



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY,

Employer,

and

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
LOCAL 3634,

Exclusive Representative.

Case No. LA-UM-1025-T

PERB Decision No. 2916-T

August 26, 2024

Appearances: Liebert Cassidy Whitmore by Adrianna E. Guzman and Kelsey Ridenhour, Attorneys, and Joanne Nielsen, Principal Deputy County Counsel, for Los Angeles County Metropolitan Transportation Authority; Bush Gottlieb by Dana S. Martinez and Adrian R. Butler, Attorneys, for American Federation of State, County & Municipal Employees, Local 3634.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Los Angeles County Metropolitan Transportation Authority (Metro) from an Administrative Determination by PERB's Office of the General Counsel (OGC). OGC granted a unit modification petition filed by American Federation of State, County & Municipal Employees, Local 3634 (AFSCME) to add nine Accounting Supervisors employed by Metro to its supervisory employee bargaining unit. Metro appealed. For the reasons below, we affirm OGC's

Administrative Determination and order that the Accounting Supervisors be included in the supervisory employee bargaining unit.

FACTUAL FINDINGS AND PROCEDURAL HISTORY

Metro and its supervisory employees are covered by the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA or Act; Pub. Util. Code, §§ 99560-99570.4).¹ AFSCME is the exclusive representative of a supervisory employee bargaining unit, which contains around 815 Metro employees in various classifications and departments. On April 14, 2022, pursuant to PERB Regulation 32781, subdivision (a)(1), AFSCME filed a petition for unit modification to add the Accounting Supervisor classification to the bargaining unit.² There are approximately nine Accounting Supervisors.

On May 17, 2022, pursuant to PERB Regulation 32783, Metro filed its response to the petition, opposing the inclusion of the Accounting Supervisors in the supervisory unit. Metro's initial response alleged that Accounting Supervisors are managerial and confidential, and so should not be included in a unit with other Metro supervisors.

On August 15, 2022, AFSCME filed a response to Metro's opposition, arguing that Accounting Supervisors are neither managerial nor confidential employees. AFSCME included declarations from two Accounting Supervisors describing their duties, and a declaration of a Bus Equipment Maintenance Instructor, who is a supervisory employee already within the supervisory unit. According to these

¹ All undesignated statutory references are to the Public Utilities Code.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

declarations, Accounting Supervisors ensure payroll and accounts payable are accurate and timely, review subordinates' work for accuracy and completeness, report specified policy violations to senior management, monitor work distribution among subordinate employees, and prepare and review other reports. The Accounting Supervisor declarants stated that they had no authority to set rules or policies for Metro, though sometimes senior management would ask for their input. Accounting Supervisors do not represent Metro in collective bargaining or in negotiations with non-employee third parties. Accounting Supervisors, like the Bus Equipment Maintenance Instructor in the supervisory bargaining unit, participate in the hiring and disciplinary process for subordinate employees.

On the basis of the information presented in the petition, Metro's opposition, and AFSCME's response, on June 14, 2023, OGC issued the parties an Order to Show Cause (OSC) why the Accounting Supervisors should not be included in the supervisory unit.

Metro's Response to the OSC

On July 11, 2023, Metro filed a response to the OSC with supporting declarations. Metro reiterated its argument that Accounting Supervisors are managerial and confidential employees, and for the first time argued that they should be excluded because they are professional employees.

Accounting Supervisors report to Accounting Managers. According to the Accounting Supervisor job description in the Accounting Department Policy and Procedure Manual, "[Accounting Supervisor] [d]iffers from Accounting Manager in that the Accounting Supervisor performs a wide range of technical and administrative work

and special projects in the management and support of financial reporting, payroll, accounts payable, accounts receivable, and grants accounting functions, while Accounting Manager serves as a section head and is responsible for the overall operation of those work units.” Accounting Supervisors may fill in for Accounting Managers in the latter’s absence. Accounting Managers, in turn, report to Senior Directors or a Deputy Executive Officer, who report to Metro’s Controller. The Controller reports to Metro’s Chief Financial Officer.

According to Metro, Accounting Supervisors are managerial employees because they exercise discretion to develop, implement, and/or modify goals and policies. The declaration of Jesse Soto, Controller, states that these employees formulate and update policies such as “Check Request policy, Capitalization of Assets, Collection and Write-off of bad debt, Pension Plan Accounting, Insurance Reserve, Special Events Revenue, Bank Reconciliation, Petty Cash, [and] Employee Travel and Business Reimbursement.” In the same vein, Elaine Dimson, Senior Director, Accounting Operations, declared that Accounting Supervisors had recommended changes to improve the Travel and Travel Related Business Expenses report and Service Request policies. Michelle Thaung, Accounting Manager, declared that in her prior role as an Accounting Supervisor, she participated in the creation or modification of policies, such as a vacation bidding policy and “PCard” submittal process. Declarants also noted that Accounting Supervisors’ role in policy formulation was subject to review and approval by more senior management. Accounting Supervisors use their independent judgment in “carrying out their assigned duties,” as when reviewing transactions for conformance with accounting principles or policies.

Metro also argued that Accounting Supervisors are confidential employees because they have access to confidential information. Examples include some personnel records of employees they supervise and credit information for contractor applicants. They prepare notes and ratings based on their evaluation of job candidates and contract proposals.

Lastly, Metro argued that Accounting Supervisors should be excluded from the supervisory employee unit because they are professional employees. Metro alleged that other supervisors in the supervisory employee unit are not professionals. In contrast to those other supervisors, Accounting Supervisors are required to hold a bachelor's degree in accounting or a related field. Their work is predominantly intellectual. Some tasks are routine, but others require the exercise of discretion and judgment. Their jobs are of a character such that results are not standardized in relation to a period of time. These characteristics, Metro argues, make Accounting Supervisors professional employees and distinguish them from nonprofessional employees.

The Administrative Determination

On February 12, 2024, OGC issued an Administrative Determination finding that Metro had not raised facts that, if proven at a hearing, would render Accounting Supervisors' inclusion in the supervisory unit inappropriate.

First, OGC addressed Metro's claim that Accounting Supervisors are confidential employees. Because there was no precedent interpreting the definition of "confidential employee" under TEERA, OGC applied caselaw developed under the other public sector collective bargaining statutes PERB enforces. OGC found that

Accounting Supervisors' access to confidential information, such as payroll and benefits information, was not sufficient to make them confidential employees, because it was not for the purpose of contributing to managerial labor relations functions. They did not participate in bargaining on behalf of Metro management, and their involvement in the grievance process for subordinate employees was not part of their regular course of duties. OGC therefore concluded that Metro could not establish that Accounting Supervisors are confidential employees.

OGC next addressed Metro's contention that Accounting Supervisors are managerial employees. OGC assumed for the sake of argument that if Accounting Supervisors had "significant responsibilities for formulating or administering policies and programs of [Metro]" (Pub. Util. Code, § 99560.1, subd. (k)), they should be excluded from the Act's coverage. However, relying on the Board's decision in *Sacramento Regional Transit District (2023)* PERB Decision No. 2871-P, OGC concluded that "low-level" managers would be covered by the Act. Here, OGC again relied on Board precedent developed under other statutes for guidance on whether Accounting Supervisors are managerial employees. OGC found that Accounting Supervisors' role in the creation of new policies was limited in scope, and subject to review and approval by more senior management. Because Metro had not shown that Accounting Supervisors exercised discretion in formulating or implementing Metro policies, there was no triable issue of fact over whether they were managerial employees.

OGC then turned to Metro's argument that Accounting Supervisors should be excluded from the supervisory unit as professional employees. OGC observed that

while some statutes PERB enforces create a presumption that professional employees should not be included in the same bargaining unit as non-professional employees, TEERA contains no such provision. For this reason, OGC rejected Metro's argument.

Agreeing with Metro that there was no need to conduct a further community of interest analysis, OGC therefore found that it was appropriate to include Accounting Supervisors in the supervisory employee bargaining unit.

On appeal, Metro contends that the Board agent failed to consider all of its evidence and inappropriately resolved material factual disputes concerning the managerial status of Accounting Supervisors, misinterpreted its argument concerning professional employees, and failed to give Metro notice of and opportunity to brief new authority, the Board's decision in *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P. Metro's appeal does not argue that OGC erred in concluding Accounting Supervisors are not confidential employees.

DISCUSSION

In an appeal from an administrative determination, the appellant bears the burden to show the decision being challenged departs from Board precedent or regulations. (*Dailey Elementary Charter School* (2024) PERB Order No. Ad-514, p. 6.) The Board applies an abuse of discretion standard in reviewing a Board agent's determinations on the conduct of the investigation, including whether to hold an evidentiary hearing. (*City and County of San Francisco* (2022) PERB Order No. Ad-497-M, p. 23.) As in any case, we review the Board agent's legal conclusions de novo. (See *Merced City School District* (2024) PERB Decision No. 2901, p. 2.)

Before turning to Metro's specific arguments on appeal, we must first review PERB's investigatory process for unit appropriateness disputes and the relevant statutes.

I. Procedures for Investigation of Unit Appropriateness Disputes

PERB Regulations govern the filing and investigation of unit modification petitions. (PERB Reg. 32781 et seq.) Upon receipt of a petition, Board agents have broad discretion to determine what procedures they deem necessary and efficient to decide the questions raised by the petition. (PERB Reg. 32786, subd. (a).) As the Board explained in *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402 (*Children of Promise*), "[a]lthough Board agents must conduct an investigation, that investigation may lead them to determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing, or they may determine . . . that no material issue of fact exists and thus that a hearing is unnecessary." (*Id.* at p. 17.) An order to show cause is one tool a Board agent may use to determine whether a material issue of fact exists in the dispute. (*Id.* at pp. 17-18.)

In a unit appropriateness dispute, the party seeking to exclude employees from a bargaining unit on the basis that they are managerial or confidential bears the burden of proof. (*Children of Promise, supra*, PERB Order No. Ad-402, p. 17.) Therefore, if a party fails to raise facts that would justify exclusion on this basis, the Board agent may conclude the investigation on the papers and issue an order of unit modification. (*Ibid.*; PERB Reg. 32786, subd. (d)(1).)

The Board agent in this case accurately informed the parties about the investigatory process and properly assigned the burden of proof. The OSC informed Metro that there was no guarantee of an evidentiary hearing and put Metro on notice of its burden to plead facts that could support its argument. We address Metro's specific arguments concerning whether it met this burden below, following our review of the relevant statutory provisions.

II. Overview of Statutory Provisions

TEERA's purpose is to permit the "fullest participation by employees in the determination of conditions of employment which affect them." (Pub. Util. Code, § 99560, subd. (e).) To that end, supervisory employees are granted the right to "full freedom of association, self-organization, and designation of representatives of their own choosing for purpose of representation in their employment []." (*Ibid.*) Among PERB's duties in administering the Act is "to determine in disputed cases, or otherwise approve, appropriate units." (Pub. Util. Code, § 99561, subd. (a).)

TEERA section 99560.1, subdivision (o) defines "supervisory employee" as one, "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 these functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." There is no dispute that Accounting Supervisors are supervisory employees under this definition.

A. Confidential Employees

TEERA section 99560.1, subdivision (d) defines “confidential employee” as one “who is required to develop or present management positions with respect to meeting and conferring or whose duties normally require access to confidential information that contributes significantly to the development of those management positions.” TEERA section 99560.1, subdivision (e) expressly excludes confidential employees from the Act’s coverage.

Other statutes enforced by PERB, including the Educational Employment Relations Act (EERA; Gov. Code, §§ 3540-3549.3), the Higher Education Employer-Employee Relations Act (HEERA; Gov. Code, §§ 3560-3599), the Ralph C. Dills Act (Dills Act; Gov. Code, §§ 3512-3524), and the Judicial Council Employer-Employee Relations Act (JCEERA; Gov. Code, § 3524.50-3524.81), contain substantially the same definition of confidential employee as TEERA. (Gov. Code, §§ 3540.1, subd. (c); 3562, subd. (d); 3513, subd. (f); 3524.52, subd. (b).) Also like TEERA, each of these acts excludes confidential employees from coverage entirely. (Gov. Code, §§ 3540.1, subd. (j); 3562, subd. (e); 3513, subd. (c); 3524.52, subd. (g).)

Because of these similarities, the Board agent was correct to refer to precedent developed under other statutes for guidance on whether Metro had alleged facts that would show Accounting Supervisors to be confidential employees. In the case the Board agent relied on most heavily, *Burlingame Elementary School District* (2006) PERB Decision No. 1847 (*Burlingame*), the Board explained that when interpreting EERA’s definition of confidential employees, PERB assumes “the employer should be allowed a ‘small nucleus’ of loyal individuals to assist the employer in developing the

employer's positions in matters of employer-employee relations; that nucleus of individuals must maintain the confidentiality of those matters because if they are made public, it would jeopardize the employer's ability to negotiate from an equivalent position." (*Id.*, adopting proposed decision at p. 10, citing *Sierra Sands Unified School District* (1976) EERB Decision No. 2.)³ But, because an employee designated as confidential loses the statute's broad grant of rights, this exclusion "must be strictly construed." (*Burlingame, supra*, PERB Decision No. 1847, p. 10.)

Thus, an employee's access to merely non-public information is not sufficient to designate them as a confidential employee. Only confidential information about the employer's labor relations, such as negotiations and the processing of grievances, is relevant to this determination. (*Burlingame, supra*, PERB Decision No. 1847, adopting proposed decision at p. 10.) Further, mere access to such information is not sufficient. Confidential employees must have access to or possess confidential labor relations information in the course of their regular duties to be properly designated as such. (*Ibid.*)

We find that it is appropriate for Board agents to apply a similar inquiry to confidential employee determinations under TEERA, with one cautionary note. While the processing of employee grievances is recognized in Board decisions as an indicium of confidential employee duties, it is also expressly a supervisory employee duty. (Pub. Util. Code, § 99560.1, subd. (o).) If a supervisor's participation in the grievance process for subordinate employees was sufficient to make them confidential

³ Before 1978, PERB was known as the Educational Employment Relations Board (EERB).

employees, the Act would paradoxically exclude the only employees it purports to cover. (Pub. Util. Code, § 99560.1, subd. (e).)

In the context of a supervisory employee bargaining unit, the Board has instead focused on employees' role in negotiations. In *Franklin-McKinley School District* (1979) PERB Decision No. 108 (*Franklin-McKinley*), the Board found that four of a school district's eleven principals were confidential employees, due to their membership on the district's bargaining team and "substantial" involvement in bargaining process. (*Id.*, adopting proposed decision at pp. 31-32.) The other seven principals had only participated on the bargaining team in the past, or not at all, and so were found not to be confidential. (*Ibid.*) While we do not intend to categorically exclude other potential evidence of confidential duties, an individualized approach like the Board's in *Franklin-McKinley* avoids irrational results. It implicitly acknowledges the fact that all supervisors, confidential or otherwise, are involved to some degree in employer-employee relations, and still grants to the employer a "small nucleus" of loyal individuals necessary to carry out its responsibilities to meet and confer in good faith. Because every unit determination case under TEERA will include issues pertaining to supervisory duties, confidential employee designations should be similarly targeted to effectuate the purposes of the Act to permit supervisory employees "the fullest participation . . . in the determination of conditions of employment which affect them." (Pub. Util. Code, §§ 99560, subd. (e).)

B. Managerial Employees

TEERA section 99560.1, subdivision (k) defines "managerial employee" as one "having significant responsibilities for formulating or administering policies and

programs of the public transit district.” Apart from this definition, the words “managerial employee” do not appear anywhere in the statute. In *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P, we determined that “TEERA’s legislative history sheds some light on this ambiguity, showing the Legislature’s intent to cover certain supervisors who are also low-level managerial employees. Specifically, all eight of the bill analyses noted the sponsoring union’s goal of assuring continued collective bargaining rights for a group of Senior Supervisors who had been union-represented but had been reclassified out of the bargaining unit to Assistant Manager positions.” (*Id.* at pp. 9-10.) We concluded that the Legislature intended to ensure supervisory employees would maintain their collective bargaining rights even if classified as “low-level managers.” (*Ibid.*) Thus, in contrast to confidential employees, managerial employees are not excluded from the Act’s coverage as such.

Indeed, correcting Metro’s practice of unilaterally classifying supervisory employees as managerial, denying them representation, ignoring arbitration decisions, and then compelling unions to go to court to enforce compliance is *the only* supporting argument cited in the bill’s committee and floor analyses. (Assem. Floor Analysis of Assem. Bill No. 199 (2003-2004 Reg. Sess.), as amended April 10, 2003; Assem. Com. on Public Employees, Retirement and Social Security, Rep. on Assem. Bill No. 199 (2003-2004 Reg. Sess.), as amended April 10, 2003; Assem. Com. on Appropriations, Rep. on Assem. Bill No. 199 (2003-2004 Reg. Sess.), as amended April 10, 2003; Assem. Floor Analysis of Assem. Bill No. 199 (2003-2004 Reg. Sess.), as amended June 2, 2003; Senate Floor Analysis of Assem. Bill No. 199 (2003-2004 Reg. Sess.), as amended June 2, 2003.)

TEERA's treatment of managerial employees differs from EERA's, HEERA's, the Dills Act's and JCEERA's, the latter acts excluding them from coverage. (Gov. Code, §§ 3540.1, subd. (j); 3562, subd. (e); 3513, subd. (c); 3524.52, subd. (g); *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P, pp. 8-9.) The Meyers-Millas-Brown Act (MMBA; Gov. Code, §§ 3500-3511), however, contains no explicit exclusion for managerial employees. (*Sacramento Regional Transit District, supra*, at p. 7.) The only employees excluded from the MMBA's definition of "public employee" are elected officials and Governor's appointees. (Gov. Code, § 3501, subd. (d).) By this broad definition, the MMBA "extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy." (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 (*Deputy Sheriffs*).) But the MMBA, Government Code section 3507.5, permits local agencies to designate employees as management, and to place them in a separate bargaining unit or units from nonmanagement employees. (See also *Deputy Sheriffs, supra*, at pp. 340-342.)

C. Professional Employees

As the Board agent observed, TEERA contains no definition of or reference to "professional employees." This contrasts with other statutes under PERB's jurisdiction. The MMBA contains a provision that professional employees "shall not be denied the right to be represented separately from nonprofessional employees []." (Gov. Code, § 3507.3.) The Dills Act contains a rebuttable presumption that professional employees and nonprofessional employees should not be included in the same

bargaining unit. (Gov. Code, § 3521, subd. (c).) HEERA contains the same rebuttable presumption as does the Dills Act. (Gov. Code, § 3579, subd. (c).)

But TEERA is not unique in its silence on professional employees. EERA also makes no distinction between the unit placement of professional and nonprofessional employees. In *San Diego Community College District* (1977) EERB Decision No. 28, the Board rejected a request to separate a group of employees, including accountants, from an office-technical bargaining unit on the basis that they were professional employees. The Board held that in the absence of any clear and unambiguous restriction within EERA's text restricting the right of professional employees to be included in a bargaining unit with nonprofessional employees, no such separation would be presumed appropriate. (*Id.*, adopting proposed decision at pp. 7-8.) Rather, any separate unit of professional employees would need to be based on the same unit determination criteria the Board applies in any case. (*Id.*, adopting proposed decision at p. 8.)

III. The Board Agent Did Not Err in Granting the Petition

As noted above, Metro's appeal abandons its argument that Accounting Supervisors are confidential employees under TEERA section 99560.1, subdivision (d). Any arguments Metro may have had on this point are therefore waived. (PERB Reg. 32360 subd. (c) [appeal "must state the specific issue(s) of procedure, fact, law or rationale that is appealed and state the grounds for the appeal"]; see also *Dailey Elementary Charter School*, *supra*, PERB Order No. Ad-514, pp. 6, 8.) Even so, as we discussed *ante* at section II.A, the Board agent correctly relied on cases interpreting the substantially similar definitions of "confidential employee" appearing in other

statutes under PERB's jurisdiction. Our review of the entire casefile in this matter supports the Board agent's conclusion that Metro did not prove that Accounting Supervisors are confidential employees.

We therefore first address Metro's argument that Accounting Supervisors are managerial employees and should be excluded on that basis. We then turn to Metro's argument concerning Accounting Supervisors' status as professional employees. Finally, we consider Metro's argument that the Board agent should have affirmatively provided the parties with an opportunity to brief new authority, the Board's decision in *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P.

A. TEERA Does Not Exclude Managerial Employees

Metro argues that the Board agent failed to fully consider its evidence that Accounting Supervisors are management employees, and inappropriately resolved disputed evidence in AFSCME's favor rather than conduct a hearing. The first reason why this argument fails is that TEERA does not restrict managerial employees from inclusion in a bargaining unit of supervisory employees. As discussed above, TEERA's legislative history demonstrates that it was enacted to correct one specific perceived problem: Metro's designation of some supervisors as managerial employees to remove them from the supervisory employee bargaining unit. Metro never attempts to explain why the Act defines both "managerial employee" and "confidential employee," but on its face only excludes the latter group. Ignoring the language of the Act, Metro claims that managerial employees "are excluded from membership in collective bargaining units, and bargaining rights guaranteed under TEERA do not extend to them."

For this claim, Metro cites without explanation *Santa Barbara Community College District* (2011) PERB Decision No. 2212, which was decided under EERA. EERA, as we noted, explicitly excludes management employees from coverage. (Gov. Code, § 3540.1, subd. (g).) TEERA does not contain a similar provision, which is adequately explained by the legislative history showing an intent to maintain the collective rights of certain employees who Metro had classified as assistant managers.

Metro also cites TEERA section 99560.3 for its view that managerial employees are not covered by TEERA. This section merely states that the Act “shall only apply to supervisory employees of the Los Angeles County Metropolitan Transportation Authority.” However, nowhere in this provision, the definition of “supervisory employee” in section 99560.1, subdivision (o), or elsewhere does TEERA state that managerial employees cannot also be supervisory employees. In fact, it is often the case that managerial employees exercise supervisory authority within their organization’s hierarchy. Metro’s own response to the OSC alleged as much, asserting that Accounting Supervisors supervise subordinate employees such as Principal Accountants, Senior Accountants, and Accountants.

That TEERA does not exclude managerial employees from coverage does not necessarily mean that they are always appropriately included in a bargaining unit with non-managers. One circumstance warranting exclusion would be if the managerial employee was also a confidential employee, as defined in TEERA section 99560.1, subdivision (d). Otherwise, arguments to exclude managerial employees must be made with reference to the Act’s unit determination criteria contained in section 99565, and in light of TEERA’s legislative history. True managerial status distinguished by

“having significant responsibilities for formulating or administering policies and programs of the public transit district” (Pub. Util. Code, § 99560.1, subd. (k)) could plausibly be relevant to multiple criteria, including community of interest, the proposed unit’s impact on meet and confer relationships, and the impact on the employer’s efficient operations and responsibility to serve the public (Pub. Util. Code, § 99565, subds. (a)(1) – (3)). Metro made no attempt to connect its arguments to TEERA’s unit determination criteria, and instead assumed that managerial status alone would be dispositive. Because this assumption was incorrect, Metro failed to carry its burden to present evidence justifying excluding Accounting Supervisors from the unit as managerial employees. (*Children of Promise, supra*, PERB Order No. Ad-402, p. 17.)

B. Metro Did Not Present Facts Showing that Accounting Supervisors are Managerial Employees

Metro’s argument also fails on its own terms. Even supposing managerial employees were presumptively excluded from a bargaining unit of nonmanagerial employees, Metro did not prove that Accounting Supervisors are managerial employees.

Because of the lack of substantial authority interpreting TEERA section 99560.1, subdivision (k), OGC looked for guidance in Board decisions interpreting similar language in other statutes. From these decisions, OGC noted that to be a managerial employee, one must have the authority to formulate or implement policies through the exercise of discretion. (*Hartnell Community College District* (1979) PERB Decision No. 81, p. 13 [“The formulation of policy contemplates the exercise of discretionary authority to develop and modify institutional goals and priorities. The administration of programs contemplates effective implementation of the policy

through the exercise of independent judgment”].) On appeal, Metro appears to agree with these principles, but contends the Board agent failed to fully consider its evidence.

First, Metro contends that the Board agent ignored portions of Controller Soto’s declaration stating that Accounting Supervisors attend weekly management meetings that include their immediate manager and/or Senior Director or Deputy Executive Officer, as applicable, as well as quarterly meetings that include additional senior managers. Soto stated that these meetings include agency or department updates, key performance indicators, priorities, business issues, and personnel matters. Next, Metro contends that the Board agent ignored Soto’s statement that Accounting Supervisors “are significant to the discussion, development, and updating of administrative policies” that are “used agency wide.”

The Board agent concluded that Soto’s declaration lacked specificity, a characterization Metro denies. While it is true that Soto’s declaration contained some details that the Board agent did not recite in the Administrative Determination, none of those details described the exercise of discretionary authority on the part of Accounting Supervisors. That Accounting Supervisors are “significant” to the formulation of policy is insufficient to show discretionary authority. Indeed, Soto’s declaration stated that Accounting Supervisors make “recommendations” that are subject to discretionary review by three-to-four managers above them in Metro’s hierarchy. Soto did not describe Accounting Supervisors’ role in the weekly or quarterly management meetings or otherwise present facts showing that they exercise discretion over the formulation or implementation of policy.

Metro also contends that the Board agent did not fully consider the declaration of Michelle Thaung, Accounting Manager. Thaung, who was formerly an Accounting Supervisor, described her work implementing a vacation bidding policy for subordinate employees and a “PCard enhancement project.” Thaung’s description of her role in these processes showed that she was an important “part of the team’s decision making process,” but not that she exercised any discretion over the formulation of policy. On appeal, Metro homes in on Thaung’s statement that she “did not need to get approval when providing best practice and existing process to be reflected in the design of the [PCard electronic submittal] application,” but this statement merely reflects that Accounting Supervisors provide input based on their knowledge and experience.

The declarations of Elaine Dimson, Senior Director, Accounting, and Diana Estrada, Deputy Executive Officer, also show that Accounting Supervisors provide input on policy changes based on their knowledge and experience. On appeal, Metro claims that the Board agent disregarded some of Dimson’s and Estrada’s statements in favor of contradictory declarations filed by AFSCME. But Metro’s declarants did not state that Accounting Supervisors exercise discretion in formulating policy changes. Rather, their recommendations are subject to the discretion of Managers and Senior Directors. Providing “input” or participating in discussions on policy does not indicate an exercise of discretion sufficient to make an employee a managerial employee.

Metro argues that the Board agent gave insufficient weight to Accounting Supervisors’ job descriptions, contained in Metro’s Policy and Procedures Manual. These job descriptions state that Accounting Supervisors “perform[] a wide range of

technical and administrative work and special projects in the management and support of” accounting functions. Examples include “[e]stablish[ing] controls and systems to ensure accuracy and security of financial records and source documents,” “[d]evelop[ing] and implement[ing] checks and balances procedures to ensure internal controls, and “[s]upervis[ing] staff on workload distribution and task prioritization, performance monitoring and evaluation.” They must have the ability to “[r]epresent [Metro] before the public,” “[e]xercise judgment and creativity in making decisions,” “[t]hink and act independently,” and “[e]stablish and implement applicable policies and procedures.”

But job descriptions are of little weight compared to evidence of actual job duties. In *Calexico Unified School District* (1990) PERB Decision No. 800, PERB relied in part on language in job descriptions in determining the appropriate unit placement of a newly created position. (*Id.* at p. 5.) But in a decision that issued shortly thereafter, the Board made clear that job descriptions were only probative because no employee had yet filled the position and performed any duties. (*Hemet Unified School District* (1990) PERB Decision No. 820, p. 9, fn. 7.) The Board noted then that it favors an approach that looks at the “actual nature of the work performed by the incumbents in the position, rather than the work specified in the job description.” (*Id.* at p. 9, emphasis in original; see also *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P, p. 16 [PERB puts limited reliance on written job descriptions unless they comport to actual job duties]; *Regents of the University of California* (2018) PERB Decision No. 2578-H, p. 3, fn. 4.)

Here, as the Board agent observed, some incumbents have worked as Accounting Supervisors for more than ten years. Metro was provided an opportunity to present evidence of actual job duties that would demonstrate they are managerial employees, but it did not do so. While the positions' job descriptions gesture toward managerial functions, they do so without specificity. In light of the other facts provided by both parties, the Board agent did not err in not relying on the job descriptions.

For all these reasons, Metro has not shown that the Board agent erred in determining, based on the parties' submissions and without a hearing, that Accounting Supervisors are not managerial employees as that term has been applied where a managerial employee exclusion exists. TEERA's omission of any such exclusion, and its particular legislative history, show that evidence of managerial employee duties would not be sufficient on its own to justify excluding Accounting Supervisors from the supervisory employee unit, further compelling the Board agent's decision.

C. The Board Agent Did Not Err by Rejecting Metro's Argument to Exclude Accounting Supervisors as Professional Employees

In its response to the OSC, Metro argued that Accounting Supervisors should be excluded from the supervisory employee unit because they are professionals. Metro based its argument entirely on citations to the MMBA's right of separate representation for professionals (Gov. Code, § 3507.3), and HEERA's rebuttable presumption against inclusion of professionals with nonprofessionals (Gov. Code, § 3579, subd. (c)). Metro's response assumed these same rules applied under TEERA, notwithstanding that TEERA does not contain any reference to professional employees. The Board agent correctly and efficiently rejected Metro's argument. As the Board agent explained, where a statute does not contain an explicit restriction on

professionals' inclusion in bargaining units with nonprofessionals, no such presumption applies. (*San Diego Community College District, supra*, EERB Decision No. 28, adopting proposed decision at p. 7.) Because there was no legal basis for Metro's argument, the Board agent properly rejected it.⁴

On appeal, Metro selectively references its response to the OSC to boldly claim that it made a further argument, that Accounting Supervisors do not share a community of interest with the (impliedly) nonprofessional supervisors in the bargaining unit. However, Metro's response to the OSC speaks for itself:

"There are numerous, substantive differences between the two groups. AFSCME provides very little information about the nature of its current members, but Metro believes the position of Accounting Supervisor is qualitatively different from all categories of AFSCME members. Regardless, there is no need to engage in a community of interest analysis. The only relevant question is whether Accounting Supervisors must be excluded from AFSCME because the position is confidential or managerial or professional. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H.)"

Metro's appeal focuses on the final clause of the first quoted sentence, that it "believes" that Accounting Supervisors' positions are "qualitatively different" from AFSCME-represented supervisors. Whatever may have been intended by that passing

⁴ For all the reasons explained herein, it does not matter whether Accounting Supervisors are in fact professional employees. Accordingly, we do not speculate whether Metro could meet its burden to show that Accounting Supervisors would qualify as professional employees under definitions such as those set forth in Government Code sections 3507.3 (MMBA), 3521.5 (Dills Act), or 3562, subdivision (o) (HEERA).

assertion, the Board agent cannot be faulted for taking Metro at its word, in the very next sentence, that it was not arguing a lack of community of interest.

Metro's attempt to retroactively reframe its argument is made all the more brazen by its continued failure to actually make the argument. Metro's appeal does not identify anywhere in its OSC response that it cited TEERA's community of interest factors or raised facts relating to those factors. Metro's meager offering on this point is one paragraph in a declaration that, viewed generously, speculates that seniority rules for Accounting Supervisors would generally not fit the Accounting Department's structure. Metro did not explain how this prediction distinguished Accounting Supervisors as professionals, as distinct from AFSCME-represented supervisors. It is also not clear what seniority rules Metro's declarant was objecting to, and Metro does not explain. In any event such matters are negotiable, so Metro's concerns would be better put to AFSCME at the bargaining table. (*Merced City School District* (2024) PERB Decision No. 2901, p. 23 [community of interest turns on differences inherent to a job, rather than terms and conditions of employment that may be changed through bargaining].)

For these reasons, the Board agent did not err in rejecting Metro's argument to exclude Accounting Supervisors from the bargaining unit as professional employees.

D. The Board Agent Did Not Abuse Her Discretion by Citing Sacramento Regional Transit District

Metro's final argument on appeal is directed at the Board agent's citation to *Sacramento Regional Transit District, supra*, PERB Decision No. 2871-P. Metro complains that because that Board decision issued after Metro responded to the OSC,

“basic notions of fairness and due process” required the Board agent to solicit additional briefing from the parties.

Metro’s argument is misplaced for several reasons. First, Metro never requested an opportunity to present additional briefing after *Sacramento Regional Transit District* issued. It is not the Board agent’s responsibility to continually apprise party advocates of new authority and solicit responses from them. If Metro thought *Sacramento Regional Transit District* represented a change in law and wanted to brief the matter further, it had ample opportunity to do so before the Administrative Determination issued. Metro appears to argue for a rule that would allow parties to prevail on an issue by simply ignoring it. But no party can reasonably expect to sit on the sidelines and still win the game.

Next, we do not read the Administrative Determination as applying *Sacramento Regional Transit District* as “heightening the burden of proof that Metro must submit to show that employees meet the managerial exception,” as Metro claims. As we discuss in detail above, the Board agent assumed for the sake of argument that PERB’s caselaw developed under statutes containing a managerial employee exclusion applied, and correctly found that Metro had failed to raise sufficient facts showing Accounting Supervisors exercised the requisite discretion in formulating or implementing policy. TEERA’s omission of any such managerial employee exclusion, and its particular legislative history, would not change the result.

Finally, it should be noted that Metro’s appeal fails to explain how *Sacramento Regional Transit District* represented a change in law. As we discuss above, the legislative history of TEERA is clear that the primary and maybe only reason why the

Act exists is Metro's history of unilaterally designating supervisory employees as low-level managers in an attempt to bar them from union representation. That history echoes two decades later in Metro's attempt to exclude Accounting Supervisors from the supervisory unit. The change in law occurred with TEERA's enactment, not the Board's decision in *Sacramento Regional Transit District*. To be aware of this legislative history but fail to reckon with it would be a dereliction of the Board's duty to administer the Act. (Pub. Util. Code, § 99561.) We therefore deny Metro's appeal.

ORDER

Based on the foregoing and the entire record in this case, American Federation of State, County & Municipal Employees, Local 3634's Unit Modification Petition is GRANTED. Accounting Supervisors are hereby added to Los Angeles County Metropolitan Transportation Authority's supervisory employee bargaining unit exclusively represented by AFSCME.

Chair Banks and Member Krantz joined in this Decision.