



PERB
California Public Employment
Relations Board

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April 30, 2021

BY E-MAIL ONLY

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Re: Long Beach Unified School District and Teachers Association of Long Beach
Case No. LA-UM-1013-E
ORDER TO SHOW CAUSE

Dear Parties:

On March 5, 2020, the Teachers Association of Long Beach (Petitioner or Association) filed with the Public Employment Relations Board (PERB or Board) a unit modification petition (Petition) pursuant to PERB Regulation 32781(a)(1).¹ The petition seeks to add approximately 209 school psychologists and school counselors to the Association's existing certificated bargaining unit employed by the Long Beach Unified School District (District or Respondent).

FACTUAL BACKGROUND

The Association is the exclusive representative of the District's Certificated Employee Unit, which includes:

"all regular certificated employees under contract including classroom, JROTC, WBL, specialist teachers, Speech

¹ PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's regulations may be found at www.perb.ca.gov.

Language Pathologist, Special Day Class Preschool teachers, Transitional Kindergarten teachers, and program facilitators, nurses, librarians, and retired teachers who return to classroom service under Ed. Code provisions.”

According to PERB records, there is one other represented certificated unit, the Child Development Center Teachers Unit, which includes only certificated employees in the Children’s Center program, California State Preschool Program, and the Head Start Program.² The Certificated Employee Unit includes approximately 3,349 to 3,600 certificated employees. The Petition seeks to represent approximately 169 to 209 unrepresented school psychologists and counselors.³

On March 29, 2021, the District filed its response to the Petition, which: (1) objects to including school psychologists and counselors because they are management employees and (2) requests that PERB schedule an election for the school psychologists and counselors.

The District’s response alleges that the following duties of school psychologists are managerial and make it inappropriate to include those employees in the existing certificated unit: (1) developing and administering in-service programs for parents, teachers, and staff; (2) planning and developing programs and policies for determining special placement eligibility and intervention strategies; (3) monitoring and implementing special education programs at assigned schools for compliance with current State and Federal laws; (4) monitoring and implementing protocols and rules for advising principals, counselors, and teachers on proper action in cases of pupil exemption, non-promotion, and acceleration and behavioral problems; and (5) participating and responding to school crisis management, including mediation and teacher conflict resolution. The District alleges that because the above duties constitute 30% of Psychologist time, School Psychologists work an additional eleven days each school year compared to teachers.

² The Association also represents the Child Development Center Teachers Unit. PERB records do indicate that a School Counselor’s Unit existed, but no exclusive representative was ever certified or recognized.

³ The Association asserts that there are approximately 3,600 employees in the existing unit and approximately 209 school psychologists and counselors. The District asserts that there are approximately 3,349 employees in the existing unit and approximately 169 school psychologists and counselors. In any configuration, the claimed employees are less than the 10% of the existing unit.

The response also alleges that the following duties of school counselors are managerial and make it inappropriate to include those employees in the existing certificated unit: (1) developing District programs for mental health, student behavior, and suicide prevention; (2) administering District programs relating to progressive discipline; (3) providing preventative and remedial guidance within the classroom and in small groups for students with behavior/emotional issues; (4) assisting the principal in improving the instructional program and reinforcing the school-wide behavioral and discipline plan; (5) developing staff and parent in-service programs; (6) supporting student access, administering standardized tests, and interpreting test results in a cohort of other administrators, counselors, and Pathway teachers; (7) supervising cumulative guidance records in accordance with State and Federal laws; (8) coordinating or organizing student interventions, SST meetings, IEP team meetings, 504 plans, and parent workshops; (9) participating in development of the master schedule and class placement; (10) serving as administrative designee for IEP and other meetings; (11) assisting the principal with evaluating school programs, overseeing grade-level instruction, and evening responsibilities; (12) formulating crisis intervention policies and strategies and monitoring and implementing support programs for school-wide critical incidents; and (13) providing strategies and plans for classroom management design and positive behavior support. The District alleges that because the above duties constitute 40% of Counselor time, School Counselors work an additional eleven days each school year compared to teachers.

DISCUSSION

A. Authority to Investigate and Issue Order to Show Cause

PERB Regulation 33237 states:

“Whenever a petition regarding a representation matter is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election or take such other action as deemed necessary to decide the question raised by the petition.”

There is “no guarantee or entitlement to an evidentiary hearing” under this provision. (See *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402 (*Children of Promise*)). Rather, after completing an investigation, the Board agent may either “determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing,” or “that no material issue of fact exists and thus that a hearing is unnecessary.” (*Ibid.*) A party’s failure to “present evidence

in the manner required” by the “clearly stated guidelines” in the order to show cause justifies a finding that there is no dispute of material fact necessitating a hearing. (*Ibid.*)

A Board agent may employ an order to show cause to investigate whether a representation petition raises a material factual dispute that must be resolved by an evidentiary hearing. (*Children of Promise, supra*, PERB Order No. Ad-402; see also *Victor Valley Community College District* (2010) PERB Order No. Ad-388 [upholding dismissal of severance petition following order to show cause]; *Wheatland Elementary School District* (2003) PERB Order No. Ad-330.)

B. Managerial Status of Claimed Employees

The District contends that including certificated school psychologists and counselors in the certificated bargaining unit is not appropriate because these individuals are managers.

EERA prohibits management employees from being represented by an exclusive representative. (Gov. Code, § 3543.4.) Because these employees are excluded from representation, the Board exercises “great care . . . in determining who should be considered” management or confidential. (*Los Angeles Unified School District* (2004) PERB Decision No. 1665, citing *Oakland Unified School District* (1977) EERB Decision No. 15 (*Oakland I*);⁴ *Los Rios Community College District* (1977) EERB Decision No. 18.) A management employee is “an employee in a position having significant responsibilities for formulating district policies or administering district programs.” (Gov. Code, § 3540.1, subd. (g).) Although this definition is phrased in the disjunctive, the Board has held that management employees must have significant responsibilities both for formulating district policies *and* for administering district programs. (*Grossmont-Cuyamaca Community College District* (2008) PERB Decision No. 1958 (*Grossmont-Cuyamaca*), citing *Lompoc Unified School District* (1977) EERB Decision No. 13.)

Significant responsibilities for formulating district policies “must entail the discretionary authority to develop or modify institutional goals and priorities,” while significant responsibilities for administering district programs must include “the authority to implement district programs through the exercise of independent judgment.” (*Grossmont-Cuyamaca, supra*, PERB Decision No. 1958, citing *Hartnell Community College District* (1979) PERB Decision No. 81 (*Hartnell*).) Management employees

⁴ Before 1978, PERB was known as the Educational Employment Relations Board (EERB).

are clearly allied with management, and their decisions are made independent of, rather than, under the direction and control of the management team. (*Paramount Unified School District* (1977) EERB Decision No. 33.) Even school principals with no significant responsibilities for formulating district policy are not management employees. (See *San Francisco Unified School District* (1977) Decision No. 23.)

In *Hartnell*, *supra*, PERB Decision No. 81, the chairpersons of various academic departments played a “pivotal” role in recruiting and hiring teachers, student assistants, and laboratory technicians. (*Id.* at p. 10.) The chairpersons also “independently scheduled” class assignments and had limited authority to determine—within established limits—curriculum, course content, and budgetary allocations. (*Id.* at p. 13.) However, because the chairpersons had limited ability to “develop” or “modify” the employer’s institutional “goals and priorities,” PERB determined that the chairpersons were not “management” employees. (*Id.* at pp. 13-14.)

The Board has consistently determined that school psychologists are not management employees, and thus capable of being exclusively represented by an employee organization. (See, e.g., *Oakland Unified School District*, *supra*, EERB Decision No. 15.) Finding that school psychologists are not management in *Oakland*, the Board stated in part:

“They exercise discretion only within their areas of expertise, which is not the same as a manager's authority to formulate district policy. While they have considerable discretion in implementing the district's testing program, this is no more administering policy than teachers administer policy because they have considerable discretion in implementing a teaching program. The psychologists’ authority is exercised on a localized basis, not on a district-wide basis. And finally, psychologists are part of a large group [of approximately 40 to 48] having no intimate relationship with high level district officials. [Footnote omitted.]”

The Board has also consistently found that school counselors are not managers. (See, e.g., *Paramount Unified School District*, *supra*, EERB Decision No. 33.) Temporary or occasional responsibility for administering the functions of the school in the administrator's absence does not support a finding that counselors are managers or supervisors. (*Pleasanton Joint Elementary School District* (1977) EERB Decision No. 24.) In fact, the Board has routinely included school counselors and psychologists

in petitioned-for bargaining units. (See, e.g., *Arcadia Unified School District* (1979) PERB Decision No. 93; *Washington Unified School District* (1977) EERB Decision No. 27; *Placer Union High School District* (1977) EERB Decision No. 25; *Grossmont Union High School District* (1977) EERB Decision No. 11.)

Here, the District claims that at least 169 school psychologists and school counselors should be excluded from the rights and protections of EERA because they are management employees. However, even assuming the District's factual assertions as true, the District's response does not meet its burden to demonstrate that school psychologists and counselors should be excluded from the unit because they are management employees.

The District alleges that school psychologists and counselors develop policies and administer programs; however, the programs and policies described are localized or specific to the employee's expertise. The District does not allege that the claimed employees exercise any independent judgment in developing district-wide policies or programs. (See *Grossmont-Cuyamaca, supra*, PERB Decision No. 1958.) Further, the job duties described do not demonstrate that psychologists or counselors may develop or modify institutional goals and priorities. (See *Hartnell, supra*, PERB Decision No. 81.)

The District alleges no facts about the management structure of the District or how the psychologists and counselors are closely aligned with management rather than directed and controlled by the management team. (See *Paramount Unified School District, supra*, EERB Decision No. 33.) While the school counselors may assist the principal with administrative duties and evening activities, occasional administrative responsibilities are not enough to establish an employee as management. (See *Pleasanton Joint Elementary School District, supra* EERB Decision No. 24.)

Thus, the District has failed to identify any material fact that would establish its burden to demonstrate that the claimed employees should be excluded from the rights under EERA. Instead, consistent Board precedent since the inception of EERA demonstrates that school psychologists and counselors, such as the claimed employees here, are not managers and are entitled to representation.

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C. Unit Appropriateness

EERA section 3541.3, subdivision (a), provides that PERB shall have the power “[t]o determine in disputed cases, or otherwise approve, appropriate units.” The EERA requires that employees be grouped into an appropriate unit for purposes of collective bargaining.

In each unit determination case, the Board is bound to follow the criteria set forth in EERA section 3545, subdivision (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.”

The general rule is that in each case PERB must “determine the ‘appropriateness’ of a unit without being limited only to a choice between ‘an’ or the ‘most’ appropriate unit.” (*San Diego Community College District* (2001) PERB Decision No. 1445 (*San Diego*), citing *Antioch Unified School District* (1977) EERB Decision No. 37.) However, where the only question presented is whether a position must be excluded from the bargaining unit, for example, on the basis that it is a confidential or management position, then the community of interest analysis is not needed. (*Hemet Unified School District* (1990) PERB Decision No. 820, at p. 10.) Where there is no other existing unit for the employees at issue to be placed, unit appropriateness is not at issue. (See, e.g., *ibid.*)

Here, the District’s Response does not otherwise dispute the appropriateness of including school counselors and psychologists in the Certificated Employee Unit. While the District’s response does claim that school counselors and psychologists work eleven additional days each school year, the Board has held that such a discrepancy is a “minor” one and “not sufficient to establish a separate community of interest.” (*Grossmont Union High School District, supra*, EERB Decision No. 11.)

Further, the Board has consistently held that school psychologists, counselors, and other pupil services employees are appropriately included in broad certificated units along with classroom teachers. (See *Oakland Unified School District* (2001) PERB Decision No. 1464; *Oakland I, supra*, EERB Decision No. 15; *Grossmont Union High*

School District, supra, EERB Decision No. 11; *Los Angeles Unified School District* (1976) EERB Decision No. 5.) Thus, no material factual dispute exists regarding the appropriateness of the claimed unit.

D. Demand for Election, Proof of Support

PERB Regulation 32781, subdivision (e)(1) states:

“If the petition requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.”

Subdivision (e)(2) also provides that proof of support is required when the claimed positions are also included in a proposed unit in a pending recognition or certification petition. Previous versions of PERB regulations afforded PERB some discretion in determining whether proof of support was required; however, PERB’s discretion was removed upon adoption of the “ten percent rule” under the current regulation subdivision. (See *Regents of the University of California* (2010) PERB Decision No. 2107-H (*Regents*).

Here, without citing any authority, the District requests that PERB schedule an election to resolve the instant petition. Even assuming the District’s numbers as correct, the 169 claimed employees are less than 10% of the approximately 3,349 employees currently in the bargaining unit. Thus, PERB is without authority to require proof of support. (See *Regents, supra*, PERB Decision No. 2107-H at pp. 20-21.) And even if the instant petition sought to increase the bargaining unit by more than 10%, PERB Regulation 32700 does not require an election to demonstrate majority support. Thus, an election is not appropriate to resolve the instant petition.

CONCLUSION

In light of the above, the District is afforded this opportunity to SHOW CAUSE as to why the instant Petition should not be **granted**. Factual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein. Legal argument and supporting materials

must be filed with the undersigned no later than **May 21, 2021**. Service and proof of service pursuant to PERB Regulation 32140 are required.

Upon receipt of the District's argument and factual assertions, or the expiration of the time allowed for filing, the undersigned shall contact the parties regarding further case processing steps, including a deadline for a response to the District's submittal, if requested.

Sincerely,

A handwritten signature in black ink that reads "Seth P. Williams". The signature is written in a cursive style with a large, stylized "S" and "W".

Seth P. Williams
Regional Attorney

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Los Angeles Regional Office, 425 W. Broadway, Suite 400, Glendale, CA, 91204-1269.

On April 30, 2021, I served the Order to Show Cause regarding Case No. LA-UM-1013-E on the parties listed below by

I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Los Angeles, California.

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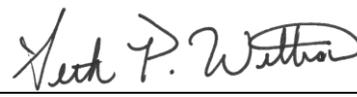
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 30, 2021, at Los Angeles, California.

Seth P. Williams

(Type or print name)



(Signature)