and the timing of meetings of OEA's representative council and board of directors, the real gravamen of the case for the proposed unit lies in the treatment of psychologists in the negotiation of the 1995-1999 agreement. IAM argues, in effect, that the statements of OEA president Visnick and other CTA and OEA leaders at the time, in combination with the terms of the settlement itself, demonstrate OEA animus toward the interests of psychologists such that the representational rights of psychologists will be denied by their continued inclusion in the established unit.

The persuasiveness of this argument fails, however, because the elected OEA officers referred to no longer hold their office, the later objections by Visnick to the settlement reached by the psychologists were emphatically rejected by OEA leadership, and the settlement itself was approved by OEA's membership. Further, the differential treatment of psychologists in the first two years of the 1995-1999 agreement is not evidence of a pattern but rather stands in

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<sup>12</sup> Though the analysis of a unit appropriateness issue is certainly distinguished from a claim of a breach of the duty of fair representation, it is worth noting that an exclusive representative is not obligated to satisfy the interests of all groups within the negotiating unit and can even reach agreements that are adverse to the interests of a group. In California School Employees Association and its Chapter 107 (Chacon) (1995) PERB Decision No. 1108, the Board held:

An exclusive representative is not expected or required to satisfy all members of the unit it represents, and the duty of fair representation "does not mean that [an exclusive representative] is barred from making contracts which may have unfavorable effects on some members." Steele v. Louisville & N.R.R. (1944) 323 U.S. 192 [15 LRRM 708, 712], quoted in Redlands Teachers Association (1978) PERB Decision No. 72.



contrast to the pattern of equal treatment for purposes of salary in the subsequent agreement and all earlier agreements.

The Board's reliance, in part, on evidence of "widespread dissatisfaction" of affected employees when approving a severance request in Livermore Valley Joint Unified School District , supra, PERB Decision No. 165 does not require a contrary result. In that case, the Board considered a request for a presumptively appropriate unit where the existing unit was established not by Board decision but by mutual agreement. (Ibid.) In the instant case, the established unit was determined by the Board and the Petitioner seeks to create a unit including a single classification of employees. Further, the bargaining history in Livermore did not span 20-plus years but only covered one bargaining cycle. Here, the dissatisfaction, as extensive and as arguably warranted as it is, focuses on events surrounding the negotiation of one four year agreement amidst the many contracts negotiated by OEA and the District without any evidence of prior cause for psychologists to object.

Thus, Petitioner has failed to show that its proposed unit is more appropriate than the Board-established unit as the psychologists continue to share a community of interest with other employees in the unit. Further, the events giving rise to the psychologists' understandable dissatisfaction with OEA did not rise to the level necessary to prove their inclusion in OEA's unit would, as in Pleasanton, deprive them of the statutory right of representation.<sup>13</sup>

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<sup>13</sup> Nothing in EERA guarantees employees free choice in the determination of an appropriate bargaining unit in which they are placed. (Los Angeles Unified School District, supra, PERB Decision No. 1267.)

## CONCLUSION AND PROPOSED ORDER

For the reasons set forth above, and based on the entire record of this proceeding, the severance request in Case No. SF-SV-113-E, Oakland Unified School District and International Association of Machinists District Lodge No. 190 and Oakland Education Association, CTA/NEA, is hereby DENIED.

### 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 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 95814-4174  
FAX: (916) 327-7960

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, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section

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 , sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8 , secs. 32090 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 , secs. 32300, 32305, 32140, and 32135(c).)

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Les Chisholm  
Regional Director