

it had organized the employees it seeks to include in the unit; (4) the Association offered no evidence that under the Winton Acton the Association made an attempt to represent substitute, part-time or temporary teachers; (5) evidence of an attempt by the Certificated Employees Council (CEC) to represent summer school teachers is unclear on the time the CEC made a proposal to the school district, and the proposal was later abandoned by the CEC.

On all classifications in issue, with the exception of summer school teachers, the Association relies solely upon a community-of-interest argument to support its position in favor of including the disputed classes in the unit. In addition to a community-of-interest argument in support of its position to include summer school teachers, the Association contends that "on more than one occasion" it made efforts to meet and confer with the district on summer school teachers. Both parties agree to the exclusive of day-to-day substitutes.

In determining the appropriateness of a negotiating unit, we are required to consider the following standard contained in Government Code Section 3545;

- (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.
- (b) In all cases: (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees; (2) A negotiating unit of supervisory employees shall not be represented by the same employee organization as employees whom the supervisory employees supervise; (3) Classified employees and certificated employees shall not be included in the same negotiating unit.

No party argues that Government Code Section 3545(b)(1) requires the inclusion of all classroom teachers in a single unit without consideration of community-of-interest and other criteria contained in Section 3545(a) of the Act. Therefore, not having been briefed or argued, that question is not appropriately before us for decision in this case.¹

¹The Association has done more than waive argument in favor of literally interpreting Government Code Section 3545(b)(1), as

The record contains no evidence on the extent-of-organization criterion required by Government Code Section 3545(a). And since neither party seeks more than a single unit, no one in this case has argued that the efficiency of operation in the school district would be impaired if the unit sought by the other party prevailed as the appropriate unit. In Sweetwater Union High School District,² we decided that "little weight" would be given to established practices predating this Act. For all of these reasons, the decision in this case will be based on the community-of-interest standard provided in Government Code Section 3545(a).

The Belmont Elementary School District has an average daily attendance of approximately 3200 students in kindergarten through the eighth grade. There are seven school sites, six elementary schools and one intermediate school. In the 1975-76 school year the district employed 130 to 140 regular full-time teachers. In addition, there were 150 to 170 names on the substitute list, one temporary teacher, 30 to 50 summer school teachers; and two part-time certificated employees.

Part-time Teachers Teaching Less
Than 51 Percent of Full-time Assignment

Part-time teachers are employed on a yearly basis to teach less than a full-time assignment. During the 1975-76 school year, the district had one part-time learning-disability teacher and one part-time nurse. During the last few years, the maximum number of part-time teachers hired by the district was three.

In support of its position that part-time teachers less than 51 percent of a full-time assignment should be excluded from the unit as casual employees, the district cites the NLRB's decision in the New York University³ case. There, the NLRB held that part-time faculty members of the university could not be included

it relates to "all... classroom teachers." The Association brief urges a nonliteral interpretation of that language, consistent with the desire of all parties in this case to exclude day-to-day substitutes from the negotiating unit.

In consent agreements, we have approved mutually requested negotiating units which do not include in the same unit all of the classroom teachers in a district. If parties may properly so agree with our approval, in the course of avoiding a hearing on any disputed issue, they may also properly so agree when other disputed issues require a hearing.

²EERB Decision No. 4 (November 23, 1976).

³205 NLRB 4, 83 LRRM 1549 (1973).

in a bargaining unit with full-time faculty members. The NLRB found differences in the employment conditions of the two groups. Full-time and part-time teachers differed in respect to compensation, fringe benefits, eligibility for tenure, teaching load and the level of responsibility beyond teaching and grading. The NLRB reasoned that the grouping of full-time and part-time teachers in the same unit would impede collective bargaining.

In New York University, the NLRB was not confronted with and did not rule on the issue of whether part-time teachers were casual employees. However, in this case the issue has been raised and the answer is clear. Employees who work less than full time but who, like the part-time teachers in this case, work regularly, are not casual employees.⁴

Apart from the casual employee issue and in respect to the community of interest criteria, we find significant distinctions between this case and the NLRB's decision in New York University. Here, unlike New York University, all part-time teachers receive the same salary and benefits, on a pro rata basis, as do the regular teachers; and because their employment is on a regular basis, part-time teachers enjoy the same reemployment rights as do the regular teachers; part-time teachers are required to perform duties substantially similar to those of regular teachers. Additionally, we note that New York University is a case involving higher education, where conditions of employment often differ greatly from those of an elementary school district.

For the above reasons, there is a community of interest between regular and part-time teachers; part-time teachers are therefore included in the unit with regular teachers.

Temporary Teachers

Temporary teachers are hired under contract to work regularly for a specified period of time designated in their contract, usually not less than a semester. During the 1975-76 school year, the district employed one temporary sixth-grade teacher for one semester. During the last few years, the number of temporary teachers hired has varied from none to three. According to the Superintendent of the school district, temporary teachers are not hired to replaced a specific regular teacher. Rather, temporary teachers are viewed as part of the regular faculty pool. Temporary teachers and regular teachers are paid on the basis of the same salary schedule. They receive the same fringe benefits as regular teachers. Education Code Section 13336.5 provides that they are eligible for reemployment rights after serving as a temporary teacher for a specified time and also provides that their service as a temporary teacher may be counted toward completion of the probationary period leading to tenured status.

⁴See Miller Bros., Inc. 210 NLRB 127, 86 LRRM 1026 (1974); The Developing Labor Law, p. 210 (C. Morris ed. 1971).

Like regular teachers, district policy is that temporary teachers are required to attend faculty meetings and prepared assignments and lesson plans. These similarities with the working conditions of regular teachers give temporary teachers a community of interest with regular teachers. Therefore, they shall be included in the unit with regular teachers.

Substitute Teachers

Education Code Section 13336 defines a substitute teacher as one employed in the place of a regularly employed teacher who is absent. That section speaks only in terms of substitute teachers. It makes no distinction between "long-term substitutes" and "day-to-day substitutes." The only distinction the district makes between the two categories is that after the twentieth consecutive day, the long-term substitute is retroactively paid an increase from \$30 per day to \$34 per day. Like the day-to-day substitutes whose exclusion from the unit is agreed to by both parties and unlike regular teachers, long-term substitute teachers have no expectancy of future employment. Under Education Code Section 13336.5, they do not accrue tenure while serving as long-term substitutes. In contrast, Education Code Section 13304 et seq. provides that teachers are eligible for tenure and accrue time towards eligibility for tenure while serving as regular teachers. Unlike regular teachers, long-term substitutes receive no sick leave or other fringe benefits; they have no contract of employment, and there is no district policy that they attend faculty meetings.

On the basis of these differences between the employment conditions of regular teachers and those of long-term substitutes, the community of interest required to include long-term substitutes in the unit with regular teachers is lacking; they are therefore excluded from the unit of regular teachers.

Summer School Teachers

Summer school teachers are hired by the district to teach a five-week summer school program. The district hires approximately 30 to 35 summer school teachers each year. Approximately 80 percent of the summer school teachers are employed from the regular pool of district teachers. Approximately 80 percent of the classes taught in summer school are specifically designed for summer school and have no counterpart in the regular curriculum.

Summer school teachers are hired on a one-summer basis. Thus, a summer school teacher enjoys no expectation of future employment as a summer school teacher. Education Code Section 13332 provides that summer employment does not count toward eligibility or attainment of permanent status with a school district. In addition, summer school teachers are paid on a separate pay schedule which bears no relationships to the regular compensation schedule in effect during the regular school year.

They are paid according to the same payroll account used for substitute teachers and others whom the district believes will have a short term relationship with the school district. Summer school teachers are not entitled to any district fringe benefits for their service as summer school teachers.

For the above reasons, we find lacking a community of interest between summer school and regular teachers; therefore summer school teachers shall be excluded from the unit of regular teachers.

ORDER

The Educational Employment Relations Board directs that:

1. The following unit is appropriate for the purpose of meeting and negotiating providing an employee organization becomes the exclusive representative:

All certificated employees, including temporary teachers and part-time teachers, but excluding summer school teachers, substitute teachers, management, supervisory and confidential employees.

2. The employee organization has the 10 workday posting period of the Notice of Decision to demonstrate to the Regional Director at least 30 percent support in the above unit. At the end of the posting period, if the employee organization qualifies for the ballot and the employer has not granted voluntary recognition, the Regional Director shall conduct an election.

Reginald Alleyne, Chairman

Dated: December 30, 1976

Raymond J. Gonzales, Member, in concurrence.

I agree with the discussion and conclusions of the preceding opinion on all issues presented in this case, with two exceptions. I would address the question, avoided in the opinion, of whether substitutes, part-time, temporary and summer school teachers are "classroom teachers" within the meaning of Government Code Section 3545(b)(1). Secondly, I will comment upon the weight in Board accords evidence on established practices predating the Act. The issue regarding "classroom teachers" is first addressed.

Because the parties do not argue that Government Code Section 3545(b)(1) requires the inclusion of all "classroom teachers" in a single unit, it is concluded in the preceding opinion that the question is not properly presented to the Board for decision. I disagree.

Section 3545(b) (1) states:

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

This statute requires the Board to decide who is a "classroom teacher" in all cases where the issue is logically presented. The statute sets forth a mandate that binds the parties and the Board and does not allow a waiver of the question of whether an employee is a "classroom teacher" on the mere basis that the parties fail to argue the issue.

Civil Code Section 3513 provides:

Anyone may waive the advantage of the law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

The cases relating to this section indicate that the term "private agreement" includes an attempted waiver of a law established for a public reason. The established rule is that when a statute fixes a definite rule of action upon a public official for the benefit of the general public, neither an individual nor the public official may escape the rule by means of a waiver because the right is public rather than private.⁵ A law is established "for a public reason" if it has been enacted for the protection of the public generally in that its tendency is to promote the welfare of the general public rather than a small percentage of citizens.⁶

It is my opinion that Section 3545(b)(1) is a section that has been established "for a public reason" because the general public has an interest in the proper determination of negotiating units according to the standards specified by the legislature. The legislature did not simply establish a private right, but a standard to be applied "in all cases." The parties and the Board cannot waive consideration of whether the employees in this case are "classroom teachers" just as they cannot preclude consideration of the unit determination criteria enumerated in Section 3545(a).

⁵ Kline v. San Francisco Unified School District (1940) 40 Cal. App. 2d 174; Western Surgical Supply Co. v. Affleck (1952) 110 Cal. App. 2d 388. See also the cases cited in notes 10 and 29 following Civil Code section 3513, Deering's California Codes.

⁶ Benane v. International Harvester Co. (1956) 142 Cal. App. 2d Supp 874.

I believe that the legislature limited the language "classroom teachers" only to the regular full-time probationary and permanent teachers employed by a district rather than to the variety of types of employees who might literally be described as classroom teachers. This conclusion is based upon my understanding that the legislature intended that Section 3545(b)(1) should prevent the fragmentation of negotiating units by precluding teachers from forming a unit smaller than a district-wide unit, either on a school-by-school or departmental basis (e.g., English department unit, physical education unit). The language of Section 3545(b)(1) speaks to the establishment of a district-wide unit by requiring that a negotiating unit including classroom teachers must as least include "all of the classroom teachers employed by the public school employer."

In focusing on the establishment of a district-wide unit and the purpose of limiting the fragmentation of units, the legislature limited the language "classroom teachers" to only the regular full-time probationary and permanent teachers since they are the core of the certificated staff of the district. The issue of the exclusion or inclusion in the unit of the variety of other certificated employees who are part of the educational program did not present itself in this context. Thus, while substitutes, part-time, temporary and summer school teachers are classroom teachers in a literal sense, they are not "classroom teachers" within the meaning of Section 3545(b)(1) because they are not regular full-time probationary or permanent teachers.

The definition of "classroom teachers" is important because Section 3545(b)(1) precludes our application of the unit determination criteria set forth in Section 3545(a) to any unit which includes "classroom teachers" must include "all of the classroom teachers." It is true that Section 3545(a) requires the Board to consider the community of interest between and among the employees, their established practices and the efficient operation of the school district "in each case where the appropriateness of the unit is an issue." But the appropriateness of the unit, beyond the question of whether all classroom teachers are included in the unit, is not an issue in the case of a unit that includes "classroom teachers" because Section 3545(b)(1) specifically provides that such a unit "shall not be appropriate unless it at least includes all of the classroom teachers..." The unit is appropriate if the unit includes all classroom teachers. And it is not appropriate if it does not.

Under the narrow definition of "classroom teachers," Section 3545(b)(1) is a sensible provision because there will be no issue regarding the appropriateness of the unit that includes all classroom teachers in that all of the regular full-time probationary and permanent teachers in a district certainly share a community of interest and a single unit of such employees will not burden the efficient operation of the employer. Thus the inability of the Board to consider the Section 3545(a) criteria

is not harmful to an appropriate unit determination. Where the issue in a case involves the appropriateness of a unit including certificated employees other than regular full-time probationary and permanent employees, the Board will consider the criteria set forth in Section 3545(a).

The narrow definition of "classroom teacher" is further supported by the logic that an absurd result would follow a literal interpretation of the language. A literal interpretation would require the inclusion in the unit of even the most casual employee who spends any amount of time teaching in a classroom regardless of the absence of a community of interest of the employee with other members of the unit. It is probable that employees with greatly disparate or opposing interests would be forced into the same unit. This result could not have been contemplated by the legislature because it would undermine the smooth operation of the collective negotiations process. The community of interest and other unit determination criteria have developed over time precisely because they are useful in determining reasonable, efficient and effective negotiating units which serve to enhance the collective negotiations relationship between the employer and employee organization. A mandated inappropriate unit which ignores these criteria certainly was not the goal of the legislature. Therefore, the legislature must have used the language "classroom teachers" in only the narrow sense of regular full-time probationary and permanent teachers.

Thus, with regard to the substitute, part-time, temporary and summer school teachers, the Board is free to look to the community of interest, established practices and efficiency of operation criteria in determining whether or not they are appropriately included in the same unit as the regular full-time teachers. These criteria have been addressed in the preceding opinion.

I agree with the discussion of the Section 3545(a) criteria in the opinion except the statement: "In Sweetwater Union High School, we decided that little weight would be given to established practices predating this Act." Such a board holding was not made in that case. Instead, it was stated only that "...in this case we give little weight to 'established practices..'" (emphasis added). It is my intention to be open to consider in each case the facts relating to the established practices of the employees whether or not such practices predate the Act.

In this case the evidence on established practices showed that under the Winton Act the Association did not make any proposals regarding substitute teachers, did meet and confer regarding part-time employees, and did make a proposal in the 1974/75 school year regarding summer school employees which was discussed and rejected by the district. These facts, however, do not cause me to alter my conclusions which are based upon the entire record.

Except for the statement on "established practices" and the failure to address the "classroom teachers" issue, I agree with the discussion and conclusion of the preceding opinion.

Raymond J. Gonzales, Member

Jerilou H. Cossack, Member, concurring in part, dissenting in part.

I concur in part and dissent in part with the results reached by the majority. As I will more fully explicate, I would include both the classifications of summer school teachers and long-term substitutes in the unit. I share completely the viewpoint expressed by Dr. Gonzales in his concurring opinion, except as it relates to summer school and long-term substitute teachers, and join him in the rationale as the majority opinion of the Board.

The majority exclusion of the classifications of summer school and long-term substitute teachers from the negotiating unit demonstrates a total disregard of the fundamental role unit determination plays in the implementation of the declared purposes of SB 160.

Certain provisions of the Act establish the obligation of the employer and the exclusive representative to negotiate collectively. This obligation extends only to the matters within the scope of representation of the employees in the unit appropriate for such purposes.

Section 3540 of the Act declares it to be the purposes of this Act "...to promote the improvement of personnel management and employer-employee relations...by providing a uniform basis for recognizing the right to public school employees...to select one employee organization as the exclusive representative of the employee in an appropriate unit,..." To effectuate this policy Sections 3543.5(c) and 3543.6(c) of the Act impose a mutual obligation on an employer and an employee organization respectively to meet and negotiate in good faith. Section 3540.1(h) of the Act in turn defines meeting and negotiating as "...meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation..." Section 3540.1(e) defines exclusive representative as "...the employee organization recognized or certified as the exclusive negotiating representative of... employees in an appropriate unit..." Finally, Section 3543.2 of the Act defines those matters within the scope of representation.

A unit is comprised of groupings of certain job classifications. In the normal course of events there are several persons in each job classification. Some individuals who occupy these job classifications, for one reason or another, may have only a tenuous employment relationship with the district while others may have a substantial employment relationship. While a classification may be included in the negotiating unit, based on application of community of interest, established practices of employees and the efficient operation of the school district, certain individuals who sporadically occupy that classification may be ineligible to vote in an election because their employment relationship is so incidental that they have no legitimate concern about those matters defined in Section 3543.2 of the Act as within the scope of representation. The majority in the instant case fails to distinguish between the exclusion of an entire classification, a unit determination, as contrasted with the exclusion of certain persons within a classification, an eligibility determination.

Since the unit determination is the cornerstone of the obligation to negotiate and further determines the parameters of this obligation, the majority's exclusion of the classifications of summer school and long-term substitute teachers from the negotiating unit in this case forecloses any obligation of the parties, in the event the Association is selected as the exclusive representative, to negotiate about the application of those matters within the scope of representation to any summer school or long-term substitute teachers. I find this result repugnant to the declared purpose of the Act, particularly since I find no basis for concluding that all summer and long-term substitute teachers are not employees within the meaning of the Act. As employees they have the right to organize and the consequent right to negotiate with their employer over those matters within the scope of representation.

Summer School Teachers

I believe that the classification of summer school teacher shares a substantial community of interest with those certificated persons included in the unit, particularly since 80 percent of the district's summer school teachers are regular district teachers. They have the same qualification, training and skills to teach a summer school course as do those who teach during the regular school year. They are employed for a set period of time on a contract basis, as are others included in the unit. The record reflects two discrete types of persons employed by the district in the classification of summer school teachers: the district's regular teachers and persons whose sole employment relationship with the district is as summer school teachers. Thus, although there is no formal policy regarding first preference for summer school employment, the fact that 80 percent of the district's summer school teachers are regular teachers indicates that the district obviously first looks to its regular teachers who are experienced in the district and who have

proven their capacity to perform the job of teaching children. While the record is largely silent regarding the re-employment patterns of the remaining 20 percent of summer school teachers, as least one of the approximately seven persons who are not regular district teachers testified that she had taught summer school two consecutive years.

Clearly the summer school program is an adjunct of the regular school curriculum. In fact, some of the courses taught are exactly the same as those offered in the normal school year.

The central fact is that all the faculty, both during the regular school year and during summer school, are teachers. As such, they are professionals who share the common goal of educating children. Summer school teachers are expected, as are regular teachers during the normal school year, to be at school during the full day. Moreover, while the salary schedule for summer school teachers is different than that of regular teachers, it does contain three ranges based on years of teaching experience. It has historically been determined by "...discussion between teachers and administrators..." even though the extent to which summer school salaries were the subject of the meet and confer process of the Winton Act is unclear.

For the reasons set forth above, I would include the classification of summer school teacher in the negotiating unit.

Since regular teachers are eligible to vote as regular teachers, the remaining question raised is the voting eligibility of those persons whose sole relationship with the district is as summer school teachers. As I have elsewhere indicated, the record is largely silent regarding the re-employment patterns of these persons. The record is also silent regarding the time that summer school appointments are made by the district. In these circumstances, it is impossible to determine whether some or all of those persons whose sole relationship with the school district is as summer school teachers possess either a sufficient expectation of re-employment or a substantial continuing interest in those matters within the scope of representation to entitle them to be eligible to vote in the election. Accordingly, I make no finding with respect to these persons but rather would permit them to vote subject to challenge, absent agreement of the parties on their eligibility.

Long-term Substitutes

Turning to the issue of long-term substitutes, the only substitute classification in dispute in this case, I believe the majority has failed to distinguish between those persons whose employment relationship with the district is so tenuous that they have no legitimate concern about matters within the scope of representation and those persons whose employment relationship with the district is substantial. I believe that some of the long-term substitutes share a sufficient community of interest with other certificated persons to warrant their inclusion in the

negotiating unit. The majority relies on the assertion that as a class of people, long-term substitutes are excluded from certain fringe benefits, salary benefits and tenure rights. However, there are several sections of the Education Code which bestow certain of these benefits upon other than full-time certification persons:

Section 13963 entitles substitutes who work 100 days or more during a school year to retirement benefits. Section 13964.1 permits substitutes working less than 100 days in a school year to elect membership in the retirement system at any time while employed in a substitute or part-time capacity.

Section 13336.5 grants certain re-employment rights to substitute or temporary persons who service during one school year for at least 75 percent of the school year and counts such service as a complete school year as a probationary employee.

Sections 13520 and 13520.1 provide that persons filling certificated positions for a semester or more shall be paid on a pro-rata basis the same as those certificated persons who work a full year.

Section 13468 entitles other than full-time persons to pro-rata sick leave benefits.

While the school district may fail to extend certain fringe benefits to long-term substitutes, nothing in the Education Code precludes the district from doing so. The lack of fringe benefits does not demonstrate a separate community of interest since they may properly be the subject of collective negotiations. Thus the mutuality of interest between some long-term classroom substitutes and regular full-time teachers rests fundamentally on their virtually identical job functions. Long-term substitutes teach the same subjects in the same manner as regular full-time teachers. They perform similar supervision of students and must turn in lesson plans just as regular teachers. They work the same hours and are supervised by the same persons as other teachers. They have access to the same facilities as other teachers and have similar contacts with other school employees. At any given point in time a long-term substitute may have to work with students in conjunction with other members of the school staff such as counselors, deans, psychologists, principals, or other teachers. The work these long-term substitutes perform is therefore an integral element in the on-going education process. While there may be differences in salary, benefits and permanency of the long-term substitutes, I believe these differences are minimal in contrast to the common integrated nature of their employment relationship.

I believe that those substitutes who have a substantial and continuing employment relationship are entitled to representation

within the unit of other certificated employees. I also favor including day-to-day substitutes who have similar substantial relationships. Although, in this case, the parties have stipulated day-to-day substitutes should be excluded from the unit, I would in future cases favor application of a formula whereby any substitute working a substantial portion of the school year would be included within the unit enabling them to bargain with the employer as a member of a larger certificated unit.

Jerilou H. Cossack, Member

