

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



PALOMAR COMMUNITY COLLEGE )  
DISTRICT, )  
 )  
Employer, ) Case No. LA-R-980  
 )  
and ) PERB Decision No. 947  
 )  
PALOMAR COLLEGE FACULTY )  
ASSOCIATION/CCA/CTA/NEA, )  
 )  
Employee Organization. )  
\_\_\_\_\_ )

Appearances: Littler, Mendelson, Fastiff & Tichy, by Richard J. Currier and C. Anne Hudson, Attorneys, for Palomar Community College District; Reich, Adell & Crost, by Glenn Rothner and Laurence S. Zakson, Attorneys, for Palomar College Faculty Association/CCA/CTA/NEA.

Before Hesse, Chairperson, Caffrey and Carlyle, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Palomar Community College District (District) and the Palomar College Faculty Association/CCA/CTA/NEA (Association) to a PERB regional director's proposed decision (attached) of the formation of a bargaining unit comprised of faculty. Essentially, the District takes exception to the regional director's finding that department chairpersons and directors are not supervisors and, thus, are included in the proposed bargaining unit. The Association objects to the regional director's denial of its request to schedule an election prior to the issuance of a final decision.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, exceptions and the responses filed thereto. The Board finds the regional director's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

Chairpersons/Directors

On appeal, the District contends the regional director misconstrued the evidence in reaching his factual conclusions. Specifically, the District contends the regional director erred by finding that: 1) adjunct faculty are interviewed and hired by committee; 2) chairpersons/directors have no authority to terminate adjunct faculty; and 3) chairpersons/directors do not exercise significant supervisory authority over classified employees and full-time faculty. After a review of the record, including the transcripts and exhibits, it is apparent there is ample evidence to support the regional director's factual findings concerning the authority and responsibility of the chairpersons/directors. Therefore, these exceptions are rejected.

The District also challenges the regional director's application of Education Code section 87610.1(e).<sup>1</sup> The District

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<sup>1</sup>Education Code section 87610.1(e) states:

Any employees who are primarily engaged in faculty or other bargaining unit duties, who perform "supervisory" or "management" duties incidental to

contends the regional director interpreted this section too broadly. The District argues that this section "discourages exclusion of faculty members as supervisory or management employees solely if they perform 'incidental' duties on committees." The District also contends that the Ralph C. Dills Act (Dills Act)<sup>2</sup> and the Educational Employment Relations Act (EERA)<sup>3</sup> differ substantially in this area. The District asserts the two-part test under Dills Act section 3513(g)<sup>4</sup> is

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their performance of primary professional duties shall not be deemed supervisory or managerial employees as those terms are defined in Section 3540.1 of the Government Code, because of those duties. These duties include, but are not limited to, serving on hiring, selection, promotion, evaluation, budget development, and affirmative action committees, and making effective recommendations in connection with these activities. These employees whose duties are substantially similar to those of their fellow bargaining unit members shall not be considered supervisory or management employees. (Emphasis added.)

<sup>2</sup>Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>3</sup>EERA is codified at Government Code section 3540 et seq.

<sup>4</sup>Dills Act section 3513(g) states:

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

inapplicable to EERA section 3540.1(m)<sup>5</sup> and the regional director erred in utilizing it here.

The District urges an overly restrictive reading of Education Code section 87610.1(e). This section provides that incidental supervisory duties "include, but are not limited to," serving on various committees. The language of this section does not limit incidental supervisory duties solely to participation on committees.

The Board has established that the supervisory status factors set out in EERA section 3540.1(m) are evaluated in the disjunctive. The independent and effective exercise of any one of the criteria is sufficient to establish supervisory status. (Sweetwater Union High School District (1976) EERB Decision No. 4;<sup>6</sup> Glendale Community College District (1979) PERB Decision

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to those of their subordinates shall not be considered to be supervisory employees.  
(Emphasis added.)

<sup>5</sup>EERA section 3540.1(m) states:

"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>6</sup>Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

No. 88.) The Board has also held, in regard to community college employees, that their actions "must be viewed in light of long-standing traditions of collegiality and shared authority within institutions of higher education." (Los Rios Community College District (1977) EERB Decision No. 18.)

Dills Act section 3513(g) contains language similar to Education Code section 87610.1(e), providing that employees with duties substantially similar to those of their fellow bargaining unit members should not be considered supervisory employees. The two-part test applied under the Dills Act requires a finding of whether the employee has independently and effectively exercised any of the type of activities considered to be supervisory. The finding of supervisory status is then tested against the "substantial similarity" requirement. This requires exclusion from the unit when the employee's duties reach that point where the supervisory obligation to the employer outweighs the entitlement to the rights afforded rank and file employees. (Unit Determination for the State of California (1980) PERB Decision No. 110c-S.)

Here, the chairpersons/directors do not exercise independent and effective authority over their fellow faculty members as required by EERA section 3540.1(m). Many decisions concerning personnel matters and selection of adjunct faculty, budget issues and instructional scheduling are made in a collaborative, collegial manner. Application of the substantial similarity requirement bolsters the finding that their responsibilities to

the District do not exceed their rights as rank and file employees.

Posting

The District also excepts to the regional director's decision not to require posting of the notice of the amended petition. The amendment altered the proposed unit from one consisting of only full-time faculty to also include part-time faculty, increasing the size of the proposed bargaining unit from 264 to more than 1,000. The District argues that a majority of employees in the amended unit were deprived of notice of the Association's desire to represent them. Further, other employee organizations were deprived of the opportunity to intervene in the proceedings.

PERB Regulation 33100(c)<sup>7</sup> provides discretion to a Board agent to decide whether to require posting of proposed unit amendments after notice of a representation hearing has been

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<sup>7</sup>PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 33100(c) states:

Amendments to correct technical errors, add or delete job classifications or positions from a party's proposed unit which are requested after the issuance of the notice of hearing are subject to approval by the Board agent assigned to the hearing. The Board agent may grant the requested amendment, if it will not unduly impede the hearing, and if sufficient proof of support is evidenced to support any request for addition of job classifications. Posting of any such amendments shall be at the discretion of the Board agent.

issued. In this case, the regional director found that although the amendment would add a large number of part-time faculty to the proposed unit, it would not change its fundamental nature. In fact, the District initially objected to the appropriateness of this unit because it did not include part-time faculty. In addition, the Association provided proof of majority support from the larger proposed unit. Further, although other employee organizations had several opportunities to seek intervention or limited party status, none came forward. Refusal to require a posting of the notice of the amended unit in this case did not prejudice either the employees or other employee organizations. Accordingly, this exception is rejected.

#### Conflict of Interest

On appeal, the District alludes to a possible bias by the regional director due to his personal friendship with the Association's counsel. The regional director noted his relationship with Association's counsel on the record in accord with PERB Regulation 32155. No objection was raised by the District until a proposed decision was issued which was contrary to the District's position. Therefore, this contention is rejected.

#### Election

The Association filed exceptions to the regional director's denial of its request to schedule an election prior to issuance of a final decision. The Association argues that public policy and employee free choice would best be served if the election is

allowed to go forward notwithstanding the pendency of any exceptions. The Association urges that the 41 chairperson/ director positions in dispute be allowed to vote subject to a challenged ballot procedure.

EERA assigns broad powers and duties to the Board. EERA section 3541.3(a) specifically empowers the Board "[t]o determine in disputed cases, or otherwise approve, appropriate units," and section 3541.3(g) gives the Board the power "[t]o adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies" of EERA.

EERA also sets forth the procedure for conducting representation elections. EERA section 3544.1 permits an employee organization and a public school employer to mutually agree on a proposed bargaining unit, allowing the employer to grant voluntary recognition to the employee organization. Where voluntary recognition is not granted and the nature of the proposed bargaining unit is in dispute, the Board must determine the appropriateness of the proposed unit.<sup>8</sup> The Board then

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<sup>8</sup>EERA section 3545(a) states, in pertinent part:

(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.



conducts an election pursuant to section 3544.7. Section

3544.7 (a) provides, in pertinent part:

Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct inquiries and investigations or hold any hearings it deems necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearing. However, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation exists pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast.

The Board has exercised its broad authority in adopting regulations governing the conduct of representation elections in furtherance of the EERA, including regulations concerning specific election procedure, representation hearings and resolving questions of the appropriateness of the proposed bargaining unit. In implementing the authority assigned to PERB under EERA, the Board has adopted regulations which currently require that a final Board decision be issued before a representation election is conducted, unless the parties mutually agree upon an appropriate unit and request a consent election.<sup>9</sup>

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<sup>9</sup>EERA does not either expressly authorize or prohibit the ordering of an election by the Board prior to a final Board decision regarding the appropriateness of a bargaining unit. If the Board concludes that the purposes of the EERA could be better served under certain circumstances by conducting an election prior to a final decision on appropriateness of a bargaining unit, the Board is empowered by EERA to adopt rules and regulations authorizing such an election process.

Specifically, PERB Regulation 33460 provides:

Elections in Consent Units. At any time prior to a final decision of the Board regarding an appropriate unit, the parties may mutually agree upon an appropriate unit and request the Board to conduct a consent election. The conduct of any election in a consent unit should not be interpreted to mean that the Board would find the unit in question to be an appropriate unit in a disputed case.

As PERB has exercised its authority under EERA by adopting regulations which require the determination of the appropriate bargaining unit before ordering an election, the Board rejects the Association's exceptions.

The Association also notes that the National Labor Relations Board (NLRB) has established a challenged ballot procedure which requires that an election proceed pending review of challenges to the regional director's decision, including questions of unit determination.<sup>10</sup> The Association argues such a procedure eliminates election delay which interferes with employee free choice.

The Association's reliance on NLRB law is inapplicable here. PERB has no similar procedure requiring an election to be conducted prior to the issuance of a final decision. Rather, PERB Regulations require that a final decision be issued before a representation election is conducted. (See PERB Regulations 33440, 33450, 33460, 33470.) Therefore, the regional director did not err when he concluded that PERB regulations prohibited

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<sup>10</sup>N.L.R.B. Regulation 29 C.F.R. section 102.67(b).

him from scheduling an election prior to resolution of any challenges to the proposed decision.

ORDER

For the reasons discussed above, the Board finds that a unit comprised of all faculty, including specified department chairpersons and directors, sought by the Palomar College Faculty Association in its request for recognition petition, is appropriate.

The Board finds the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

Unit Title: Faculty

Shall Include: All faculty (full-time, part-time, adjunct, contract or temporary), counselors, coaches, librarians, child care center teachers, department chairpersons and those directors not specifically excluded.

Shall Exclude: Classified employees, and the superintendent/president, assistant superintendents/vice presidents, deans, administrative interns, and the director, athletics; director, institutional research and planning; special assistant to the president; director, student activities; director, library/media center; facility planner; director, Escondido education center/extension education; director, health services; director, extended opportunity programs and services; director, extended day services; director, auxiliary services; director, facilities; director, human resources and affirmative action; director, business services; director, financial aid; contracts/special projects manager; director, disabled student programs and services; director, matriculation; director, Camp Pendleton/Fallbrook/Ramona education centers; director, placement services; director, vocational programs; director, admissions, records, and veterans' services; director, Mt. Carmel/Poway education centers; director, fiscal services; director, public information; director, regional occupational programs; director, instructional operations and services; director, information systems; director, title III; chief advancement officer; director,

child development instruction and services center; and director, public services program.

Within 10 days following issuance of the Notice of Decision, the District shall post on all employee bulletin boards in each facility of the employer in which members of the unit described in the decision are employed, a copy of the Notice of Decision attached hereto as an Appendix. The Notice of Decision shall remain posted for a minimum of 15 workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

The regional director shall conduct an election at the end of the posting period to determine whether the employees in the appropriate unit wish to be represented by the Association, unless the District chooses to grant voluntary recognition to the employee organization.

The Board hereby ORDERS that this case be REMANDED to the Los Angeles Regional Director for proceedings consistent with this decision.

Member Carlyle joined in this Decision.

Chairperson Hesse's concurrence begins on page 13.

Hesse, Chairperson, concurring: With the exception of the majority's discussion regarding the Palomar College Faculty Association/CCA/CTA/NEA's (Association) request to schedule an election prior to the issuance of a final Public Employment Relations Board (PERB or Board) decision, I agree with the majority's decision and PERB regional director's administrative determination. I write separately to express my position regarding the Board's authority and obligation to issue a final Board decision determining an appropriate unit in disputed cases prior to ordering an election.<sup>1</sup>

The preservation of the integrity of the statutory scheme of the Educational Employment Relations Act (EERA) can best be achieved by recognizing the paramount right of public school employees to select an exclusive representative of their own choice in an appropriate unit. The free choice of an exclusive representative is a cornerstone of the EERA, as it is in all analogous collective bargaining schemes. Specifically, EERA begins by stating, at section 3540:

It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by

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<sup>1</sup>The real issue in this case is the Board's ability to process representational matters in a responsive fashion to insure timely and meaningful elections. I share the Association's concern regarding the dynamics of an election, particularly in a school setting. In recognition of those dynamics, years ago, PERB established that representational matters are cases of the highest priority and therefore, those cases must be handled expeditiously. Undoubtedly, employee free choice is best insured by the expeditious handling of representational disputes and the subsequent direction of a prompt election. For that reason, the Board itself will continue to endeavor to resolve the representational cases in a more timely manner.

providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.  
(Emphasis added.)

Not only is free choice crucial to protecting the individual rights bestowed by the statute, but it is also critical to stable and efficient labor relations. For collective bargaining to work, an exclusive representative must fairly and effectively represent the interests of the members of the bargaining unit. The best guarantee of such a result is the free and democratic selection of such representatives by unit members in an appropriate unit. (See Peralta Community College District (1987) PERB Order No. Ad-164.) Under the statutory language of EERA, the Board has broad discretion in determining appropriate bargaining units. (See EERA section 3545.) The Board's jurisdiction to make bargaining unit determinations is at the heart of the collective bargaining system. The size and composition of the bargaining unit will directly affect the structure and composition of the exclusive representative and the issues that will be addressed in collective bargaining.

The EERA sets forth the procedures for conducting representation elections, and determining appropriate bargaining units. EERA section 3541.3(a) specifically empowers the Board "[t]o determine in disputed cases, or otherwise approved, appropriate units." EERA section 3544.1 permits an employee

organization and a public school employer to mutually agree on a \*proposed bargaining unit, allowing the employer to grant voluntary recognition to the employee organization. Where voluntary recognition is not granted and the nature of the proposed bargaining unit is in dispute, the Board must determine the appropriateness of the proposed bargaining unit.

Specifically, EERA 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.

After determining an appropriate bargaining unit, the Board then conducts an election pursuant to section 3544.7. Section 3544.7(a) provides, in pertinent part:

Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct inquiries and investigations or hold any hearings it deems necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearing. However, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation exists pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast.

Although EERA does not expressly prohibit the Board from ordering an election prior to a final Board decision regarding the appropriateness of a bargaining unit, it is clear that the

EERA presumes that in disputed cases, the Board will issue a final Board decision regarding the appropriateness of a bargaining unit prior to ordering an election. This power is fairly implied from EERA, because the determination of an appropriate bargaining unit prior to conducting an election is administratively efficient and furthers the purposes of EERA.

Such implied statutory power has been established under PERB case law. In Washington Unified School District (1985) PERB Decision No. 549, the Board found that the lack of specific authority for an administrative law judge's sua sponte dismissal of a complaint was not fatal to the administrative law judge's actions under the circumstances. The Board relied upon Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal.App.3d 110, where the court held that, although no statute expressly authorized the Board of Medical Examiners to settle licensing disputes, the Board did possess such power. In reaching this conclusion, the court stated:

Administrative agencies only have the power conferred upon them by statute and an act in excess of these powers is void. [Citations omitted.] However, an agency's powers are not limited to those expressly granted in the legislation; rather, "[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." [Citations omitted.]

(Id. at p. 114, emphasis in original.)

In this case, the Board's determination of an appropriate bargaining unit prior to ordering an election is a power



necessary for administrative efficiency and furtherance of EERA's purposes and policies.

Consistent with EERA, PERB regulations require that a final Board decision be issued before a representation election is conducted, unless the parties mutually agree upon an appropriate unit and election. Specifically, PERB Regulation 33460 provides:

Elections in Consent Units. At any time prior to a final decision of the Board regarding an appropriate unit, the parties may mutually agree upon an appropriate unit and request the Board to conduct a consent election. The conduct of any election in a consent unit should not be interpreted to mean that the Board would find the unit in question to be an appropriate unit in a disputed case.

It should be noted, in adopting PERB regulations, it is not within the Board's authority to adopt rules and regulations which are inconsistent with the expressed language of the statute.

(Apple Valley Unified School District (1990) PERB Order No. Ad-209; Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 371-372; Service Employees International Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 467-468.)

Pursuant to EERA's statutory scheme, PERB regulations evidence the requirement that a final decision be issued before a representation election is conducted. (See PERB Regulations 33440, 33450, 33460, and 33470.) Based upon the language of EERA and PERB regulations, the necessity for determining the appropriate bargaining unit before ordering an election is crucial to protecting the public school employees' rights under section 3540 of EERA. Such rights include the public school

employees' selection of one employee organization as the exclusive representative of the employees in an appropriate unit,

Accordingly, I affirm the regional director's proposed decision and order finding an appropriate unit and ordering that an election be conducted.

APPENDIX

NOTICE OF DECISION  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California



**CASE:** PALOMAR COMMUNITY COLLEGE DISTRICT  
Case No. LA-R-980  
PERB Decision No. 947  
July 14, 1992

**EMPLOYER:** Palomar Community College District  
1140 West Mission Road  
San Marcos, CA 92069-1487  
(619) 744-1150

**EMPLOYEE ORGANIZATION  
PARTY TO PROCEEDING:**

Palomar College Faculty Association/CCA/CTA/NEA  
1140 West Mission Road  
San Marcos, CA 92069-1487  
(619) 744-1150

**FINDINGS:**

The Board finds the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

Unit Title: Faculty

Shall Include: All faculty (full-time, part-time, adjunct, contract or temporary), counselors, coaches, librarians, child care center teachers, department chairpersons and those directors not specifically excluded.

Shall Exclude: Classified employees, and the superintendent/president, assistant superintendents/vice presidents, deans, administrative interns, and the director, athletics; director, institutional research and planning; special assistant to the president; director, student activities; director, library/media center; facility planner; director, Escondido education center/extension education; director, health services; director, extended opportunity programs and services; director, extended day services; director, auxiliary services; director, facilities; director, human resources and affirmative action; director, business services; director, financial aid; contracts/special projects manager; director, disabled

student programs and services; director, matriculation; director, Camp Pendleton/Fallbrook/Ramona education centers; director, placement services; director, vocational programs; director, admissions, records, and veterans' services; director, Mt. Carmel/Poway education centers; director, fiscal services; director, public information; director, regional occupational programs; director, instructional operations and services; director, information systems; director, title III; chief advancement officer; director, child development instruction and services center; and director, public services program.

Pursuant to PERB Regulation section 33450, within 10 days following issuance of this Notice of Decision, the District shall post on all employee bulletin boards in each facility of the employer in which members of the unit described in the decision are employed, a copy of the Notice of Decision. The Notice of Decision shall remain posted for a minimum of 15 workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

The regional director shall conduct an election at the end of the posting period to determine whether the employees in the appropriate unit wish to be represented by the Palomar College Faculty Association/CCA/CTA/NEA, unless the District chooses to grant voluntary recognition to the employee organization.

Dated: \_\_\_\_\_ PALOMAR COMMUNITY COLLEGE  
DISTRICT

By \_\_\_\_\_  
Authorized Agent

**THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR A MINIMUM OF FIFTEEN (15) WORKDAYS. REASONABLE STEPS SHALL BE TAKEN TO ENSURE THAT THIS NOTICE IS NOT REDUCED IN SIZE, ALTERED, DEFACED OR COVERED WITH ANY OTHER MATERIAL.**

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



PALOMAR COMMUNITY COLLEGE )  
DISTRICT, )  
 )  
Employer, ) Representation  
 ) Case No. LA-R-980  
and )  
 ) PROPOSED DECISION  
PALOMAR COLLEGE FACULTY ) (1/2/92)  
ASSOCIATION/CCA/CTA/NEA, )  
 )  
Employee Organization. )  
\_\_\_\_\_ )

Appearances: Littler, Mendelson, Fastiff & Tichy, by Richard J. Currier, C. Anne Hudson and Nicholas T. Calderon, Attorneys, for Palomar Community College District; Reich, Adell & Crost, by Glenn Rothner and Laurence S. Zakson, Attorneys, for Palomar College Faculty Association/CCA/CTA/NEA.

Before Les Chisholm, Hearing Officer.

PROCEDURAL HISTORY

On April 9, 1991<sup>1</sup> the Palomar College Faculty Association/CCA/CTA/NEA (Petitioner) filed a petition with the Los Angeles Regional Office of the Public Employment Relations Board (PERB or Board) seeking to represent a unit of full-time faculty, counselors and librarians of the Palomar Community College District (District). Notice of the petition was posted by the District on April 19. On May 10, PERB issued a determination indicating that the Petitioner had submitted evidence of majority support in the unit claimed as appropriate, and that no timely intervention had been filed.

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<sup>1</sup>All dates referenced herein are in the calendar year 1991, unless specified otherwise.

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This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The District, by letter dated May 14, declined to grant voluntary recognition and contested the appropriateness of the unit described by the Petitioner. The District specifically objected to the exclusion of part-time and hourly academic employees and child care center employees from the proposed unit, and also contended that the proposed unit inappropriately failed to exclude all management, supervisory and confidential employees. The District submitted that an appropriate unit must exclude the superintendent/president, vice-presidents, directors, deans, administrative interns, and department chairpersons.

By letter dated May 16, Petitioner requested PERB to conduct an investigation pursuant to PERB regulation 33230(a)(1).<sup>2</sup> A settlement conference was held with the parties on July 24, but no agreement was reached. A hearing was then conducted by the undersigned on September 19 and 20, and October 21 and 22.

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<sup>2</sup>PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Section 33230(a)(1) provides as follows:

(a) Not later than 90 days following the date an employer decision is filed or required to be filed with the regional office, whichever occurs first, an employee organization may file a petition pursuant to Government Code section 3544.5(b) or (c) requesting the Board to investigate and decide whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit. The petition shall allege one of the following grounds:

(1) The employer has filed a decision not to recognize the employee organization, but did not request a Board investigation.

On the first day of hearing, Petitioner moved to amend its petition to include "all faculty, including those employed at the child care center." By letter dated October 7, the parties were advised that PERB had determined that the Petitioner had submitted evidence of majority support in the amended unit. On October 21, the undersigned granted the motion to amend, pursuant to PERB regulation 33100(c).<sup>3</sup> On October 22, the parties were advised on the record that posting of the amendment would not be required in this case.

Prior to the conclusion of the hearing, the parties entered into stipulations by which they agreed the following positions should be excluded from the bargaining unit: director, institutional research and planning; special assistant to the president; director, student activities; director, library/media

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<sup>3</sup>PERB regulation 33100 provides, in relevant part, as follows:

33100. Amendment of Request or Intervention:  
Posting Amendments.

.....

(c) Amendments to correct technical errors, add or delete job classifications or positions from a party's proposed unit which are requested after the issuance of the notice of hearing are subject to approval by the Board agent assigned to the hearing. The Board agent may grant the requested amendment, if it will not unduly impede the hearing, and if sufficient proof of support is evidenced to support any request for addition of job classifications. Posting of any such amendments shall be at the discretion of the Board agent.

center; facility planner; director, Escondido education center/  
extension education; director, health services; director,  
extended opportunity programs and services; director, extended  
day services; director, auxiliary services; director, facilities;  
director, human resources and affirmative action; director,  
business services; director, financial aid; contracts/special  
projects manager; director, disabled student programs and  
services; director, matriculation; director, Camp Pendleton/  
Fallbrook/Ramona education centers; director, placement services;  
director, vocational programs; director, admissions, records, and  
veterans' services; director, Mt. Carmel/Poway education centers;  
director, fiscal services; director, public information;  
director, regional occupational programs; director, instructional  
operations and services; director, information systems; director,  
title III; chief advancement officer; director, child development  
instruction and services center; and director, public services  
program.

The positions whose status remained in dispute included all  
department chairpersons and the director of athletics; director,  
art gallery; director, dental assisting; director, reading  
services; director, allied health; director, planetarium; and  
director, multi-cultural studies. (IV: 93, 14-23.)<sup>4</sup>

Timely briefs were filed by both parties and the case was  
submitted for decision on December 3.

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<sup>4</sup>Cites to the reporter's transcript include the volume  
number followed by the applicable page and line numbers.



### POSITIONS OF THE PARTIES

Based on applicable law and precedent, Petitioner argues that all positions in dispute in this matter are properly included in the faculty unit. In addition, the Petitioner cites the "community college tradition of collective decision-making, the District's expressed policy of collegiality, and the Legislature's intention . . . that participatory and collegial decision-making becomes an integral a [sic] part of the community college system. . . ." (Petitioner's Brief at p. 2.)

In support of its position, Petitioner relies on testimonial and documentary evidence which shows that: 1) department chairs are selected by the faculty in their department, not the administration; 2) department chairs are eligible to participate in the Faculty Senate; 3) department chairs lack authority to resolve grievances or disputes, or to discipline their colleagues; 4) scheduling and assigning classes is accomplished collegially, and the department chairs' role is ministerial; 5) department chairs' budget authority is ministerial or routine; 6) department chairs function in a collegial capacity in the hiring and evaluation of full-time faculty, adjunct faculty and classified staff; 7) department chairs spend a significant amount of time teaching and only a small amount of time supervising non-unit employees.

Petitioner also argues that the hearing officer should direct an election which would proceed irrespective of any exceptions filed to the instant decision, with a challenged

ballot mechanism provided to handle any disputes over the inclusion or exclusion of employees.<sup>5</sup>

The District argues for the exclusion of department chairpersons and program directors from a unit which it concedes is otherwise appropriate. The District contends that the record "clearly establishes that all department chairs and directors at issue are given supervisory authority over full-time faculty, adjunct faculty and classified staff." (District's Brief at p. 1.)

As to adjunct faculty, the District cites evidence that the department chairs and directors are responsible for hiring and assigning classes to adjunct faculty, determining whether to rehire them and being involved in their performance evaluation. The District contends that department chairs and directors exercise similar authority over classified staff.

The District also argues that department chairs and directors exercise general supervisory authority over their respective department or program, including such matters as assigning classes, setting class times and locations, and setting up and monitoring the department/program budget.

The District emphasizes that department chairs and directors are in a "position of allegiance to the District because they are paid a stipend, are given release time to accomplish their supervisory duties and are given discretion and independent

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<sup>5</sup>The Petitioner notes that a challenged ballot mechanism need involve only 30 to 32 employees, in a voting unit of 1,000 or more employees.

judgment as to the managerial styles and methods they use to accomplish their supervisory duties." (*id.*, at pp. 3-4.) The District dismisses as unimportant, under Board precedent, evidence concerning collegial-style decision-making and whether the employees supervised are non-unit employees.

On procedural issues, the District contends that the hearing officer lacks authority to order an election prior to issuance of a final decision in this matter, and argues that the hearing officer erred in not ordering posting of the amendment to the petition granted during the hearing.

#### FINDINGS OF FACT

Palomar College, with a student enrollment in excess of 25,000, serves a population of approximately 500,000 in northern San Diego County. The main campus is located in San Marcos, but courses are also offered at nine off-campus education centers and nearly 100 other locations, including numerous high schools, rest homes, and shopping malls and centers.

The main campus includes more than 50 buildings, a theater, art gallery, planetarium, library, student union, children's development center and laboratories.

The District employs approximately 350 classified employees, and an established bargaining unit of classified employees is represented by the Council of Classified Employees/AFT Local 4522.

The District currently employs fewer than 300 full-time faculty, approximately 800 adjunct faculty and 5 child care

center teachers.<sup>6</sup> "Full-time" faculty may actually be employed less than 100%-time; adjunct faculty are limited to no more than 60% of a full-time load (and thus are often referred to as part-time).

The District is governed by a five-member Governing Board, which delegates authority to the superintendent/president. The superintendent/president is assisted by three assistant superintendents/vice presidents, who are responsible for instruction, student services, and finance and administrative services. The deans of arts and languages; human arts and sciences; mathematics and the natural and health sciences; media, business and community services; and vocational technology, and the director, library/media center, report to the vice president for instruction. The dean of counseling guidance and career development, the dean of student support services and the director of student activities report to the vice president for student services.

The organizational units headed by these deans and directors include various academic and student support departments and programs. Academic departments are generally headed by a

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<sup>6</sup>The term "faculty", as used herein, refers unless otherwise specified to employment categories including probationary faculty (contract), tenured faculty (regular), adjunct faculty (instructors), librarians, counselors and child care center teachers. The term "faculty" also generally includes department chairpersons and directors, except directors who are 100% educational administrators. The parties' agreed-upon exclusions applied to all of the 100% educational administrators.

department chairperson, and academic programs by a director.<sup>7</sup> For purposes of this decision, the directors whose status is in dispute are considered the functional equivalent of department chairpersons.<sup>8</sup> Department chairpersons/directors are most often elected by faculty in the department, or selected by some other procedure (e.g., rotation) decided upon by the faculty. Only full-time (or contract) faculty members are eligible to be a department chairperson/director. Each program and department is required to adopt a procedure which is kept on file in the vice president's office. Procedures must also provide for a recall mechanism, and the term of office is two years. There is no evidence that the District administration has to approve the selection of a chairperson or director, or that the administration may remove a chairperson/director. The only exception to this general rule concerns the director of athletics; the department recommends two candidates to the director of student activities and the vice president for student services for final selection of a candidate.

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<sup>7</sup>The "Palomar College Governance Structure" specifies that "[t]his plan does not address or interfere with department/division organization or managerial structure. (Petitioner's Exhibit No. 8, Section II, at p. 1.)

<sup>8</sup>While there is evidence in the record to support the view that directors have somewhat less authority and responsibility, any difference is held to lack significance to the instant decision. The confusion is created in part by the District's use of the term "director" to denote quite different levels of authority. For example, the math center director reports to the chairperson of the mathematics department, while the library technology department chairperson reports to the director, library/media center, and the director of athletics reports to the director of student activities.

The District has a Faculty Senate, in which department chairpersons/directors are eligible to -- and do -- participate. There are, currently, individuals who serve both as a department chairperson or director and in the Senate. Deans are not eligible to participate in the Faculty Senate.<sup>9</sup>

The Faculty Senate's duties include considering problems, procedures and policies in such areas as academic standards, the "status and morale of the professional teaching staff," health and welfare issues such as retirement, leave, salary and benefits,<sup>10</sup> making recommendations in such areas, and acting as the liaison for the faculty with the administration and Governing Board. (Petitioner's Exhibit No. 4.)

Department chairpersons/directors are compensated both by a salary stipend (8% for most)<sup>11</sup> and "assigned time." Assigned time (sometimes referred to as released time or reassigned time) is intended to provide compensated time from other instructional duties in recognition of the time needed for the various administrative and supervisory duties that go with the position. The amount of assigned time varies from 0% to 80%: 12 positions

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<sup>9</sup>The record is not clear on whether the deans are eligible to participate in the Administrative Association, but it is clear that department chairpersons/directors are not.

<sup>10</sup>One standing committee of the Faculty Senate is the Salary and Benefits Committee.

<sup>n</sup>All department chairpersons receive 8%, as do directors at level 3 or 4. Directors at level 1 or 2 receive no stipend. A director at level 5 would receive 10%. The only directors at issue receiving other than 8% are the director, planetarium; director, reading services and director, dental assisting (all at 0%).

receive 20%; 13 receive 40%; 2 - 0%; 2 - 60%; 1 - 25%; 1 - 66% and 1 - 80%. The director of athletics is the only position currently at 80% assigned time. (District's Exhibit No. 4.)<sup>12</sup> The "Behavioral Sciences Departmental Structure and Operation" policy allows for the sharing of the assigned time provided to the department chairperson with other department members who perform duties which would otherwise be performed by the chairperson. (Petitioner's Exhibit No. 10.)

According to District Governing Board policy, department chairpersons/directors have certain responsibilities, the first listed of which is to "[r]epresent department faculty to the administration." (Petitioner's Exhibit No. 8, Section I, at p. 58.) They are also responsible for coordinating curricula, approving texts, screening budget requests and approving requisitions, maintaining current syllabi, preparing job descriptions for new positions (with the dean and vice president), providing support for compliance with the District's affirmative action program, arranging for screening and interviewing of job candidates, participating in the evaluation and improvement of instruction, transmitting evaluations of

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<sup>12</sup>The District also introduced documentary and testimonial evidence concerning various requests for increases in assigned time, and a general recommendation made by the District's Staff Priorities Committee, to increase it by 20% for all affected positions. For purposes of this decision, and to the extent that specific percentages of assigned time are given weight, the actual percentages of assigned time in effect are what the hearing officer considers relevant.

instructors to the dean and vice president, and accepting other responsibilities from the dean (Ibid. )

It was also established that the department chairpersons/directors are charged by the administration with responsibilities in such areas as the District's sexual harassment policy, safety and health, evaluation of classified staff, compliance with the collective bargaining agreement in the classified bargaining unit, overtime and attendance policies, drug and alcohol awareness, and the hiring of substitute and short-term (classified) employees. Training in these areas has been provided for and offered to managers and supervisors, including department chairpersons/directors, but attendance at the training has only once been required.

Department chairpersons/directors have never been required to have or obtain an administrator's or supervisory credential (or any functional equivalent). The District, through various policies and procedures, encourages and/or requires the use of collaborative decision-making and collegiality. (See, for example, II: 163, 15-20; 166, 1-6; and Petitioner's Exhibits Nos. 1 and 5.)

Testimony was given by the department chairpersons of English as a second language, mathematics, and child development; a former chairperson of the physics and engineering department; the directors of library/media center, dental assisting and athletics; the deans of the arts and languages division, and the mathematics and the natural and health sciences division; and the



director of human resources and affirmative action. The parties stipulated that these witnesses' testimony was representative of any testimony that might be given on the subject of the duties and responsibilities of department chairpersons and directors. (IV: 95, 1-19; 109, 18-28; and 110, 1-3.)

Consistent with formal policy, department chairpersons/directors most often self-identify as "facilitators" and/or advocates for their department, and not as representatives of the administration to the faculty. Among those testifying, only the director of athletics gave significantly different testimony in this regard, and even he characterized his role as "liaison" for both the coaches and the administration. (IV: 53, 20-26.)

The department chairpersons/directors exercise no real authority over other full-time faculty. In hiring, interviewing is conducted and the effective recommendation made by a selection committee which does not necessarily include the chairperson, and the chairperson has no special status even if a participant. The tenure evaluation process of a probationary faculty member (a four-year process) is accomplished by a five-person committee, which includes the department chairperson or designee.<sup>13</sup>

(Petitioner's Exhibit No. 6.) The department chairpersons/directors have no authority to adjust grievances for full-time or adjunct faculty. To the extent the chairperson gets involved in conflict or dispute resolution, the role is dependent more on

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<sup>13</sup>If a department chairperson does serve on a committee, that individual continues on the committee even if no longer the chairperson.

seniority or personality than formal position. (See, e.g., I: 161, 13-16.)

The hiring of adjunct faculty, also, is accomplished by a committee process. Formal policy requires that screening and selection involve the department chairperson/director, discipline expert, or designee and at least one other faculty member.

(District's Exhibit No. 6.) While the department chairperson/director most typically is involved, there is no evidence that this individual carries any added authority over the final selection decision, except that it is the department chairperson/director who must complete the paperwork and sign the notice of employment in order for final approval to be given by the District. While there was testimony regarding a chairperson acting alone to fill a vacancy in an emergency, there were also instances cited of chairpersons who routinely defer to another faculty member (especially where the department is multi-disciplinary).

Evaluation of adjunct faculty is performed by the department chair or discipline designee or a designee appointed by the tenure review coordinator. (Petitioner's Exhibit No. 6 at p. 20.) Testimony revealed varied practices by department chairpersons/directors regarding evaluation of adjunct faculty, with some doing first-hand observation and evaluation, and others doing nothing more than reviewing the contents of a standardized evaluation instrument with the individual (based on data collection and/or observation conducted by others).

According to the "Handbook for Adjunct Faculty," an instructor is to consult with the department chairperson/director and division dean to decide whether a missed class should be cancelled or made up. (District's Exhibit No. 7 at p. 32.) The instructor's initial reporting is made, not to the designated supervisor, but to the department secretary (a classified staff employee), who is responsible for posting notice for the class and preparing an absence form. (id., at p. 33.)

Hiring of classified staff is also done by committee, and it is up to the department chairperson/director what role, if any, s/he will play in the process. Department chairpersons/directors do generally give work assignments to classified staff,<sup>14</sup> especially a department secretary, but so do other faculty members. Department chairpersons/directors are responsible for the probationary and performance evaluations of classified staff in their department or program, but at least some do so with extensive input from (or even collegially with) other faculty members. While most classified staff evaluations will be routinely approved by the dean, the dean's review can be and has been on occasion more substantive than cursory. (II: 125, 1-4.) Department chairpersons/directors are generally responsible for

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<sup>14</sup>Exceptions would clearly include the directors of the art gallery, multi-cultural studies and planetarium, where there are currently no classified staff employed. (District's Exhibit No. 4.)

approval of such matters as overtime, vacation and other absences requiring approval.<sup>15</sup>

The contractual grievance procedure for classified staff provides for a grievance to be taken to an employee's immediate supervisor at step one and, in most instances, the department chairperson/director would be considered to be the immediate supervisor for this purpose. There was no evidence given, however, to show any actual application of this process, nor any other evidence to show what authority the department chairperson/director would have to adjust a grievance.

While it is the department chairperson/director who signs off on numerous other documents concerning the operation of the department/program, including such matters as budget requests, requisitions, class schedules, textbooks, and class assignments, the record is replete with examples of these functions being performed within specific guidelines and/or based on a collegial discussion and department decision. Class schedules is another area where the dean's review of the department chairperson/director's "decision" is neither cursory or routine, and where the department chairperson/director is on occasion overruled.

(III: 105, 1-15.)

Where department chairpersons/directors have leeway under District policies, they tend to act only on the basis of a

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<sup>15</sup>The dean's approval is also required for overtime before it is worked. One absence form used (the "Academic Absence Report") has signature lines for the employee and the vice president, but not the department chairperson or director (or dean). (Petitioner's Exhibit No. 11.)

consensus decision; where they act unilaterally, it tends to be within such limited parameters that the decision is more ministerial and routine than an exercise of real authority over the department. Again, in each case, the department chairperson/director functions within a role definition (both in policy and practice) of acting as a representative of the department. One exception to this general finding involves the director of athletics, who testified that he could interpret some District rules for application in his area, and that he has acted unilaterally on some occasions to order equipment and on issues concerning non-faculty staffing. (III: 54, 15-19 and 55, 21-26.)

#### LEGAL ISSUES

1) Is a unit of all faculty, excluding only managerial, supervisory and confidential employees, an appropriate bargaining unit?

2) Should department chairpersons and the positions of director of athletics; director, art gallery; director, dental assisting; director, reading services; director, allied health; director, planetarium; and director, multi-cultural studies be excluded from the unit as supervisory employees?

3) Should the amended petition be ordered posted?

4) Can the hearing officer order that an election be conducted irrespective of any exceptions to this decision?

## DISCUSSION

### Unit Appropriateness

The statutory criteria relevant to this case are set forth in the Educational Employment Relations Act (EERA)<sup>16</sup> at section 3545, subsections (a) and (b)(1):

(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.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

In Peralta Community College District (1978) PERB Decision No.

77, the Board determined that these provisions, read together,

establish a rebuttable presumption that all classroom teachers

(or faculty) should be placed in a single bargaining unit. In

this case, neither party seeks to rebut the presumption, and the

record supports a finding that a unit including all faculty is an

appropriate bargaining unit.

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<sup>16</sup>The EERA is codified at Government Code section 3540 et seq. All sections referenced, unless otherwise noted, are to the Government Code.

Supervisory Designation of Department Chairpersons and Directors

The EERA defines, in section 3540.1, subsection (m), a "supervisory employee" as

any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

These various indicia of supervisory status are to be evaluated in the disjunctive. The independent and effective exercise of any one of the criteria is sufficient to establish supervisory status under section 3540.1(m). (Sweetwater Union High School District (1976) EERB<sup>17</sup> Decision No. 4; Glendale Community College District (1979) PERB Decision No. 88.) "It is the authority to perform or effectively recommend the functions enumerated in section 3540.1(m), and not the frequency of their exercise, which determines the supervisory status of employees." (Berkeley Unified School District (1979) PERB Decision No. 101; footnote omitted.)

The Board has held, however, that this "definition as applied to certificated community college employees must be viewed in light of long-standing traditions of collegiality and shared authority within institutions of higher education." (Los

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<sup>17</sup>Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

Rios Community College District (1977) EERB Decision No. 18; footnote omitted. )

Department chairpersons were held to be supervisors in Los Rios based on findings that their allegiance was with the administration, that they exercised "substantial control over critical aspects of faculty teaching responsibilities," and their ineligibility to participate in the faculty senate. (Ibid.) The "allegiance" finding was premised on both the payment of a "substantial stipend" and the chairpersons' selection by the administration. (Ibid.)

In Monterey Peninsula Community College District (1978) PERB Decision No. 78, division chairpersons were not excluded from the bargaining unit. The Board relied here on findings that the chairpersons were selected by faculty and confirmed by the administration; could be removed by the faculty or administration; were eligible for the faculty senate; and did not "exercise independent effective control of supervisory functions over the faculty." (Ibid.) The Board noted that supervisory functions were generally of a routine nature or conducted collegially, and stated that the "fact that chairpersons supervise classified personnel in their daily activities does not" support their exclusion from a faculty unit. (Ibid.)

Department chairpersons, despite the fact that a majority carried an 80% teaching load, were found to be supervisors in Hartnell Community College District (1979) PERB Decision No. 81. This conclusion was based on findings that "chairpersons schedule



both full- and part-time faculty class assignments, effectively determine who shall be hired to fill a part-time position, and discipline faculty members." (Ibid.)

In Glendale Community College District (1979) PERB Decision No. 88, the Board held that the division chairpersons were appropriately included in the unit. The Board considered the following factors in reaching this decision: chairpersons were selected, and could be removed, by the faculty; viewed themselves as representatives of the faculty; were paid only a minor stipend; most had between 20 and 45% released time for their chairperson duties; were eligible to participate in the faculty senate; and their authority in other areas of supervisory function, including over non-unit personnel, was not sufficient to warrant their exclusion. (Ibid.)

Citing Washington Unified School District (1978) PERB Decision No. 56, the Board held "the sporadic exercise of supervisory authority over non-unit personnel had not so allied the employees with management that a generalized conflict of interest was created." (Glendale Community College District, supra, PERB Decision No. 88.) The Board also considered whether the supervision of classified personnel made classroom teachers supervisors under EERA in Redlands Unified School District (1982) PERB Decision No. 235a. In Redlands the Board said that teachers do perform supervisory functions as outlined by section 3540.1(m) but still found

that such authority was exercised incidentally to the performance of teachers'

professional duties, and not as agents of the employer. Thus, as a matter of law, we [hold] teachers not to be supervisors of aides, based upon our review and endorsement of a well-established line of cases decided by the National Labor Relations Board. (Ibid.)

All of the decisions cited above were made prior to the enactment of Education Code section 87610.1(e),<sup>18</sup> which reads as follows:

Any employees who are primarily engaged in faculty or other bargaining unit duties, who perform "supervisory" or "management" duties incidental to their performance of primary professional duties shall not be deemed supervisory or managerial employees as those terms are defined in section 3540.1 of the Government Code, because of those duties. These duties include, but are not limited to, serving on hiring, selection, promotion, evaluation, budget development, and affirmative action committees, and making effective recommendations in connection with these activities. These employees whose duties are substantially similar to those of their fellow bargaining unit members shall not be considered supervisory or management employees.

The Board has not previously been called upon to interpret and apply this language. Guidance is provided, however, by the Board's past interpretations of similar language found in the Ralph C. Dills Act (Dills Act) at section 3513(g).<sup>19</sup> Under the

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<sup>18</sup>This section was adopted by the Legislature in 1988, but did not take effect until July 1, 1991.

<sup>19</sup>Section 3513(g) defines a "supervisory employee" as meaning

. . . any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote,

Dills Act, if a purported supervisor meets at least one of the statutory criteria, the claim of supervisory status must then be tested against the substantial similarity requirement.

In applying this test, the Board has not relied upon quantitative analysis or the rote application of percentages. Instead, the Board has concluded that substantial similarity occurs at "the point at which the employees' supervisory obligations to the employer outweighs their entitlement to the rights afforded rank-and-file employees." (Unit Determination for the State of California (1980) PERB Decision No. 110c-S.) Where supervisory obligations exist to the degree that they outweigh rights to organize under the Dills Act, an employee no longer performs duties substantially similar to his/her subordinates.

Under the EERA, of course, supervisors who are so designated do not lose the right to organize, only the "right" to be included in the same bargaining unit as those they supervise. Education Code section 87610.1(e) seems clearly intended to minimize this occurrence, however, for community college faculty.

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discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees. (Emphasis added.)

Despite the different statutory frameworks, the Board's discussion of the purpose behind the exclusion of supervisors is still relevant. "[E]xclusions are designed to prevent a division of supervisors' loyalties that might occur because of the negotiating relationship of the parties, concerned as it is with wages, hours and working conditions." (Unit Determination for the State of California, supra, PERB Decision No. 110c-S.) The potential for the conflict of interest lies in the authority to control personnel decisions. It is this authority over personnel decisions, as distinguished from control over work processes, that lies at the core of supervisory status.

For the reasons discussed below, department chairpersons and those directors whose status is in dispute, with the exception of the director of athletics, are found not to be supervisors and are properly included in the unit. It is further held that there are sufficient facts in the record to warrant approval of the exclusions stipulated to by the parties, as those positions are sufficiently distinguishable from those in dispute. (See Centinela Valley Union High School District (1978) PERB Decision No. 62.)

As in prior cases where the Board has included department or division chairpersons in a faculty unit, the department chairpersons/directors here are eligible to and do participate in the affairs of the Faculty Senate; they are selected by and may only be removed by their departmental colleagues; they operate and make decisions, concerning personnel matters, instructional

matters and financial matters, in a collaborative, collegial environment; and they have little or no independent effective supervisory authority over other faculty members. The department chairpersons/directors' authority over non-unit personnel is largely delimited by District policies and procedures, often exercised only in collaboration with and on behalf of the faculty as a group, and subject to effective review and approval by higher levels of authority. (See Monterey Peninsula Community College District, supra, PERB Decision No. 78, and Glendale Community College District, supra, PERB Decision No. 88.)

It is true that most department chairpersons/directors receive a "substantial stipend" (Los Rios Community College District, supra, PERB Decision No. 18), but the record as a whole does not support the view that the department chairpersons/directors have an allegiance to the administration any different than other faculty members, and to the extent they have and exercise supervisory authority, they function more as agents of their departments/programs than of the administration.

These findings are made even more necessary when the language of Education Code section 87610.1(e) is considered. Department chairpersons/directors are and remain faculty members while performing this function, and carry a substantial instructional or teaching load. Being a faculty member remains their "primary" engagement, and their duties may not be characterized as other than "substantially similar" to other

faculty. (See language and discussion of Education Code section 87610.1(e) ,ante., pp. 22-23.)

A different conclusion is reached with regard only to the director of athletics. The factors which require a different result are the different selection process for this position (final control rests with the director of student activities and the vice president of student services), the higher level of assigned time (with 80% assigned time and only 20% instructional time, the director duties cannot fairly be characterized as "incidental") and the incumbent's own credited testimony concerning his role perception and actual authority over matters of policy, finances and personnel.

Posting of the Amendment

In its brief, the District restates arguments already made on the record favoring a ruling ordering posting of Petitioner's amended petition. The District's request must be denied here for the same reasons given at the time. (See reporter's transcript at Volume I, from line 12 of page 14 through line 18 of page 16, and Volume IV, from line 8 of page 90 through line 13 of page 93.)

To summarize, the District asserts that the number of employees added by the amendment, and the possibility that there may have been a non-intervening employee organization which would have sought to intervene had it known that part-time faculty would be sought by Petitioner, requires both posting and an intervention period based on the amendment.

The District's argument is unpersuasive in light of several factors, including first the fact that the amendment, while it added a large number of employees to the proposed unit, did not change the fundamental nature of the unit sought.<sup>20</sup> In this case, the Petitioner filed initially for a unit including only full-time faculty, and the District filed an employer decision (PERB regulation 33190) arguing that only a unit including all faculty could be found appropriate. No employee organization came forward to file an intervention for the same or an overlapping -- or different -- unit, and no such organization sought status as a limited party under PERB regulations 32165 or 32166.

If the Petitioner in this case had not amended, and an election had later been ordered in a unit of all faculty, only the Petitioner could have sought to qualify for the ballot, and would only have had to demonstrate 30% support. (PERB regulation 33470.) Instead, the Petitioner offered an amendment which required demonstration of majority support, and which had the effect of expediting completion of the hearing (by removing the unit appropriateness question as one in dispute).

Granting the District's posting request, at the time or now, would have had an effect contrary to the standard imposed by PERB

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<sup>20</sup>A different ruling may indeed have been made by this Board agent if, for example, a petitioner first filed for a unit of bus drivers and later tried to add instructional aides to the proposed unit.

regulation 33100(c),<sup>21</sup> and for all the reasons discussed above, must again be denied.

Directing Election Prior to Issuance of Final Decision

Petitioner argues, in the interest of expediting the resolution of the question concerning representation raised by its petition, and because of election scheduling difficulties unique to community college faculty units, that the hearing officer should direct that an election be conducted based on his decision, regardless of exceptions filed, with positions in dispute voting by challenged ballot. Petitioner relies on PERB's statutory authority, National Labor Relations Board policy and precedent, and California State University (1981) PERB Decision No. JR-11-H in support of its position.

The District opposes the request, contending that PERB lacks such authority and arguing that the employer has a right to know who its supervisors are before a representation election is conducted.

For the reasons which follow, the Petitioner's request must be denied. Even assuming that PERB has authority under EERA to order such a procedure, the regulations adopted by the Board do not allow a Board agent to order same. Under EERA, unless the parties agree on an appropriate unit prior to a final Board decision (see PERB regulation 33460), the Board will direct an election only following issuance of a final decision and a period

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<sup>21</sup>Ante, fn. 3.



of posting of a notice of decision (PERB regulations 33440, 33450 and 33470).

The case precedent cited by Petitioner, including California State University, supra, PERB Decision No. JR-11-H, is neither instructive nor controlling in this matter. In California State University (1981) PERB Decision No. 173-H, the Board itself had found department chairpersons to be properly included in the bargaining unit. Upon consideration of a request for reconsideration, the Board did not reverse its decision, but did agree to review the proper designation of department chairpersons de novo, based on any challenges which any party filed to the voter eligibility of department chairpersons in the course of the election. (California State University, supra, PERB Decision No. JR-11-H.)

In the instant case, obviously, the Board itself has not ruled on the status of department chairpersons/directors.

#### PROPOSED ORDER

Accordingly, the following unit is found to be appropriate for meeting and negotiating provided an employee organization becomes the exclusive representative:

Unit Title: Faculty

Shall INCLUDE: All faculty (full-time, part-time, adjunct, contract or temporary), counselors, coaches, librarians, child care center teachers, department chairpersons and those directors not specifically excluded.

Shall EXCLUDE: Classified employees, and the superintendent/president, assistant superintendents/vice presidents, deans, administrative interns, and the director, athletics; director, institutional research

and planning; special assistant to the president; director, student activities; director, library/media center; facility planner; director, Escondido education center/extension education; director, health services; director, extended opportunity programs and services; director, extended day services; director, auxiliary services; director, facilities; director, human resources and affirmative action; director, business services; director, financial aid; contracts/special projects manager; director, disabled student programs and services; director, matriculation; director, Camp Pendleton/Fallbrook/Ramona education centers; director, placement services; director, vocational programs; director, admissions, records, and veterans' services; director, Mt. Carmel/Poway education centers; director, fiscal services; director, public information; director, regional occupational programs; director, instructional operations and services; director, information systems; director, title III; chief advancement officer; director, child development instruction and services center; and director, public services program.

An election shall be conducted to determine whether the employees in the above unit wish to be represented by the Palomar College Faculty Association/CCA/CTA/NEA, unless the Palomar Community College District chooses to grant voluntary recognition.<sup>22</sup> A Board agent will contact the parties upon issuance of a final decision in this matter to discuss the further processing of this case.

#### 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 at the headquarters office in Sacramento within 20

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<sup>22</sup>Pursuant to the EERA and PERB regulations, the employer may forego an election since the Petitioner evidenced majority support and no timely intervention was filed.

days of service of this Decision. 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. (See Cal. Code of 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 sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) 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 of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: January 2, 1992

Les Chisholm  
Hearing Officer

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