STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO ALTO UNIFIED SCHOOL DISTRICT, Employer, and SUBSTITUTE TEACHERS' SECTION, PALO ALTO EDUCATORS ASSOCIATION, Employee Organization.	)	Case No. SF-R-497 PERB Decision No. 84 January 9, 1979
JEFFERSON UNION HIGH SCHOOL DISTRICT, Employer, and AMERICAN FEDERATION OF TEACHERS, LOCAL 1481, AFL-CIO, Employee Organization.	)	Case No. SF-R-550

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Palo Alto Unified School District; Byron Mellberg, Attorney (Mellberg and Stearns) for Substitute Teachers' Section, Palo Alto Educators Association; George Camerlengo, Attorney (San Mateo District Attorney's Office) for the Jefferson Union High School District; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for American Federation of Teachers, Local 1481, AFL-CIO.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

DECISION

These two cases are consolidated for decision by the Public Employment Relations Board (hereafter PERB or Board) because they raise two common issues. 1) Whether substitute teachers are public school employees within the meaning of

section 3540.1(j) of the Educational Employment Relations Act (hereafter EERA)[1] and 2) whether a unit of substitute teachers is an appropriate unit for negotiating pursuant to the requirements set out by the Legislature in section 3545 of the EERA.

These cases are before the PERB on exceptions by the Palo Alto Unified School District and by the Jefferson Union High School District (hereafter the Palo Alto District and the Jefferson District, respectively) to hearing officers' proposed decisions, both issued simultaneously. Both decisions held that substitute teachers are "employees" within the meaning of section 3540.1(j) and that a unit composed of substitute teachers is an appropriate negotiating unit. The districts contest these conclusions. The Jefferson District specifically contends that its per diem substitutes do not hold "positions" within the school district and therefore cannot form an appropriate negotiating unit, and that negotiating with substitutes on matters within the scope of representation (section 3543.2) would be a "practical impossibility."

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Based on the entire record in each case, the findings of fact regarding certificated employees contained in the attached proposed decisions are adopted by the Board itself.

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[1]The EERA is codified at Government Code section 3540 et seq. All section references are to the Government Code unless otherwise indicated.

Substitute Teachers Are Employees Within the Meaning of Section 3540.1(j) of the EERA

The Jefferson District argues that its per diem substitute teachers are not "employees" under the EERA because they have no written contract. In support of this argument, it cites the 1935 case of Wood v. Los Angeles City School District (1935) 6 Cal.App.2d 401.

The authority for the court's statement that a written contract is required for employment is not determinable from the decision itself.[2] Furthermore, neither the question of whether the teacher was an employee of the school district nor the existence of a written contract was ever in issue, since the teacher was in fact serving on a written contract as a substitute. At any rate, we do not find the Wood case relevant to the issues presented here. The authority of the PERB derives from the EERA itself, which defines "employee" in Section 3540.l(j):

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this State, management employees, and confidential employees.

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[2]The Wood court cited the case of Gould v. Santa Ana High School District (1933) 131 Cal.App. 346, in which it was held that, as used in the school laws of California, the term "employment" meant services to be rendered for compensation on an express, rather than implied contract. In both the Wood and Gould cases, the issue was not whether certain teachers were employees of the school districts, but rather was limited to whether the teacher in question had served in a probationary capacity such that would qualify that teacher for permanent status.

Thus, EERA excludes only four specific categories of persons who would otherwise be deemed as employed by a public school employer. "Substitutes" are not one of these four.

The districts contend that, even though the statute does not specifically exclude substitutes, PERB should do so, essentially because their employment is casual. "We believe" the Palo Alto District states, "an employee's casual status is first an employment issue and then a unit issue." It is argued that substitute teachers are employed on an "as-needed" basis, and a substitute does not enjoy an expectancy of continued employment.

The Board disagrees with these arguments. An initial consideration is that substitutes, who teach in the place of absent regular teachers, as a class form an integral, essential component of the instructional staffing program of the public schools. Although the freguency with which any given substitute will teach is on this record difficult to ascertain with precision, it is clear that regular teachers, as a group, are occasionally absent and that substitues will be employed to teach in their place. In the Jefferson case, the hearing officer estimated that the Jefferson District required over 2,500 substitute days through April in the 1967-77 school year. In the Palo Alto case, the total number of substitute teacher days taught in 1975-76 was found to be 5,132.5. To characterize substitutes as a class as peripheral or ephemeral employees is misleading and fails to reflect their central,

continuing role in the staffing of public schools. Indeed, this role provides affirmative, sound reasons why substitutes should be considered employees within the meaning of EERA.

Second, exclusion from coverage under EERA would deny them far more than negotiating rights. Section 3543 of EERA endows public school employees with certain rights, including, among others, those of forming, joining and participating in the activities of employee organizations for the purpose of representation on all matters of employer/employee relations. Section 3543.5(a) prohibits, among other things, public school employers from threatening reprisals on or discriminating against employees for exercising any right granted to employees by EERA. Thus, defining substitutes as "nonemployees" would remove them from statutory protections against discrimination and reprisals for engaging in organizational activity in addition to denying them negotiation rights. Such protections appear especially significant for substitutes since they are not covered by tenure provisions of the Education Code and exist on a substitute list at the discretion of the district. Thus, substitutes who comprise such an important staffing function in the districts should not be denied the fundamental protections which EERA confers on public school employees.[3]

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[3]The Board's position that the question of "casual" status does not determine whether or not a worker is an "employee" within the meaning of EERA accords with the treatment of this issue by the National Labor Relations Board (NLRB). The NLRB has consistently treated the intermittency or irregularity of a worker's employment as a unit issue and has

We believe that the Legislature intended the definition of of "public school employee" to be inclusive, and extend broad coverage for representation and negotiating rights for persons who perform services for, and receive compensation from, public school employers. The Board thus finds that substitutes are public school employees within the meaning of the EERA.

Substitutes May Hold Positions in a School District

The Jefferson District contends that, pursuant to section 3544, substitutes may not be part of a negotiating unit because they do not hold "positions" in a school district but rather only replace persons employed in positions who are absent. Section 3544 provides for, inter alia, the filing of a representation petition by an employee organization seeking exclusive recognition in an appropriate unit. It states in part:

> ...the request [for recognition] shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate....

(con't fn. 3)

avoided denying "casual" employees coverage under the National Labor Relations Act. In The Tamphon Trading Company, Inc. (1950) 88 NLRB 597 which involved stevedores, the NLRB indicated that it was "common knowledge" that the tenure of stevedores in the shipping industry is of a casual nature. The NLRB reasoned that "there is nothing in the NLRA that restricts or limits the definition of an employee to one whose tenure of employment must be fixed to a regular day to day or week to week or month to month basis." Notwithstanding the "casual nature" of their employment, the stevedores "have not been deprived of the rights of employees under this act." See also All Work, Inc. (1971) 193 NLRB 918.

We do not interpret the use of the words "jobs or positions" to be a limitation on the eligibility of employees who may be included in negotiating units or on the type of classifications which may comprise an appropriate unit. The function of the words "jobs or positions" used in section 3544 is merely to describe or to identify, and not to limit, the constituent occupational classifications in the unit sought by the petitioner.

A Unit of Substitutes is an Appropriate Negotiating Unit

Having decided that substitutes are eligible to be included in a negotiating unit, the question of the appropriateness of a unit of substitutes must be examined. In Peralta Community College District (11/17/78) PERB Decision No. 77 the Board modified its earlier interpretation of the term "classroom teacher" employed in section 3545(b), which indicated that there exists a rebuttable presumption that all classroom teachers share a community of interest. As the Board there explained:

> Reading subsection 3545(b) together with its companion subsection (a) gives rise to the presumption that all teachers are to be placed in a single unit save where the criteria of the latter section cannot be met. In this way, the legislative preference, as the Board perceives it, for the largest possible viable unit of teachers can be satisfied. Thus, we would place the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it.

If this reasoning were applied to the cases before us, a presumption would exist that substitute teachers shared a

community of interest with the regular, full-time teachers, and the unit of substitutes would be presumptively inappropriate. However, the above described presumption will not be applied to these cases. The modified interpretation of section 3545(b), the Board stated in Peralta, should only have prospective effect in situations where a retrospective application would cause disruption and instability. In Peralta, this Board recognized the hazards to stable employer-employee relations of retrospective application of the new unit appropriateness guidelines established therein. It stated

> [n]egotiations and certifications have been granted, contracts have been executed and in many units negotiations are even now in progress. It would not serve the statutory goal of the stablization of employer-employee organization relations in the public school system if we were to void, or in any way interfere with units already established under the guidelines of Belmont [4] or Petaluma.[5]

In the cases before us, application of the Peralta interpretation of section 3545(b) would clearly carry with it potential for disruption. Representation files of PERB, of which official notice is taken, indicate that in both districts there exist negotiating units of teachers which exclude

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[4]Belmont Elementary School District (12/30/76) EERB Decision No. 7.

[5]Petaluma City Elementary and High School Districts, (2/22/77) EERB Decision No. 9.

substitutes.[6] In both units there are contracts between the districts and an exclusive representative, and these contracts contain recognition clauses for certificated units which also exclude substitutes.

Since the interpretation of section 3545(b) established in Peralta is not being applied to this case, we turn to the question of whether the substitutes in each district constitute appropriate negotiating units. The Board agrees with the hearing officers' findings that the substitutes in each district share a community of interest among themselves based on the fact that their principal responsibility is to teach students in a classroom setting and that the terms and conditions of their employment are sufficiently alike. The Board also finds that considerations of efficiency of operations of the school district and established practice do not indicate that a unit of substitutes would be inappropriate under the exceptional circumstances of this case. Therefore, the Board approves the petitions for units of substitutes.

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[6] In the Palo Alto District, a unit of certificated employees which excluded substitutes was established on May 7, 1976. The district voluntarily recognized the unit sought by the Palo Alto Educators Association, which was originally petitioned for on April 5, 1976, and amended to exclude substitutes on April 8, 1976. On January 17, 1978, the Palo Alto Educators Association and the Palo Alto Unified School District entered into a collective bargaining agreement for the term January 17, 1978, to June 30, 1980. This contract contained a recognition agreement whereby the unit recognized was that created by the above-mentioned voluntary recognition. The request for recognition by the Substitute Teachers

The Board also agrees with the hearing officers' conclusions that the negotiating unit of substitutes should be broadly defined and include all employees who work in the position of substitute. Therefore, a proper unit description is one which comprises all substitutes who are employed by each district.

Voter Eligibility

While it is presumed that salaries and other terms and conditions of employment will affect all members of the unit, the choice of a negotiating agent should be limited to those substitutes with an established interest in employment relations with the district. We therefore determine that substitute teachers on the current substitute teacher list who have been employed for at least 10 percent of the pupil school days during the 1977-78 school year, or 10 percent of the pupil

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(con't fn. 6)

Section/Palo Alto Educators Association for a unit of substitutes was filed July 28, 1976.

In the Jefferson District, AFT, Local 1481, became exclusive representative in a unit of teachers which excluded per diem substitutes on May 26, 1976, as a result of winning a representation election. AFT had on April 1, 1976, originally sought a unit of all teachers. But in the consent election agreement prior to the election, per diem substitutes were excluded from the agreed upon negotiating unit. AFT and the district entered into a collective negotiating agreement on March 29, 1977, for the term September 1, 1976, until June 30, 1978. The contract contained a recognition clause which incorporated the exclusion of substitutes from the unit of certificated teachers. On March 24, 1977, AFT, Local 1481, sought recognition as exclusive representative for a unit of substitutes.

school days of the current school year up until the election cut-off date which is established by the regional director shall be eligible to vote in that election.

ORDER

Upon the entire record in this case, the Public Employment Relations Board ORDERS:

1) The following units are appropriate for meeting and negotiating provided an employee organization becomes the exclusive representative:

> In the Palo Alto Unified School District: all substitutes employed by the Palo Alto Unified School District;
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> In the Jefferson Union High School District: all per diem substitutes employed by the Jefferson Union High School District.

2) It is further ORDERED that a substitute employee in the Palo Alto Unified School District Substitute Unit shall be eligible to vote in an election for exclusive representative if the employee is on the current substitute teacher list and has worked at least 10 percent of the pupil school days of the 1977-78 school year, or at least 10 percent of the pupil school days of the current school year up until the election cut-off date which is established by the regional director.

It is further ORDERED that: because the composition of the unit the Board has found appropriate is the same as that which petitioner seeks, no new showing of support will be required. It is further ORDERED that, in view of the time elapsed since the filing of the petition and accompanying proof of support,

the employer is not required to grant voluntary recognition and may request an election. Therefore, pursuant to Cal. Adm. Code, tit. 8, sections 33460 et seq. (Article 8, Representation Elections), the regional director shall conduct an election in the unit if the employer does not grant voluntary recognition.

3) It is further ORDERED that a per diem substitute employee in the Jefferson Union High School District shall be eligible to vote in an election for exclusive representative if the employee is on the current substitute teacher list and has worked at least 10 percent of the pupil school days of the 1977-78 school year, or at least 10 percent of the pupil school days of the current school year up until the election cut-off date which is established by the regional director.

It is further ORDERED that: because the composition of the unit the Board has found appropriate is the same as that which petitioner seeks, no new showing of support will be required. It is further ORDERED that,in view of the time elapsed since the filing of the petition and accompanying proof of support, the employer is not required to grant voluntary recognition and may request an election. Therefore, pursuant to Cal. Adm. Code, tit. 8, sections 33460 et seq. (Article 8, Representation Elections), the regional director shall conduct an election in the unit if the employer does not grant voluntary recognition.

By: Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

Raymond J. Gonzales, Member, dissenting:

I dissent from the majority's decision to form a separate unit

of substitute employees. I do not believe that per diem substitutes should be considered employees within the meaning of the EERA. As a group, their employment relationship with any individual school district is too ephemeral to justify granting them the right to engage in negotiations.

A substitute's employment relationship with a school district involves being placed on a list. As the Palo Alto Unified School District argues:

> The existence of a substitute teachers list does not create an employment status, yet the hearing officer concludes that any substitute teacher whose name appears on the current list, who worked as little as one hour last year, and who may not have worked at all this year, is an employee of the district.

Both the majority and the hearing officer apparently believe that being placed on a list is a sufficiently strong tie to a district to justify an extension of all EERA rights to per diem substitutes. They both attempt to concoct a unit and a voter eligibility formula to satisfy their desire, apparent in so many majority decisions, to guarantee coverage of the Act to everyone who simply passes through a district on a very limited basis. The results in both instances are so absurd that they are akin to a random walk of an infinite number of monkeys across the keys of an infinite number of typewriters in their effort to reproduce the works of Shakespeare.

I do not believe that the EERA requires this Board to extend negotiating rights to every person who receives money from a school district, no matter how attenuated the employment relationship is. The Board should exercise judgment and its supposed knowledge of the educational process of this state to determine

when a person has a sufficiently strong interest in his/her employment with a school district to be entitled to compel the district to negotiate the terms and conditions of that employment. In my opinion, substitutes do not have such a substantial and continuing employment relationship with individual school districts that they should be given negotiating rights.

The attenuated nature of a substitute's employment is demonstrated by the fact that being on the substitute list is no guarantee that a substitute will ever be hired. Also, the substitute is under no obligation to accept employment if offered. Employment is on a day-to-day basis; the district can fire the substitute at any time[1] while the substitute can also refuse to work at any time. Even the Board, in excluding both per diem and long-term substitutes from certificated units, has consistently noted that substitutes have no expectation of future employment.[2]

Although some substitutes work year after year, substitute lists in general are subject to constant fluctuation; thus any unit formed would tend to be unstable. In the Jefferson district, for example, on a substitute list averaging approximately 75 persons, in one year 26 persons were dropped from the list and 41 were added.

I believe that these factors show that substitutes do not have a substantial and continuing employment relationship with any particular school district. I realize, this opinion is contrary to

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[1]Education Code Section 44953.

[2]Belmont Elementary School District (12/30/76) EERB Decision No. 7; Petaluma City Elementary and High School Districts (2/22/77) EERB Decision No. 9; Oakland Unified School District (3/28/77) EERB Decision No. 15.

NLRB decisions and to some decisions in other states. However, I have never viewed those types of decisions as binding or even particularly influential on this Board. The NLRB deals only with private sector employees. None of the types of employees covered by NLRB decisions relating to on-call, as-needed employees (e.g., "stevedores," "day laborers") have roles that are remotely related to those of substitute teachers in our public school system. And, while a few other states have decided that substitutes should be given negotiating rights, I think California, being more similar to the State of New York in its educational system, should, perhaps, take the course New York has pursued in deciding that substitutes' employment relationship with school districts is too ephemeral to extend them the coverage of the EERA.[3]

I think the insubstantial employment relationship that substitutes have with a particular district is a sufficient reason for excluding them from negotiating rights. However, I also have strong policy reasons for my decision. In the first place, many substitutes are on lists in two or more school districts. To allow them full negotiating rights in every district in which they are listed would give them several "bites at the taxpayers' apple." In these times of shrinking school budgets, such a result should be avoided.

In addition, giving substitutes negotiating rights enables them to negotiate not only wages, but all of the other terms

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[3] East Ramapo Central School District (1973) 6 New York PERB 4059; Bernard T. King (1973) 6 New York PERB 3132.

and conditions of employment listed in section 3543.2. For example, to allow a separate unit of per diem substitutes the right to bargain on class size while the district at the same time must negotiate class size with the regular unit of certificated employees would in reality be a contradiction. How could the district possibly establish two separate policies on class size--one for the regular certificated teachers, and another for the substitutes who are hired by the district on an as-needed basis? What would the district do? Send some children home when their teacher is absent so that the class size would be the one negotiated for day-to-day substitutes? Hire two substitutes to replace one regular teacher?

Another policy consideration is that the per diem substitutes have in the course of the last few years allowed districts to comply with their statutory mandate of providing a public school education when some employees in the state have violated the law by going on strike. The majority, on page 5 of its decision, cleverly disguises its intent in this same regard. It states:

> Thus, defining substitutes as "non-employees" would remove them from statutory protections against discrimination and reprisals for engaging in organizational activity in addition to denying them negotiating rights.

What the majority has expressed in its brief to the Supreme Court on strikes by public employees is that organizational activity arguably includes the right to strike.[4] The fact is that

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[4]Brief of the Public Employment Relations Board to the Supreme Court of California, California Teachers Association v. Superior Court for the County of San Diego, Case No. L.A. 30977, at p. 18.

California courts have expressly prohibited strikes by public school employees in the absence of legislative authorization.[5] The majority of this Board, on the other hand, appears to have an opposite view. What they are doing by allowing for the establishment of a unit of part-time per diem substitutes is effectively eliminating the work force on which a district depends to provide children an education when its regular employees engage in an unlawful strike.

The problems that are raised by giving substitutes negotiating rights are further demonstrated by the majority's efforts to limit voting eligibility. They decide that voting eligibility should be confined to substitutes "with an established interest in employment relations with the district."

Assuming, arguendo, that substitutes should be given negotiating rights, this standard makes no sense. What the Board has done is conclude that some employees who have requested of the district that they be placed on the per diem substitute teachers list do not have "established interests in employment relations with the district." Thus, we must assume that some per diem substitute teachers' reason for putting their name on a list was perhaps frivolous and could not in itself demonstrate an established interest in employment relations.

Moreover, if some per diem substitutes do not share a substantial interest in those matters within the scope of representation, then they obviously do not share a community of

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[5] See, e.g., Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100.

interest with those per diem substitutes who qualify under the majority's formula and should not be included in the same negotiating unit. On the other hand, if they do share a community of interest, then logically they must also share a mutual interest in matters within the scope of representation and should thus enjoy the equal right to vote and participate in the activities of the employee organization of their own choosing as specified in the Act.

I personally disagree with the idea that only some employees should have the right to vote for the representative of all employees in a unit. If a substitute has a significant enough employment interest to be included in a unit, s/he should have the right to cast a vote for or against exclusive representation.

I also think that creating a voting eligibility requirement can lead to absurd results. Per diem substitutes who have been designated by the majority as members of the regular unit of per diem substitutes could sign proof of support cards or petitions pursuant to Government Code section 3544.[6]

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[6]Section 3544 provides in pertinent part:

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

A district as the result of receiving a showing of majority-support could grant voluntary recognition to an employee organization. This would clearly undermine the majority's new holding that not all per diem substitutes in the unit have the right to vote. Any per diem substitute would, in effect, be casting a vote by signature rather than by ballot, even though that employee does not have what the majority would consider a sufficiently substantial established interest in employment relations to entitle them to vote in an election.

Equally absurd is that while any per diem employee's signature can be used to establish an employee organization's proof of support, because of the voting eligibility requirement established by the majority, the very same per diem employee would be unable to vote for the exclusive representative of his/her choice. This is a fundamental flaw in the democratic right to vote for a representative or in fact vote for "no representative," the latter right being expressly mandated by the Legislature in the statute when it declared that every ballot should have a place for "no representative."[7]

Even assuming that it is appropriate to limit voting rights, care must be taken to not do so arbitrarily. The majority has not taken such care. Generally, the NLRB disenfranchises only employees who have no reasonable expectations of future employment.

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[7] Government Code section 3544.7(a) provides in pertinent part:

> . . . There shall be printed on each ballot the statement: "no representation." . . .

In making such a determination, the NLRB tries to develop a rational basis for deciding when an employee does not have such an expectancy.[8] Despite its usual reverence for NLRB policies, the majority provides no such basis for its decision that substitutes "on the current substitute teacher list who have been employed for at least 10 percent of the pupil school days during the 1977-78 school year, or 10 percent of the pupil school days of the current school year . . . " have demonstrated a sufficiently greater "established interest in employment relations" than those who have worked less than that amount that would justify disenfranchising the latter group of substitutes. The 10 percent figure is totally arbitrary. The majority is merely trying to make its first unreasonable decision—that of giving negotiating rights to substitutes—more palatable by making a further unreasonable voting eligibility requirement.

Finally, I must conclude that we have in Jefferson and Palo Alto another manifestation of the majority's inability to grasp the significance of their action in respect to the totality of the public education system of this state. Without entering into a broad discussion of efficiency of operation, suffice it to say that since the Legislature saw fit not to alter the designation of per diem substitute in the Education Code and continued the right of a governing board to hire and fire per diem substitutes

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[8]See, e.g., the NLRB's discussions in Berlitz School of Languages of America, Inc. (1977) 231 NLRB No. 116 [96 LRRM 1644]; American Zoetrope Productions, Inc. (1973) 207 NLRB 621 [84 LRRM 1491].

at will, it would be a contradiction for this Board to now extend to per diem substitutes a right that the Legislature could easily have extended to them by eliminating in the EERA those sections of the Education Code referring to per diem substitutes which are in conflict with the Act. It is my conclusion that the Legislature had no intention of extending coverage to per diem substitutes for it could have easily made its intention clear by repealing those management prerogatives it granted to school district governing bodies in Education Code sections 44918, 44953, and 45030. This decision by the majority once again flies in the face of the mandate of the statute to promote good personnel management and good employee-employer relations. Instead, it would lead to chaos by requiring the district to locate, identify, and maintain records on such a casual group of employees as per diem substitute teachers.

While I must conclude that most districts in this state have failed to provide per diem substitutes with adequate compensation for their very important service to education, I cannot see that granting them collective bargaining rights under the EERA is a reasonable remedy. It would be perhaps more advisable for the Legislature to reexamine the entire nature of substitute teaching in our public schools and correct several discrepancies in a single act.

Raymond J. Gonzales, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
PALO ALTO UNIFIED SCHOOL DISTRICT,	)	Case No. SF-R-497
Employer,	)	PROPOSED DECISION
and	)	(9-7-77)
SUBSTITUTE TEACHERS' SECTION, PALO ALTO EDUCATORS ASSOCIATION,	)	
Employee Organization.	)	

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Palo Alto Unified School District; Byron Mellberg, Attorney (Mellberg and Stearns) for Substitute Teachers' Section, Palo Alto Educators Association,

Before David W. Girard, Ad Hoc Hearing Officer.

PROCEDURAL HISTORY

On July 28, 1976, the Substitute Teachers' Section, Palo Alto Educators Association (hereinafter "STS") filed a request for recognition with the Governing Board of the Palo Alto Unified School District (hereinafter "District"). The request sought a unit of all substitute teachers, a unit comprising 180 employees of the District.

On October 1, 1976, the District notified the San Francisco Regional Office of the Educational Employment Relations Board of its decision to deny recognition to STS. A formal hearing was conducted on Nay 12, 1977.

ISSUES

The parties stipulated that the following issues are in dispute:

1. Is STS an employee organization within the meaning of Section 3540.l(c) of the Educational Employment Relations Act (EERA)[1]?

2. Do substitute teachers have negotiating rights under the EERA?

3. Are substitute teachers an appropriate unit?

FINDINGS OF FACT

The Palo Alto Unified School District has an enrollment of approximately 14,000 pupils in kindergarten through the twelfth grade.[2] It has thirty schools including twenty elementary schools, three junior high schools and three special schools.[3] The District employs approximately 925 certificated personnel and some 455 classified personnel.[4]

There are approximately 200 substitutes on the District's active employment list, on the average, over the course of a year. At the time of this hearing, the list included approximately 170 substitutes. Some 47 percent of the substitutes on the District's active roster have employment dating three years or less; 26 percent have employment dating four to five years; the remaining substitutes have employment dating more than five years. The average length of time substitutes have maintained placement on the District's

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[1]Government Code Sections 3540 et seq.

[2]Selected Statistics: 1974-75 California Public Schools, (Sacramento: California State Department of Education), 1976.

[3]California Public School Directory, (Sacramento: California State Department of Education), 1975.

[4]Ratios of California Public School Nonteaching Employees to Classroom Teachers (Sacramento: California State Department of Education), 1976.

list is three years and three months. Turnover on the substitute list from year to year is between 25 and 30 percent. No evidence was presented regarding frequency of individual assignments of those employees maintaining placement on the District's roster. The total number of substitute teacher days taught in 1975-76 was 5,132.5.

The District employs substitutes on either a day-to-day or long-term basis. "Long-term" is defined as any assignment continuing for 21 days or more. Long-term substitutes who teach for a full semester receive employment contracts. Day-to-day substitutes and substitutes teaching more than 20 days but less than a semester do not. Semester assignments are infrequent. Day-to-day substitutes *are* not guaranteed any certain number of days of work each year but, rather, are on-call. Substitute assignments are made on a rotational basis from the substitute employment list. Regular teachers can, however, request substitutes byname. Subject to substitute availability such requests are routinely honored. Substitutes are free to refuse an assignment without providing a detailed reason for such refusal. Substitutes can and do substitute in other districts.

Substitutes do not have tenure rights. There are no mandatory evaluation procedures for "short-term" substitute teachers. Substitutes serving for ten days or more are subject to evaluation by the principal of the school to which they were assigned. Substitutes are not entitled to a hearing upon termination, but the District as a matter of practice routinely notifies substitutes prior to eliminating them from the master list.

The District follows a procedure in the employment of substitutes which can be briefly described as having four steps. First, applicants for the substitute list are required to complete an application form. Second,

application forms are screened for purposes of selecting interview candidates. Third, interviews are conducted by the assistant superintendent of personnel services. Fourth, upon completion of the interview process, candidates are selected by the assistant superintendent for placement on the substitute roster or master list. This procedure differs from that used in the employment of regular teachers basically in that substitute appointments are not submitted to the District's Governing Board for final approval

Substitutes are required to hold a valid California teacher's credential and take an oath of allegiance prior to employment. Substitutes are placed on a salary schedule different from that of regular teachers. They are not entitled to leave or health benefits. Substitutes are subject to certain payroll deductions required by law such as federal and state withholding taxes and contributions to the California State Teachers Retirement System.

In the 1976-77 school year, substitutes working 20 consecutive days or less are paid at a rate of $42.00 per day. Substitutes working 21 consecutive days or more but less than a semester are paid $63.00 per day. The $63.00 rate is calculated from the base step of the regular teachers' salary schedule. Semester substitutes are placed on the regular teachers' salary schedule according to education and experience and paid in accordance with that placement. In no case are semester substitutes credited with more than 45 units beyond a bachelor degree and eight years of experience on the salary schedule.

The primary duties and responsibilities of substitute teachers are to conduct classes in conformance with absent teachers' regular program lesson plans and instructions. Substitutes are expected to maintain classroom control as well. Substitutes are advised to maintain standby lesson plans

to be used when the regular teachers' lesson plans are mislaid or need to be supplemented.

Substitutes are not required to attend faculty meetings or workshops but are encouraged to do so. Substitutes are not required to supervise student extracurricular activities but on at least one occasion a substitute was asked to volunteer for such duty.

STS is an organization affiliated with the Palo Alto Educators Association (hereinafter "PAEA"). PAEA is the recognized representative of regular contract teachers for the District. STS has representation on the governing "Representative Council" of PAEA. STS members on the Representative Council are permitted to vote on non-policy matters but are not permitted to vote on policy matters. Policy matters include those items pertaining to collective negotiations. Non-STS PAEA Representative Council members may, however, vote on all matters affecting substitute teachers.

STS has been in existence for approximately five years. It has heretofore not negotiated with the District. It is governed by its own set of by-laws. Its members elect their own officers. It holds regular monthly meetings at various school sites in the District. The official business address of STS is the same as that of PAEA.

The purpose of STS is "to promote substitute teacher professional growth, provide substitutes information about the District and promote self-esteem and camaraderie among substitute teachers." STS has met with school faculties, held substitute workshops and worked on school bond elections.

There are approximately 60 STS members. Membership in STS is open only to persons accepted for employment as substitute teachers by the District. STS members are required to pay dues. Dues are determined by and paid to PAEA. There is no salary check-off for STS members.

DISCUSSION AND CONCLUSIONS

STS is an Employee Organization

The District concedes that STS is an "organization" according to common dictionary usage but argues that STS need not and should not be found to be an "enployee organization" within the meaning of the Educational Employment Relations Act (EERA). Its argument is bottomed on the contention that STS is a mere "puppet" of the parent affiliate PAEA. It is maintained that if STS is found to be an employee organization, STS will be patently unable to meet its obligation to meet and negotiate with the District in good faith.

The District's argument rests upon four bases: (1) STS does not have the requisite power to establish negotiating priorities or reach agreement; (2) STS cannot fairly represent its members; (3) there is an inherent conflict of interest between the parent PAEA and its affiliate STS, and finally (4) STS cannot ultimately be held accountable by the District for any legal and contractual responsibilities which it attempts to enter.

STS takes the position that two statutory requirements must be met in order for it to be included under the provisions of the EERA as an employee organization. First, the existence of an "organization" must be established. Secondly, a defined organization must "include employees of a public school employer."

On the first point, STS argues that the EERA is clear and unambiguous in its definition of an employee organization and further that an expansive statutory interpretation is to be preferred in any event. STS, it is proffered, has all the necessary indicia of such a statutorily defined organization.

STS points out that, though it is affiliated with the larger PAEA, such affiliation cannot be construed as tantamount to integration. On the second point, STS contends that its members are employees of a public school employer. Such contention is based on the relationship between the District and substitutes whereby the substitutes "sell...services for a wage or salary and undertake to perform a given function under supervision" to the District, any lack of regularity of that relationship notwithstanding.

The definition of an "employee organization" is provided in Section 3540.l(d) of the EERA.;

> "Enployee organization means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer."

In order to find that an employee organization exists under the EERA., three requirements must be satisfied: (1) it must be an organization; (2) it must include employees of a public school; and (3) one of the primary purposes of the organization must be providing representation of employees in relations with the public school enployee

Rules of statutory construction require that : "[s]tatutes must be given a fair and reasonable interpretation with due regard to the language used and the purpose sought to be accomplished. The language of an enactment controls the construction, though extraneous aids may be resorted to where the language is ambiguous and the legislative intent not clearly discernible."[5]

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[5]45 Cal. Jur. 2d 623-624. See also People v. Rodriguez (1963), 222 Cal. App. 2d 221

The term "enployee organization" is not ambiguous by definition or context. Clearly an ordinary dictionary meaning of the word organization would appear to be quite adequate. Had the Legislature intended a more stringent requirement for EERA coverage—a requirement that the petitioner be a legal entity, for example—it would have so provided. Here STS easily falls within the dictionary definition of organization. It has been in existence for five years, it has its own by-laws, it is led by duly elected office holders and it holds meetings on a regular basis. In fact, the District concedes in its post-hearing brief that STS is an organization within the dictionary meaning of that word. The District nevertheless urges that STS is not an organization within the meaning of the EERA.

While the precise legal theory of the District's claim goes unstated the District apparently seeks to place its arguments on public policy grounds. The District merely points out several potential public policy problems and asks that the Board look beyond the plain meaning of the statutory language.[6]

A finding that STS is an employee organization within the meaning of the EERA does no injustice to common sense or injury to the underlying purpose of the legislation taken as a whole. It is the stated purpose of the EERA to "...recogniz[e] the right of public school employees to join organizations of their own choice [and] ...to be represented by such organizations."[7]

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[6]Holy Trinity Church v. U.S., (1892), 143 U.S. 457; See also Silver v. Brown, (1966), 63 Cal 2d 841, 48 Cal Rptr 609. "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statutes legislative history appear from its provisions considered as a whole."

[7]Government Code Section 3540.

An expansive interpretation of the meaning of organization can be said to be favored given a legislative intent having such wide parameters.[8]

Nevertheless, the District claims that due to the nature of STS' affiliation with the parent PAEA, STS' organizational status is vitiated. Ordinarily, affiliation has no bearing on organizational status. In fact, it is not uncommon practice for a single labor organization to act as the exclusive negotiating agent of more than one unit of a single employer. So here—as under the NLRA—for example, if PAEA sought to represent substitute teachers there is no reason why it could not qualify as an organization within the meaning of the EERA and seek to do so. If PAEA can therefore directly seek to represent substitutes, there would appear to be no reason why its affiliate STS could not. Mere affiliation does not otherwise defeat organizational status under the EERA.

There is no California precedent for a claim that something more than mere affiliation will defeat organizational status. There have been such claims under the NLRA,[9] however, that organizational status should not be granted on the basis that an organization was (1) a "front"; (2) was receiving "administrative assistance"; or (3) was incapable of proper representation.

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[8] See NLRB v. Ampex Corp., (CA. 7 1971), 442 F. 2d 82, which is representative of the federal courts' view on such interpretation.

[9] See Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976, footnote #1, where the Board noted that, "While we are not bound by NLRB decisions we will take cognizance of them where appropriate." It should be noted that the language of the NLRA differs from that of the EERA. NLRA Section 2(5) has been defined as including "...any organization of any kind, or any agency or employee representation committee or plan..." NLRB v. Cabot Carbon Co., (1959), 360 U.S. 203, 44 LRRM 2204; The Developing Labor Law, p. 136 (C.Morris ed. 1971).

In General Dynamics Corp.,[10] the employer claimed that the employee group was a "paper organization" under the direct domination and control of the international union and thus a "front." The NLRB stated:

> "Petitioner is a labor organization within the meaning of the Act, regardless of whether it is fronting for the international union—an issue which may go to misrepresentation of the true bargaining representative but has little to do with Petitioner's existence or status as a labor organization."

Moreover, in Colonial Williamsburg Foundation,[11] the NLRB rejected a contention that a petitioning local was not a labor organization because (1) it was receiving "administrative assistance" from the international union; (2) the filing of the petition and all other matters were handled by an organizer from the international union; and (3) the local had no regular officers. In the instant case, STS filed its own petition and has its own officers. Other than the fact that STS has the same business address as PAEA there is no evidence presented that PAEA was instrumental in organizing substitutes.

Despite the difference in statutory language between the NLRA and the EERA in defining employee organization, the NLRB view that "fronting" or "administrative assistance" has little to do with organizational status should be followed. There is little to commend a rule that organizational status be predicated according to some formula of degree of affiliation. Not only would standards be difficult to establish but such a rule would also serve to erode the right of employees to select the organization of their choice for purposes of representation.

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[10]213 NLRB 851 (1974).

[11]224 NLRB 115 (1976).

The District's public policy argument additionally embraces the view that if STS is found to be an employee organization within the meaning of the EERA, it will be unable to act responsibly toward either the District or its members. The record is barren of any evidence to support such a claim and it is not patent or necessarily inferred from mere affiliation.

Nevertheless, it should be noted that the NLRB in Alto Plastics[12] stated that:

> "For, it must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained and the employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative..."

Clearly the NLRB has rejected the notion that organizational status be placed on a footing of representational effectiveness. The wisdom of such an approach makes sense in this case as well. There are more appropriate alternative means of dealing with problems of representational effectiveness. The employer or an individual could, for example, bring an unfair practice charge should it be felt that the employee organization is not meeting its statutory obligations.[13] Though the spectre of representational impropriety can be raised, it should not be done in the context of organizational status and it should never be presumed.[14]

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[12]136 NLRB 850 at p.851-852 (1962); See also Hotel Properties, 194 NLRB 139 (1972).

[13] Government Code Section 3543.6.

[14]See Morris, Developing Labor Law Supp. 1971-75, at p. 73 where it is said, "Consistent with its decision in Alto Plastic Mfg. Corp., the Board has continued to refuse to inquire into the internal affairs of a union in determining whether it is a statutory 'labor organization.' It chooses instead to police the union's statutory obligation after certification."

For the above stated reasons, the District's claim on public policy grounds must fail.

Next it is found that STS includes employees of the District within its membership ranks. While the discussion, infra, concludes that substitutes are "employees" it should be noted that Section 3540.l(d) only requires that to be an employee organization it must "...include employees." A finding that some members of the organization are not employees would not defeat STS' standing as an employee organization.

The third and final statutory requirement necessary to find that STS is an organization within the meaning of the EERA is to determine whether one of its primary purposes is to represent employees in their relations with the public school employer.

In Roytype[15], the NLRB found the requisite purpose of a labor organization existed, saying:

> "The applicable provision of Section 2(5) of the Act defines a labor organization as 'any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.' Clearly, Petitioner exists for statutory purposes, although its purposes have not yet come to fruition; and employees have participated in its organization and subsequent activities, although the latter have been limited by the organization's lack of representation rights. Accordingly, we find that Petitioner is a labor organization within the meaning of the Act."

Here STS has not negotiated with the District but it seeks to do so. To that end it has requested recognition as an exclusive representative. As in Roytype, the requisite purpose should be found to exist despite the fact that it has not yet come to fruition.

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[15]199 NLRB 354 (1972).

Substitutes Have Negotiating Rights

The District takes the position that substitutes do not have negotiating rights since they are not "employees" within the meaning of the EERA. It is first pointed out that substitutes differ from regular employees in statute and in fact. The District, further, takes the position that mere placement on a substitute list does not in any event necessarily constitute employment. The District argues that coverage under the EERA does not automatically extend to all employees and suggests that coverage only be provided to those persons meeting the burden of a two-pronged test of employment continuity. First, substitutes must show that as individuals they are used "frequently" by the District. Secondly, they must show that they are used on a "predictably regular basis." Presumably, persons not able to meet the test should be considered "casual" employees and as such be excluded from coverage of the EERA.

STS first points out that exclusions from the EERA are not favored and thus a presumption favors coverage. It contends that while there is precedent for identifying certain employees as casual, it is inapposite for purposes of EERA coverage here. Rather, it is argued that casual status possibly bears on exclusion from a unit but not exclusion from the protection of the EERA in its entirety. It is advanced, arguendo, that even if a showing of casual employment status can defeat statutory coverage in some instances it should not do so here. STS contends that the extant substantial employment interest of substitutes here assures the occurrence of meaningful negotiations. Finally, STS argues that while substitutes may work in more than one district, this should not defeat the right to negotiate in the Palo Alto Unified District because multiple district substituting does not undermine the interest of substitutes in terms and conditions of their employment in Palo Alto.

Substitute enployee status is an issue of first impression in California. Consequently, it is useful and instructive to begin by reviewing precedent established at the federal level under the NLRA as well as decisions in other states. In doing so two distinct approaches tend to emerge. First, under the NLRA employees are distinguished from non-employees along traditional common-law standards governing the relationship between employer and employee.[16] The NLRB has found that the requisite employment relationship did not exist because of explicit and implied statutory exclusions,[17] retiree status,[18] and student status[19] for example. But the NLRB has never found that a person failed to qualify as an enployee due to the casual nature of the person's employment relationship with the employer.[20] Instead, the NLRB has simply excluded such employees from the unit. Although a group remains that is deemed "fringe" or "residual," they are nevertheless employees under the NLRA.

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[16] In C. W. Post Center of Long Island University, (1971) 189 NLRB 904 university faculty members were held to be employees since they had the "usual incidents" of an enployee relationship with the University employer.

[17] Bell Aerospace Co. Div., (1974) 416 U.S. 267, 85 LRRM 2945.

[18] Tusculum College, (1972) 199 NLRB 28.

[19] Evans Broadcasting Corp,, (1969) 179 NLRB 781.

[20] All Work Inc., (1971) 193 NLRB 918, 78 LRRM 1401. The NLRB found temporary unskilled workers hired on a voluntary referral system to be employees despite the fact that the employer did not exercise control of many aspects of their work including supervision.

In a recent case dealing with substitute teachers, the Oregon Employment Relations Board followed the approach taken by the NLRB.[21] The Board found substitute teachers to be employees within the meaning of the Oregon statute. In reaching its decision, the Board said:

> "There is no valid issue about whether the substitute teachers are 'public employees' when they are in fact hired, since the statutory definition does not exclude them, and when hired, they are then on the public payroll. The Act gives 'public employees' the 'right' to engage in labor relations. Any prohibition or exclusion is required to be plainly stated. Those excluded by the Act are plainly stated. Others are included."

Both the NLRB and the Oregon Board view casual status as a unit question, not one of employment status—no matter how casual that status might be. New York, on the other hand, takes an opposite view. In East Ramapo Central School District No. 2,[22] the Director of Public Employment Practices and Representation concluded that per diem substitutes were not "employees" covered under the Taylor Law based upon New York precedent, saying:

> "This Board has previously considered and rejected the argument that the definition of 'public employee' is all inclusive. We ruled that some persons holding positions of seasonal employment with New York State might not be covered by the Taylor Law if the season was too short, too few returned from year to year, or they worked too few hours. We said, 'In some instances, the employment relationship is too ephemeral to carry with it Taylor Law rights and obligations.[23]

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[21]Eugene Substitute Teachers Organization v. Eugene School District, (1976) 1 PECBR 716.

[22]PERB Case No. C-0956, paragraph 6-4033, 3 CCH Labor Law Rptr, State Laws, paragraph 49, 999B.49 (1973).

[23]See In the Matter of State of New York (Department of Correctional Services), 6 PERB 3067, 3069-70 (1973), for a discussion of the argument that "public employee" status is not all inclusive.

In the East Ramapo case, the director pointed out that:

> "Whether per diem employment is inherently 'ephemeral' is a question I need not now decide, for I find that the employment relationship of the per diem substitutes involved in this proceeding is of a casual or temporary nature." (emphasis added)

It is clear, therefore, that East Ramapo is of limited precedential value.

First, of course, the EERB need not follow New York and, secondly, East Ramapo is limited by the facts. In East Ramapo, as well as here, there were master lists of employees. But there existed in East Ramapo a more tenuous employment relationship than here. In East Ramapo it was found that 38 to 40 percent of the substitutes had a de minimus employment relationship, working no more than 10 days of the minimum 180-day school year. Further, at least 70 percent of the proposed unit saw service for less than a quarter of the year. Here there was no evidence of such a de minimus employment relationship. In fact, substitutes on the average worked approximately 30 days each.

In New York, the court also placed great reliance on the element of continuity from year to year and applied a standard of 60 percent rate of return, as had been established for seasonal workers. Here there is no such standard, but even if there were, there is greater than a 70 percent continuity of substitute employees from 1976 to 1977.

Substitutes have a legitimate concern and interest in their employment relationship. They are told when to be at work, whether to have lesson plans, what they will be paid and if they will be evaluated. They have a right to have those interests represented under the EERA..

On the issue of enployee status the line of reasoning articulated by the NLRB and the Oregon Board should be followed here. There is no reason to ignore statutory guidelines and read in enployee exclusions beyond those specifically enumerated.[24] The EERA should be read broadly in defining enployee status in light of the legislative purpose with which it was enacted.

Substitutes Constitute an Appropriate Unit

The District argues that the key to deciding the issue of unit appropriateness where substitutes are concerned is "expectancy of future employment." Apparently the District contends that unless there is a showing of a substantial expectancy of future employment, substitutes are not entitled to inclusion in the unit. To find otherwise, the argument continues, would precipitate at least three problems: (1) unit instability (substitutes, lacking a future with the District, would opt for short-term negotiating gains), (2) indeterminate substitute status in that substitutes would be difficult to identify for purposes of voting and representation rights, and (3) District operational efficiency would be reduced because it would be onerous if not futile to establish and maintain substitute check-off, release time and collective negotiating contract provisions. The impact of the District's position is that, at least in this case, there can be no unit established which is an appropriate unit.

[24]Government Code Section 3540.l(j) provides that a "'public school enployee' or 'enployee' means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees and confidential employees."

STS takes the position that a unit determination inquiry should focus on the "community of interest" between and among substitutes. STS argues that the community of interest standard has been met by all persons on the District's substitute list as evidenced by examining the following indicia: (1) qualifications, training and skills, (2) manner of assignment, (3) amount and method of pay, and (4) job function. While STS argues that all persons on the District's substitute list should be included in the unit, nevertheless only those who have worked 10 days in the preceding 12 school months or one day in the preceding 30 days should be eligible to vote.

The standard to be applied in deciding unit determination issues is now fairly well settled under the EERA. Government Code Section 3545(a) provides that:

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

The Board has also considered other factors in determining issues involving community of interest. In determining that long-term substitutes. should not be included in a unit with regular classroom teachers, the Board identified the criteria of "expectancy of future employment,"[25] " job security and tenure," "leave," "fringe benefits " and "employment contracts."[26] Also considered in community of interest cases have been job description, pay schedule, who selects employees for employment, commonness of purpose and goals, length of work day and work year, inter alia.[27]

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[25]Petaluma City Elementary and High School District, EERB Decision No. 9, February 22, 1977; Belmont Elementary School District, EERB Decision No. 7, December 30, 1976.

[26] Lompoc unified School District, EERB Decision No. 13, March 17, 1977.

[27]Grossmont Union High School District, EERB Decision No. 11, March 9, 1977.

The nub of the issue at hand is to determine whether such differences warrant concluding that all substitutes do not share a similar community of interest. Again NLRB precedent provides some guidelines. Generally the issue of community of interest relative to "part-time," "day-to-day" and "on-call" workers has come up in the context of whether or not such employees should be included in a particular negotiating unit or excluded as "casual employees."

The notion of "casual employee status" is a concept long employed in unit determination cases decided by the NLRB. Its origin is found in cases interpreting the NLRA rather than in the language of the statute itself. It is reasoned that casual employees do not share a community of interest with other employees. The NLRB determines the existence of casual status on a case-by-case basis, balancing such factors as expectation of continued employment, work patterns and history, inter alia.

The NLRB has held employees to be casual if their employment is "intermittent,"[28] "sporadic,"[29] "too few hours per week,"[30] and if they have no demonstrable expectation of being rehired,[31]

In finding casual status the NLRB has also considered such factors as attending school as an indication of employment expectancy, manner of pay, manner of hire and whether the employee is employed elsewhere.[32]32

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[28]Murphy G.C. Co., (1968) 1171 NLRB 45; 68 LRRM 1108.

[29]Glynn Campbell, dba Piggly Wiggly El Dorado Co., (1965) 154 NLRB No. 32, 59 LRRM 1759.

[30]NLRB v. Greenfield Components Corp., (CA 1 1963), 53 LRRM 2145, enforcing 49 LRRM 1532:

[31]Maine Sugar Industries, Inc., (1968) 169 NLRB 186, 67 LRRM 1142.

[32]George Groh and Sons, (CA 10, 1964) 329 F 2d 265, 55 LRRM 2729; enforcing 52" LRRM 1424; Bowman Transportation, op. cit.; Georgia Highway Express (1965) 150 NLRB 164y.

In some cases if employees are found not to be "casual" under the NLRA they are considered "regular part-time employees" and included in the unit along with regular employees.[33]

In finding part-time status as contrasted with casual status, the NLRB has also found that turnover was not determinative where work is not irregular, intermittent, sporadic or occasional;[34] that a unit included "on-call" employees who averaged four hours work or more per week;[35] that lack of fringe benefits alone will not be cause for exclusion from the unit;[36] and that expectancy of recall standing alone will not defeat inclusion in the unit.[37] The NLRB in deciding between casual or part-time status does not focus on one particular factor. Rather it balances a number of factors and decides on the basis of the case as a whole. It is clear, however, that a major factor in NLRB reasoning is regularity and continuity of employment.[38]

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[33]See generally: Baumer Foods, Inc., (1971) 190 NLRB 690, 77 LRRM 1270; Knapp-Scherril Co., (1972) 196 NLRB 1072, 80 LRRM 1467; William J. Keller, (1972) 198 NLRB 1144, 81 LRRM 1048; NLRB v. Broyhill Co. (CA 8 1976), 91 LRRM 2109; Perm Truck Painting and Lettering Corp. (1974) 215 NLRB 147, 88 LRRM 1092; Sears, Roebuck and Co., (1971) 193 NLRB 330, 78 LRRM 1249; Stockham Valve and Fittings, (1976) 222 NLRB No. 19, 91 LRRM 1263; Daniel Ornamental Co. (1972) 195 NLRB 334, 79 LRRM 1343.

[34]A.S. Able Co. (1970), 185 NLRB 144; W. Horace Williams Co. (1961) 130 NLRB 223.

[35]O'Niel, M. Co., (1969) 175 NLRB 514.

[36]Quigly Industries (1969) 180 NLRB 487.

[37]Westchester Plastics of Ohio (1968) 69 LRRM 2507.

[38]Tol Pac Inc., (1960) 128 NLRB 1439.

It should also be mentioned that, following the NLRB approach, the Pennsylvania Labor Relations Board in School District of Radnor Township[39] decided that certain bus drivers were not part of the regular bus driver unit due to the fact that they did not work full-time. Consequently such drivers were put in a separate part-time unit based on community of interest. The Pennsylvania Board further split off some employees from the part-time unit due to the casual nature of their employment.

It can be seen that the case-by-case approach followed by the NLRB is not a model of clarity. The balancing act which takes into consideration a variety of competing factors therefore presents no small difficulty in ascertaining touchstones and principles useful in application here. However, from a review of the NLRB and state cases dealing with casual status two threads are discernible. First there are those cases that deal with the issue of separating or carving out a part-time work force from a regular work force, as in the retail trade. If the part-timers are found to be casual they are carved out. If not, they are called "regular part-timers" and included in the full-time unit. The NLRB decides each case by balancing the factors mentioned above. There is a second line of cases which also emerges in which casual status comes up but in a somewhat different context. In these cases there is not a question of splitting off, or carving out, employees from a full-time unit. Rather casual status is used as a general broadside to question the integrity of intermittent employees as a whole.

[39]Case No. PENA-R-5375E, January 13, 1975.

That is, do the employees in the unit sought have a sufficient community of interest among them to comprise a cohesive work force? The issue here is not so much one of division; it is one of diffusion. Casual status of this genre typically arises in the day labor or construction worker cases.

Under this second line of cases the NLRB has shown a greater reluctance to identify employees as casual. There would appear to be two reasons for such a result. First, where all employees in the unit sought are intermittent, it is difficult to eliminate some as casual based upon the amount of work performed. It is not so difficult, however, where the issue is merely one of splitting off certain employees from a full-time unit. Secondly and in the same vein, drawing lines in such cases could lead to excessive unit fragmentation.

In the instant fact situation there are elements of each line of NLRB cases. There is a regular work force with which to compare substitutes as in the retail trade cases. Also substitutes perform essentially the same tasks as the regular work force. On the other hand, substitutes are not seeking to be part of the regular unit. They are seeking a separate unit. Thus a finding of casual status goes to the cohesiveness of the substitutes as a whole. This is similar to the second line of NLRB cases dealing with day labor. The issue here is whether any or all substitutes share a community of interest among themselves.

Any distinction to be made between substitute teachers should be made along the line of NLRB cases dealing with day labor or the construction industry. Those cases do not involve community of interest between part-time and full-time employees. Rather they dealt with community of interest among and between intermittently scheduled workers. As in such cases

a line should not be drawn differentiating some employees as casual unless there are reasonable standards by which to do so.

The Oregon PERB has recently dealt with the precise question faced here. In deciding whether or not substitute teachers are so casual as to have a community of interest that Board took the view that:

> "It is not logical to draw an artificial line somewhere between the one-half day per year hired substitute teacher and the 182 days per year hired substitute, where each has some reasonable expectation of reemployment. Any division based on number of days among those actually hired is wholly arbitrary. To say that the two-day per year substitute has a community of interest with others who are teaching, while the one-day or one and one-half day per year substitute does not, cannot be supported."
>
> "The only real yardstick should be whether or not substitute teachers have a reasonable claim to expectation of reemployment."[40]

In the Oregon case there was no evidence which would have allowed the Board to distinguish between substitutes.

In some cases it may be possible to establish that a differing community of interest exists between substitutes. For example there might be a standard where there can be little argument that only a de minimus expectancy of employment exists. Substitutes falling below such a standard could be considered casual and not within the unit. A number of possible lines of demarcation suggest themselves. Twenty-one days of work could be the cutoff since the District provides a different level of pay for substitutes serving 21 days or more. The only problem, however, is that such payment applies only to substitutes employed for consecutive days in the same assignment. Another possibility is to select average days worked.[41]

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[40] Eugene Substitute Teachers Organization, 1 PECBR 716, August 1976.

41[41] In the Matter of the Employees of School District of Philadelphia, 5 PPER 113, December 11, 1974, where "median" rather than average was used as a line of separation.

But such lines, as is argued in the Oregon case, are unquestionably arbitrary In the instant case there was no evidence presented which compels a line to be drawn between categories of substitutes. Certainly it is not necessary to shy away from drawing lines when there is some supporting rationale. Here there is none.

The cogency of deciding casual status on a case-by-case basis and concluding that all substitutes should be placed in the unit is perhaps best demonstrated by Fresno Auto Auction.[42] In that case, the NLRB included all "drivers" in a unit. Drivers were recruited by telephone from a list of drivers who had previously worked or applied. A majority worked more or less regularly but about one-third worked less than three weeks in the previous six months. Drivers were on-call as needed. The number of hours worked ranged from one or two hours per week to 35. They were paid hourly and received no fringe benefits, Many held regular full-time jobs elsewhere. The NLRB did not distinguish between the drivers because it balanced work "pattern" with other considerations saying:

> "The record clearly demonstrates that, while the number and identity of the drivers, deliverymen and detail shop employees fluctuates from week to week, a substantial number of the group have reported and worked fairly regularly over a period of several months preceding the hearing..."
>
> "In determining the relative permanence or regularity of the employment in the proposed unit, we believe this fact outweighs those considerations having to do with the individual's freedom to determine his own work schedule or to report for work intermittently. Similarly, the fact that they are carried on the payroll as part-time workers does not, in our view, alter the character of the work force as a cohesive group of individuals with a strong mutual interest in their working conditions."[43]

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[42] 167 NLRB 878 (1967).

[43] Id. at 879.

Simply put, Fresno Auto Auction stands for the proposition that employees, no matter how few days they work, should not be distinguished from other employees solely on that basis.

From the findings of fact it must be concluded that substitute teachers have a separate community of interest. They are hired, evaluated, paid and have standards of performance which are generally the same. They have no guarantee of employment, have no tenure rights and are offered no written contracts.

Furthermore, given the facts that on the average employee substitutes serve approximately five weeks per annum, the low turnover of persons on the substitute list, and the similarity of working conditions among substitutes, no arbitrary division between substitutes with the view to excluding some as "casual" is justified.

Another criterion to be considered by the EERA in unit determination decisions is the extent to which members of the unit belong to the same employee organization. STS membership rolls contain approximately 30 percent of the District's substitutes. It is logical to infer that individual membership in STS is in part determined by a substitute's expectancy of future employment with the employer. This, however, does not outweigh the community of interest shared by all substitutes and require anything other than an all exclusive unit. No evidence was offered regarding past practices or efficiency of operations in the context of community of interest and thus such factors play no part in the Proposed Decision.

Eligibility to Vote

Although all of the employees in a unit are affected by negotiations, under NLRA precedent,[44] voter eligibility has been limited to those employees with a substantial employment interest based on having worked a sufficient period of time to reflect a continuing interest in working conditions and the outcome of the election.

Those restricted from voting are deemed not to have the same significant interest in selecting an exclusive representative as the other employees in the unit. Eligibility herein is determined by balancing a number of factors such as length of time, regularity and currency of employment.

PROPOSED DECISION

It is the Proposed Decision that:

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

> A unit of all substitute teachers on the most current substitute teaching list who have worked in the District during the previous or current school year.

It is further proposed that members of the unit are eligible to vote in an election for exclusive representative if:

(a) They are on the list as of the established election cut-off date, and

(b) Have continuously been on the substitute teaching list for three, consecutive semesters (excluding summer sessions) including the one in which the election is held, and

(c) Have actually worked in any two of the three consecutive semesters listed.

[44] Daniel Ornamental Iron Co., (1972) 195 NLRB 334; Julliard School, (1974) 208 NLRB 153.

2. STS is an employee organization within the meaning of the EERA.

3. Substitute teachers on the most current substitute teaching list who have worked in the District during the previous or current school year are found to be employees within the meaning of the EERA.

The parties have seven (7) calendar days from the receipt of this Proposed Decision in which to file exceptions in accordance with Section 33380 of the Board's Rules and Regulations. If no party files timely exceptions, this Proposed Decision will become final on September 19, 1977, and a Notice of Decision will issue from the Board.

Within ten (10) workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if the employer does not grant voluntary recognition.

Dated: September 7, 1977.

David W. Girard
Ad Hoc Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
JEFFERSON UNION HIGH SCHOOL DISTRICT,	)	
Employer,	)	
	)	CASE NO. SF-R-550
- and -	)	
	)	
AMERICAN FEDERATION OF TEACHERS,	)	
LOCAL 1481, AFL-CIO,	)	
Employee Organization.	)	
	)	

Appearances: George Camerlengo, Attorney (San Mateo District Attorney's Office) for the Jefferson Union High School District; Stewart Weinberg, Attorney (Van Bourg} Allen, Weinberg and Roger) for American Federation of Teachers, Local 1481, AFL-CIO.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On March 24, 1977, the American Federation of Teachers, Local 1481, AFL-CIO (hereinafter "Federation"), filed with the Jefferson Union High School District (hereinafter "District") a request for recognition as the exclusive representative of a unit of all certificated per diem substitutes in the District.

On April 21, 1977, the District filed with the EERB its Employer Decision in which it questioned the appropriateness of the unit requested by the Federation. A unit determination hearing was conducted on June 6, 1977.

FINDINGS OF FACT

The District has a student enrollment of approximately 7,604 in six high schools.[1] The negotiating unit of "regular" certificated employees,

[1] 1977 California Public School Directory, at 467.

including substitutes employed for a semester or more on contract, numbers approximately 400. The number of teachers on the per diem substitute teaching list is approximately 75.

Applicants for per diem substitute jobs are interviewed by the District. The same criteria used in hiring probationary teachers are applied, but the preemployment interview process is not as rigorous. The District governing board takes official action to place successful applicants on the substitute list. The list, as periodically updated, is distributed to the six high schools. Substitute arrangments are made at the individual school site. Many times the regular teacher requests a particular substitute to serve during his or her absence.

Substitutes generally perform the same teaching duties as the absent regular teacher including assigning homework, giving examinations and grading the students. However, they are not expected to perform allied, non-teaching duties such as supervision of games, dances, or student activities. Some schools have substitute teacher handbooks. Although substitutes are not formally evaluated, school administrators, department heads or the absent teacher report on a substitute's performance. This report influences the decision to use the substitute again at the particular school. Quite a few new probationary teachers in the District have been hired from the substitute teacher ranks, but substitute teachers as such have no guarantee of future employment. See Education Code §44953.

Per diem substitute teachers receive $7.50 an hour or $37.50 for a full day (five periods). These rates reflect the first raise in about ten years and are contained in the current negotiated agreement between the District and the Federation for the "regular" certificated negotiated unit.[2]

[2]Under the current agreement, regular teachers may receive extra pay for substituting during their preparation periods. When the budgeted funds for substitutes run out, regular teachers and administrators substitute free of charge on a rotating basis.

After 20 consecutive days of substituting for one absent teacher, the substitute is classified "long term" and receives retroactive, pro-rated pay based on the entry level probationary salary step on the District's salary schedule.[3] Per diem substitutes receive pro rata sick leave, workers compensation coverage, and coverage under the District's blanket liability policy. They do not receive the remaining benefits given to regular employees and substitutes on contract.

Of the approximately 75 persons on the substitute teaching list, about 20 to 25 form a "core" who work for the District from year to year and generally serve more than 50 percent of a school year. The remainder of the substitute list is subject to fluctuation and change. Evidence was presented that during the 1976-77 school year there were 41 additions to, and 26 deletions from, the list. Some of these persons work as little as once a month on an irregular basis. A person may be deleted from the substitute list for one of two reasons: upon the person's request, or upon the District's discovery that the person either has another job or has left the area. Some of the persons on the substitute teaching list also are on substitute lists in other school districts.

The only specific evidence as to problems which may arise in negotiations with per diem substitutes was the deputy superintendent's testimony that the District is not wealthy and that surplus monies usually go into regular teachers' salaries and benefits, the implication being that

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[3] The parties agreed that both "per diem" and "long-term" substitutes are included in the Federation's proposed unit. In this Proposed Decision, unless the context indicates otherwise, the terms "per diem substitute" or "substitute" are used interchangeably to include both per diem and long term substitutes.

negotiations with substitutes will impose a greater financial burden on the District. The deputy superintendent also testified that based on past experience with teachers' absences the District would be able to project the cost of a salary increase proposal made on behalf of per diem substitute teachers.

Per diem substitutes have utilized the District's grievance procedure. In the past the Federation has brought grievances on behalf of substitutes without contracts; three such grievances were brought in the 1976-77 school year.

ISSUES

1. Are per diem substitute employees entitled to exclusive representation under the EERA?

   a. Are per diem substitute teachers without contracts "employees" within the meaning of Government Code §3540.l(j)?

   b. Is a unit of per diem substitute teachers appropriate for negotiating under the EERA?

2. What is the appropriate composition of a unit of per diem substitute teachers?

3. Which per diem substitutes are eligible to vote in an election for an exclusive representative?

DISCUSSION AND CONCLUSIONS OF LAW

1. Per diem substitute teachers are entitled to exclusive representation under the EERA.

   a. Per diem substitute teachers are "employees" under the EERA.

The District first argues that the substitutes in issue are not "employees" under Government Code §3540.l(j) since they have no written

employment contracts. See Wood v. Los Angeles City School District (1935) 6 C.A.2d 400, 403, 44 P.2d 644; Main v. Claremont Unified School District (1958) 161 C.A.2d 189, 195, 326 P.2d 573; Gould v. Santa Ana High School District (1933) 131 CA. 345, 348-9, 21 P.2d 623.

The hearing officer cannot agree. Government Code §3540.1(j), defining "employee," does not require a written employment contract; by its terms it requires only that a person be "employed" by a public school employer. Education Code §44917 clearly states that "substitute employees [are] those persons employed in positions requiring certification qualifications... ." (emphasis added). See also, Education Code §§44830, 44831.

Government Code §3540.l(j) defines "public school employee" or "employee" as "any person employed by any public school employer," subject to four specific exclusions. It must be presumed that the Legislature intended to exclude only these four categories.[4] There is no reason for grafting onto Government Code §3540.l(j) a case law definition of "employee" under the Education Code. The purposes of the EERA are distinct from those of the employment provisions of the Education Code. Accordingly, the definitions of "employee" need not be the same. In fact, they are not. The EERA's definition excludes management and confidential employees who certainly can be school district employees under the Education Code. Similarly, even if a written contract were required for employee status under the Education Code, it does not follow that it is also required under the EERA.

The District's position also could lead to absurd results. For example, because essential terms of employment are governed by statute or school

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[4] "Mention of one thing implies exclusion of another." Black's Law Dictionary (Rev. 4th Ed. 1968), at 692.

district policy, tenured teachers do not need a written contract. See Gerritt v. Fullerton Union High School District (1938) 24 C.A.2d 482, 75 P.2d 627; 45 Ops. Cal. Atty. Gen. 131, 134 (1965). It would be absurd to exclude full-time, tenured teachers from a certificated negotiating unit for not having written contracts. Furthermore, a school district may give written contracts to all its employees, including per diem substitutes. Since it is within the District's power to grant or withhold written contracts to its substitutes, it would be unfair to include or exclude substitutes from a negotiating unit on this arbitrary basis.

The District next argues that substitutes do not hold "positions" and therefore may not be in a negotiating unit which, under Government Code §3544, consists of a grouping of "jobs or positions." (The District contends that "job" has the same meaning as "position.") But Education Code §44917 plainly states that substitutes are "employed in positions requiring certification qualifications... ." (emphasis added). On the other hand, Education Code §§44919 and 44920, governing employment of temporary teachers, do not mention the term "position." Nevertheless, the Board has determined that temporary teachers are properly includable in a unit of certificated employees. Belmont Elementary School District, EERB Decision No. 7, December 30, 1976; Grossmont Union High School District, EERB Decision No. 11, March 9, 1977.

Under the National Labor Relations Act (NLRA), "casual" employees may be excluded from negotiating units. Casual employees are those who lack a sufficient interest in conditions of employment to be included in the bargaining unit. Mission Pak Co. (1960) 127 NLRB 1097, 46 LRRM 1181. However, no NLRA case has been found in which casual employees were held not to be "employees" within the meaning of §2(3) of the NLRA.

In other states with broad definitions of "employee" similar to that in Government Code §3540.l(j), the majority in which applicable precedent has been found hold that per diem substitutes are "employees." Eugene Substitute Teacher Organization v. Eugene School District 4-J (Oregon 1976) 1 PECBR 716; Philadelphia School District (Pa. 1975) 5 PPER 113; Milwaukee Board of School Directors (Wise. 1969), Decision No. 8901; Reese Public School District (Mich. 1969) 1969 MERC Lab. Op. 253. Cf. Roncocas Valley Regional High School (N. J. 1976) 2 NJPER 68 (evening teachers are "employees"); Town of Lincoln (Mass. 1975) 1 MLC 1422 ("call firefighters" are "employees"). In New York per diem substitutes were held not to be "employees." Bernard T. King, Esq. (N.Y. 1973) 6 PERB 3083.

In Belmont, supra, at 6-7, Petaluma City Elementary and High School Districts, EERB Decision No. 9, February 22, 1977, at 3-4, and Oakland Unified School District, EERB Decision No. 15, March 28, 1977, at 8-9, "long-term" substitutes were excluded from certificated negotiating units based on their lack of a community of interest with "regular" certificated employees. Likewise, in Los Rios Community College District, EERB Decision No. 18, June 9, 1977, at 13, day-to-day substitutes similarly were excluded. The Board did not hold in any of these cases that the substitutes were excluded from the unit because they are not employees.

The EERA should be liberally interpreted so as to effectuate its purpose of affording public school employees the right to organize and be represented in their employment relations by an exclusive representative. Government Code §3540. Therefore, in view of the foregoing discussion and authorities, and absent contrary Board precedent, it is found that per diem substitutes on the District's substitute teaching list who have taught in the District are "employees" within the meaning of Government Code §3540.l(j).

b. A unit of per diem substitute teachers Is appropriate.

The District argues that it would be impossible or impractical to negotiate with a per diem substitute teacher unit on most matters within the scope of representation (Government Code §3543.2), and therefore such a unit is inappropriate.

However, even the District admits in its brief that substitute wages can be negotiated. They in fact were negotiated this past year by the "regular" certificated unit.[5] Because of the importance of wages in negotiations, this factor alone rebuts the District's argument. Nevertheless, there is no showing that other items within the scope of representation cannot also be negotiated. For example, there was no evidence presented to show that health and welfare benefits could not be negotiated for substitutes. It has been done in Pennsylvania (see GERR No. 668, 8/2/76 at B-16). The same is true of evaluation procedures. The informal evaluation of a substitute teacher's performance is an important factor in the decision to use the substitute again. Also, many new probationary teachers come from the substitute ranks and these informal evaluations could play a part in this hiring decision as well. Assuming, without deciding, that an evaluation procedure for per diem substitutes is negotiable, under the circumstances per diem substitutes may want to negotiate on the evaluation procedure.

The fact that some persons on the substitute list also are on substitute lists in other school districts is not an impediment to formation of a substitute teachers unit. Under the NLRA, employees have been included

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[5] This fact also militates in favor of finding a substitute unit appropriate for another reason. Under Ed. Code §44977, absent, ill or injured teachers receive their regular pay, less that paid to their substitute, for a specified five-month period. Because an increase in substitute pay reduces such "difference pay," regular teachers have an inherent conflict of interest when negotiating substitute pay.

in bargaining units even though they also may work for other employers. E.g., Henry Lee Co. (1972) 194 NLRB 1107, 79 LRRM 1159; All-Work Inc. (1971) 193 NLRB 918, 78 LRRM 1401. In Fresno Auto Auction, Inc. (1967) 167 NLRB 878, 66 LRRM 1177, employees working on an "as-needed" basis, many of whom held regular, full-time jobs elsewhere, nevertheless were included in the unit. In this case, there is no evidence that substitute employment in other school districts would detract from the substitutes' community of interest in the terms and conditions of their employment in this district. See Los Rios Community College District, EERB Decision No. 18, June 9, 1977, at 11.

It is apparent from the Findings of Fact that a unit of per diem substitute teachers would have a separate and distinct community of interest in terms and conditions of employment. Their salary, benefits, method of employment and selection for service are the same. Their duties when substitute teaching are similar. They have no guarantee of future employment,[6] earn no tenure and have no written contracts. These same factors distinguish them from the unit of regular, certificated employees.

Per diem substitute teachers are an integral part of the District's operations. Extrapolating from the evidence it appears that the District required over 2500 substitute days through April in the 1976-77 school year.[7] Without these substitutes, it is doubtful that the District could

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[6] The deputy superintendent testified that no per diem substitutes serve 75% of a school year so as to be assured future employment under Ed-, Code §44918.

[7] The $95,000 substitute budget was exhausted in April. At $37.50 per day, the approximate number of substitute days was determined. If substitutes were paid at the previous lower rate, the number of substitute days of course would be increased.

operate an effective instructional program. Per diem substitutes thus are an important and presumably permanent component of the District's instructional program.

For the above reasons, it is found that per diem substitute teachers constitute a separate but homogeneous group with a separate and distinct community of interest justifying formation of a negotiating unit.

2. All per diem substitute teachers who have worked during the previous school year or the current school year and who are on the most current substitute teaching list, are included in the unit.

Having found that per diem substitute teachers are employees under the EERA and that they possess a sufficient community of interest to justify formation of a negotiating unit, there still remains the question of the composition of an appropriate unit. In the cases previously cited from other states in which substitutes were found to be employees within the meaning of their respective statutes, there is no uniformity as to which employees were included in the unit.

In Pennsylvania (Philadelphia School District, supra), per diem substitutes who served less than the median number of days (22) served by all per diem substitutes in the last school year were excluded from the unit. In Wisconsin (Milwaukee Board of School Directors, supra), all per diem substitutes were included in the unit; however, only those who had taught at least 30 days in the year preceding the election were found to have sufficient interest in the outcome of the election to be eligible to vote. The result in Michigan (Reese Public School District, supra) was similar. In Oregon (Eugene Substitute Teacher Organization, et al., supra), all substitutes who taught at all during the past school year or thereafter and who were on the current substitute list were included in the unit and also were eligible to vote.

Under the NLRA, there is a line of cases originating in the construction industry with results generally the same as reached in Milwaukee Board of School Directors and Reese Public School District, supra, and which provides a useful analogy to the per diem substitute teacher situation. The NLRB stated in R. B. Butler Inc. (1966) 160 NLRB 1595, 1602, 63 LRRM 1173:

> "Because of the nature of the construction industry, many construction employees may be employed by several different employers during the course of the year. Also, many such employees experience intermittent employment and may work for short periods of time on different projects. However, ...these factors in no way detract from such employees' continuing interest in working conditions."

In Trammell Construction Co., Inc. (1960) 126 NLRB 1365, 45 LRRM 1489, the employer engaged in various construction projects in a particular geographic area. The employer had about five regular employees who acted as a "nucleus" for the formation of construction crews at new projects. Since the employer had a nucleus of regular employees and continually embarked upon new construction projects requiring construction crews, the NLRB placed all construction employees at the employer's various projects in the unit. Eligibility to vote in the representation election, however, was limited to those who during the past year had worked the average number of days worked by members of the unit. These persons were determined to have sufficient continuing interest in working conditions to entitle them to vote. To similar effect, see W. Horace Williams Co. (1961) 130 NLRB 223, 47 LRRM 1337; Daniel Construction Co., Inc. (1961) 133 NLRB 264, 48 LRRM 1636; Broomall Construction Co., Inc.(1962) 137 NLRB 344, 50 LRRM 1150; Queen City Railroad Construction Co., Inc.(1965) 150 NLRB 1679, 58 LRRM 1307.

The NLRB also has applied similar reasoning in other contexts with similar results. In Fresno Auto Auction, Inc., supra, the NLRB found appropriate a unit consisting entirely of employees who worked on an "as needed" basis. The position of "driver" is illustrative. An average of 12 to 15 drivers out of a fluctuating pool of approximately 120 were employed weekly, ranging from one to 35 hours a week. They were paid on an hourly basis and received no fringe benefits. Many held full-time jobs elsewhere. There was no commitment to work any particular number of hours or days. During one forty-week period, a majority worked three or more consecutive weekly pay periods; "many" of this majority worked ten or more consecutive weekly pay periods. As stated above, the NLRB included all drivers, regardless of hours worked, in the unit. Eligibility to vote in the election, however, was limited to those who had worked a certain minimum amount.

In Julliard School (1974) 208 NLRB 153, 85 LRRM 1129, a unit of mostly "per diem" stage hands, employed under conditions similar to those in Fresno Auto Auction, was found appropriate. See also Newton-Wellesley Hospital (1975) 219 NLRB 699, 90 LRRM 1090 (on-call nurses); Daniel Ornamental Iron Co., Inc. (1972) 195 NLRB 334, 79 LRRM 1343 (intermittently employed welders); Cavendish Record Manufacturing Co. (1959) 124 NLRB 1161, 44 LRRM 1622 (studio musicians).

The underlying rationale of the above NLRB cases seems to be that so long as there is a "nucleus" of employees who work fairly regularly and on a continuing basis, all employees in the job classification, regardless of hours worked by the remainder, will be included in the unit. Amount and continuity of employment are taken into account in determining the voting eligibility formula.

Essentially the same situation exists with per diem substitute teachers in the District. Out of a fluctuating pool of 75 persons employed as needed and without regular fringe benefits, 20-25 substitutes form a "core" by returning from year to year and regularly working more than 50 percent of a school year.

It has been said that drawing lines is a tricky business. The hearing officer agrees with the statement in Eugene Substitute Teacher Organization et al., supra, on this point:

> "Any division based on number of days among those actually hired is wholly arbitrary. ...The only real yardstick should be whether or not a substitute teacher was in fact hired at all during the previous school year or thereafter." (1 PECBR 718, at 726)

Furthermore, "community of interest" should not be an inflexible standard. Rather, as the term itself implies, it should be defined by the particular "community" to which it is applied. While the Board has determined that it is not appropriate to put substitutes in a unit with regular, full-time teachers, an entirely different situation is presented when considering, as here, a unit solely of per diem substitutes. In the latter case, even though the "core" of the unit works on a more regular basis than the rest, all unit members have virtually identical terms and conditions of employment, which, in the judgment of the hearing officer, outweigh the variances in length of employment.

Therefore, following the NLRB precedent discussed above, and as held by the public employment relations boards in Oregon, Wisconsin and Michigan, it is found that an appropriate negotiating unit for per diem substitute teachers in the District consists of all per diem substitute teachers on the most current substitute teaching list who have actually taught in the District during the previous or current school year (excluding summer sessions).

The two remaining criteria set forth in Government Code §3545(a), established practices and efficiency of operations, do not change the proposed unit determination based on community of interest. The evidence pertaining to representation of per diem substitutes in the past is inconclusive. If anything, the fact that the Federation represented substitute teachers in grievances lends some support to finding a substitute unit appropriate.

The evidence on efficiency of operations also is inconclusive. The deputy superintendent's testimony, that increased salary and benefits for per diem substitutes as a result of negotiations will impose a greater financial burden on the District, is unpersuasive. This is a normal and expected concomitant of collective negotiations. The deputy superintendent's testimony also is belied by the fact that substitute wages already have been negotiated and increased in the current agreement with the regular certificated unit.

It may well be that negotiating, obtaining or administering a fringe benefit program for per diem substitutes who work on an irregular and infrequent basis will present administrative difficulties for the District. Thus an efficiency of operations argument could be made to exclude from the unit per diem substitutes who work on a less regular basis. However, while such an argument certainly would be entitled to consideration in an appropriate case, there is no evidence in this record to support such an argument.

3. Per diem substitute teachers (1) on the substitute teaching list as of the established cut off date, (2) who have been on the list continuously for three consecutive semesters including the one in which the election is held, and (3) who actually worked in any two of the three semesters listed, are eligible to vote in the election.

As indicated in the previous discussion, in most of the cases cited above, even where all employees in particular job classifications were included in a unit, the NLRB nevertheless restricted voter eligibility to those unit members who worked a specified period of time and thus were judged to have a sufficient, continuing interest in working conditions and the election outcome to vote in the representation election.

The reason for this distinction between unit membership and voter eligibility in certain industries appears to be that once it has been determined that an appropriate unit exists, all employees with a community of interest performing work within the unit description (subject to certain exclusions not relevant here) are entitled to representation in their employment relations. Certainly, as a practical matter, all employees' terms and conditions of employment are likely to be affected by the unit's negotiations with the employer. On the other hand, only those employees who have worked a particular amount during a specified time period are deemed to have a sufficient interest in the outcome of the election (i.e., a reasonable expectancy of future employment) to participate in the election and thereby influence the result.

The NLRB tailors the voter eligibility formula to fit the peculiar characteristics of the unit and to reach the unit "nucleus." "Selection of an eligibility formula...depends upon a careful balancing of the

factors of length, regularity and currency of employment giving due regard to the industry involved." Daniel Ornamental Iron Co., 334, supra. For example, in Daniel Construction Co., Inc., supra, responsive to the intermittent employment conditions and layoffs characteristic of the construction industry, eligible voters included, in addition to those employed in the payroll period preceding the election, employees who worked 30 days within the last 12 months, or 45 days within 24 months including some within the past 12 months. In Julliard School, supra, all stagehands employed for five days in a two-year period were eligible to vote.

Even though neither party has addressed the issue, in light of the fluctuating, irregular employment pattern of per diem substitutes other than the "core," in the present case it likewise is found necessary to devise a voting eligibility formula to include those employees who have a sufficient, continuing interest in their conditions of employment and a reasonable expectancy of future employment. Accordingly, per diem substitutes who meet all the following criteria are found to be eligible to vote in an election for an exclusive representative:

(1) Are on the District's substitute teaching list as of the established cut off date.

(2) Have continuously been on the substitute teaching list for three consecutive semesters (excluding summer sessions) including the one in which the election is held; and

(3) Have actually worked in any two of the three consecutive semesters listed.

Proposed Decision

It is the Proposed Decision that the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

A unit of all substitute teachers on the most current substitute teaching list who have worked in the District during the previous or current school year.

It is further proposed that members of the unit are eligible to vote in an election for exclusive representative if:

(a) They are on the list as of the established election cut-off date, and

(b) Have continuously been on the substitute teaching list for three consecutive semesters (excluding summer sessions) including the one in which the election is held, and

(c) Have actually worked in any two of the three consecutive semesters listed.

The parties have seven (7) calendar days from the receipt of this Proposed Decision in which to file exceptions in accordance with Section 33380 of the Board's Rules and Regulations. If no party files timely exceptions, this Proposed Decision will become final on September 19, 1977, and a Notice of Decision will issue from the Board.

Within ten (10) workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if the employer does not grant voluntary recognition.

Dated: September 7, 1977.

Gerald A. Becker
Hearing Officer.