STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO ALTO UNIFIED SCHOOL DISTRICT, Employer, and PALO ALTO EDUCATORS ASSOCIATION, CTA/NEA, Employee Organization.	)	Case No. SF-UM-199 (SF-R-155A,B,C) PERB Decision No. 352 October 24, 1983

Appearances; Bruce A. Barsook, Attorney (Liebert, Cassidy & Frierson) for the Palo Alto Unified School District; Diane Ross, Attorney for the Palo Alto Educators Association, CTA/NEA.

Before Gluck, Chairperson; Tovar and Morgenstern, Members.

DECISION

TOVAR, Member: The Palo Alto Educators Association, CTA/NEA (Association) filed a unit modification petition on July 21, 1981, with the Public Employment Relations Board (PERB or Board) to consolidate three certificated units, of which it is the exclusive representative, into one comprehensive negotiating unit. Specifically, the petition sought to consolidate existing units of hourly adult education teachers, substitute teachers, and regular contract teachers.[1]

[1]There are five separate bargaining units in the District including the three units at issue here and two units of classified employees. There are approximately 575 employees in the regular contract teacher unit, 135 employees in the substitute teacher unit and 88 employees in the hourly adult teacher unit.

After a hearing on the matter, the administrative law judge (ALJ) granted the comprehensive unit modification petition. The Palo Alto Unified School District (District) excepts to such a conclusion.

The Board has reviewed the entire record in this case and, in accordance with the relevant facts set forth below, we affirm the ALJ's conclusions of law to the extent they are consistent with the following discussion.

DISCUSSION

Government Code section 3545 of the Educational Employment Relations Act (EERA) sets forth the standards for determining the appropriateness of a unit.[2] The Board has interpreted

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[2]EERA is codified at sections 3540 et. seq. All references are to the Government Code unless otherwise specified.

Section 3545 states:

> (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.
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> (b) In all cases:
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> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed

these provisions to create a rebuttable presumption that all classroom teachers will be contained in a single unit. Peralta Community College District (11/17/78) PERB Decision No. 77.

The Peralta presumption favoring a comprehensive teacher unit applies to the question of proper unit placement of substitute teachers and hourly adult education teachers, and a single unit will be directed unless the presumption is rebutted by a showing that there is lack of community of interest or that such application would cause disruption or instability within an already established unit. See Oakland Unified School District (6/20/83) PERB Decision No. 320; Dixie Elementary School District (8/11/81) PERB Decision No. 171. In Dixie, supra, the Dixie Elementary Teachers Association petitioned to add day-to-day substitute teachers to the existing comprehensive teacher unit. In analyzing the request for unit modification, PERB applied the Peralta presumption favoring

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> by the public school employer, except management employees, supervisory employees, and confidential employees.
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> (2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.
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> (3) Classified employees and certificated employees shall not be included in the same negotiating unit.

inclusion of all classroom teachers in a single unit. PERB ordered that substitutes be added to the existing unit, finding that the District had failed to rebut the presumed appropriateness of the requested unit.

The District contends that the Peralta presumption does not apply to the circumstances of this case because the Board has previously declined to apply the Peralta presumption in a unit determination case- involving substitute employees of the Palo Alto Unified School District. In Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No. 84, the Board addressed the request of the District's substitute employees to form a separate bargaining unit. In a two to one decision the Board chose not to apply the Peralta presumption and found the proposed unit of substitutes appropriate. The presumption was not applied because, on the facts of that case, such application would have had the potential of disrupting the established bargaining unit of regular full-time teachers. Consequently, the District argues that it was error for the ALJ to apply the Peralta presumption since there was no evidence of changed circumstances in the instant case and the Board was thus bound by its previous decision. We disagree. The legal question in the instant case, whether a consolidated unit is appropriate, is different from the earlier case where the appropriateness of a separate unit was analyzed. Specifically, the difference

between Palo Alto, supra, and the instant case is that in the earlier Palo Alto case a collective bargaining agreement was in place covering the regular teacher unit which was not due to expire for a year and a half. At the time of the hearing in the instant case, all relevant contracts were simultaneously scheduled to expire in approximately six months. The District has not presented any evidence to demonstrate that new long-term contracts are in place which would be disrupted by the requested consolidation. Even assuming that there are contracts in effect covering the other employees, the District has presented no evidence that additional negotiations on behalf of the substitutes or the hourly adult education teachers would impact on those agreements. Furthermore, the District would be entitled to reject any proposals which would require it to reopen or modify those existing contracts.

Community of Interest

The District has not submitted sufficient evidence to rebut the presumption that a community of interest exists between full-time contract teachers, hourly adult education teachers and substitute teachers.

Hourly Adult Teachers

Hourly adult education teachers are credentialed personnel who, like regular contract teachers, deal directly with and educate students. A substantial number of courses taught in

the adult school program deal with subject matter that is also taught in the regular K-12 program, including courses that may be taken for credit toward a high school diploma. The goals and objectives in teaching adult education classes are similar to those in the regular K-12 program. The instructional practice and the techniques, tools and materials used to achieve those goals are also similar. Finally, the work performed by hourly adult education teachers is identical to the work performed by contract adult education teachers (those working 15 or more hours per week) and contract adult education teachers are members of the regular contract teacher unit.

Hourly adult education teachers must grade their students when those students are taking their classes for credit toward a high school diploma. As to all other students, although formal grades are not required, the evidence shows that hourly adult education teachers give tests and evaluate their students' progress in much the same way that regular contract teachers evaluate the progress of their students.

Hourly adult education teachers attend faculty meetings as do regular contract teachers in the District. Although it is not required, hourly adult education teachers participate in in-service training, often with teachers from the regular K-12 program.

Like regular contract teachers, some, but not all, hourly adult education teachers participate in curriculum development.

There are 93 adult education teachers in the District, 88 of whom are hourly employees. The other five teachers are full-time contract adult education teachers who are members of the regular teacher bargaining unit.

The regular classroom teacher is guaranteed employment despite cancellation of his or her assigned classes. Hourly adult education teachers are not guaranteed alternative teaching assignments if their classes are cancelled for insufficient enrollment. However, only a small percentage (11 out of 121 scheduled classes, or 9 percent) of the adult education classes were cancelled in the fall of 1981.

Adult education classes are held at 13 different sites. Although only six of the 13 sites are also used in the K-12 program, 89 percent of the adult classes listed in the Fall, 1981, schedule were to be held at one of those K-12 sites-

There is overlap of course content between courses taught in the adult education program and courses taught in the regular K-12 program. Of the 85 courses listed in the fall, 1981, adult education catalogue, at least 35 are taught in the regular school program, either as discrete classes or as part of more general classes in the general subject area.

Hours worked by hourly adult education teachers vary. Such teachers may work as little as three hours a week or as much as 15 hours a week. If an adult education teacher works 15 or more hours per week, he or she is classified as a contract

employee and may earn tenure in the adult education program. Such teachers are part of the regular contract teacher unit.

Contract teachers may work longer hours and have many fringe benefits that hourly adult education teachers do not (for example, bereavement leave, prepaid health or dental insurance). However, the Board has not found this factor persuasive "since for all practical purposes the hours, wages and other terms and conditions of . . . employment are wholly within the District's control." Oakland Unified School District No. 320, supra. Redwood City Elementary School District (10/23/79) PERB Decision No. 107. See also El Monte Union High School District (6/30/82) PERB Decision No. 220. Moreover, there are some similarities between the salaries and benefits of hourly adult education teachers and regular contract teachers. Both receive salary recognition for length of service with the District. At least until a separate bargaining unit of hourly adult education teachers was established, the District's general practice was to give hourly adult education teachers the same percentage salary increase as regular contract teachers. Although the District does not provide prepaid health or dental insurance to hourly adult education teachers as it does for contract teachers, the hourly adult education teachers accrue sick leave at the same proportional rate as regular contract teachers and, like regular contract teachers, may use a portion of their sick

leave for serious illness or death of a family member. Like regular contract teachers, hourly adult education teachers have sought, through negotiations, to achieve other fringe benefits afforded regular contract teachers, such as bereavement leave.

Hourly adult education teachers do not acquire tenure in the District but they have sought, through negotiations, to achieve some form of tenure rights similar to those enjoyed by regular K-12 and adult education contract teachers.

Substitute Teachers. The issue of whether substitute teachers can be appropriately placed in the same unit as regular contract teachers was squarely decided by PERB in Oakland Unified School District, No. 320, supra, and Dixie Elementary School District, supra.

In short, the substitute teachers virtually "step into the shoes" of the teachers they replace. As we stated in Oakland Unified School District, No. 320, supra;

> [S]ubstitutes are an integral part of the instructional function of the District, performing the same work and under the same general conditions as do the teachers they replace. They teach the same courses, deal with the same students and perform as circumstances require, virtually all of the replaced teachers' duties. . . . The very word 'substitute', defined as 'one who takes the place of another', testifies to such community.

The District points to three areas where the interests of regular contract teachers and substitute teachers are said to conflict. First, the District points to the fact that the

District honors requests by regular teachers for specific substitute teachers. This practice is said to conflict with the desire of the substitute teachers' section to have seniority be the sole method of selecting substitutes. There is no evidence in the record to support the District's assertion of a "conflict" on this issue.

Second, the District points to the fact that under the existing collective bargaining agreement, and in conformity with minimum statutory requirements (Education Code section 449773), regular teachers who are ill and have exhausted their regular sick leave receive the difference between their regular salary and the salary paid to the substitute employed

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3Education Code section 44977 states:

> Salary deductions during absence from duties. When a person employed in a position requiring certification qualifications is absent from his duties on account of illness or accident for a period of five school months or less, whether or not the absence arises out of or in the course of the employment of the employee, the amount deducted from the salary due him for any month in which the absence occurs shall not exceed the sum which is actually paid a substitute employee employed to fill his position during his absence or, if no substitute employee was employed, the amount which would have been paid to the substitute had he been employed. The school district shall make every reasonable effort to secure the services of a substitute employee.
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> . . . . . .

to replace them. Under this system, the larger the substitute's pay, the smaller the regular teacher's "differential pay." However, Education Code section 44977 does not require that the dollar amount of long-term sick pay be tied to a substitute's salary, it merely set this differential pay as a minimum. The Association and the District are free to negotiate any formula they wish as long as it does not provide less than this minimum. Thus, to the extent this presents a conflict, it could easily be resolved through collective bargaining.[4]

Third, the District points to the fact that regular contract teachers are required to perform adjunct duties that substitute teachers are not required to perform. This fact does not constitute a "conflict" as represented by the District. Although single differences in employee concerns might entail internal disharmony sufficient to overcome other indicia of community interest, community of interest is assessed by the totality of the circumstances — where not all employee duties or concerns need be identical. In our view, this difference is insufficient to rebut the community of interest already established above.

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[4]The Association points out that the substitute teachers section has used, in the past, virtually the same bargaining team as the regular contract teacher unit and there was no indication at the hearing that any of the issues posed by the District have created conflicts.

The District also points to differences in the existing collective bargaining agreements of the substitute unit and the regular teachers unit as evidence of a lack of community of interest.[5] However, the fact that there may be different provisions does not establish that the two groups do not share a community of interest in the areas discussed. In addition, many provisions unique to the regular teacher contract have a direct impact on substitute teachers, such as class size, hours, preparation periods, etc. Moreover, the fact that different provisions may be necessary in some areas, such as transfer for regular teachers and daily assignment and employment procedures for substitute teachers, is insufficient to establish a lack of community but merely means that the comprehensive negotiations will be slightly more complex. See, e.g., Dixie Elementary School District, supra; El Monte Union High School District, supra; Oakland Unified School District, No. 320, supra.

[5]However, the record indicates there are many areas of the contract where provisions are similar if not identical. For example, evaluations are required for long-term substitute teachers, for any substitute teacher if requested by a supervisor, and as a prerequisite to barring any substitute from teaching at a particular site. Similarly, the District asserts that there has been little or no emphasis on insurance benefits by the substitute teachers section as a result of the fact that substitute teachers either work a full-time job elsewhere which provides insurance benefits, or have a spouse whose employer provides the benefits. However, the substitute teachers section has set up, on its own, a health insurance plan for substitute teachers modeled after, and providing the same benefits as, the health plan provided to regular contract teachers by the District.

Negotiating History and other Disruption Issues

The parties' negotiating history is another factor among many to which the Board looks to see whether a stable negotiating relationship would be disrupted if the consolidation requests were granted. Livermore Valley Joint Unified School District (6/22/81) PERB Decision No. 165. The Board has held that the burden of proof remains on the party opposing the presumptively appropriate unit. Livermore, supra. The District argues, instead, that the burden should be on the party seeking to alter the unit configuration to show that the proposed alteration will not be disruptive. The cases cited by the District in support of this contention are inappropriate because the National Labor Relations Board does not have a parallel concept to the Board's rebuttable presumption that all classroom teachers will be contained in a single unit.[6]

The Livermore case involved a request to sever a presumptively appropriate operational support services unit

[6]Further, Great Atlantic & Pacific Tea Co. (1965) 153 NLRB 1549, 1550 [59 LRRM 1679] and West Virginia Pulp & Paper Co. (1958) 122 NLRB 738 n. 12 (whether classifications in question were supervisory), are both severance cases and therefore inapposite. Moreover, in Great Atlantic unlike the instant case, neither the old unit nor the proposed units were presumptively appropriate as the new organization sought to carve out two store units in Howell and one store unit in Woburn from a chain-wide unit of retail stores; and there was no cogent justification. Potomac Electric Power Co. (1958) 111 NLRB 553, 557-8 [35 LRRM 1527] does not contain a discussion on negotiating history in either a severance or consolidation request.

from a wall-to-wall unit of classified employees.[7] The Board recognized that negotiating history takes on more significance in a severance case but continued to treat it as one factor among many. However, even if a stable negotiating history may be found significant in a severance case, we find the District's formulation completely inappropriate in the consolidation context. There isn't an attempt in the instant case to steal part of its bargaining unit from an incumbent representative nor is there contemplated any change in bargaining representatives. In addition, there is no need to guard against instability resulting from mere shifting employee dissatisfaction with the representative of the established unit. Therefore, the existence of a stable negotiating history between the parties is not as important a consideration or one that we find militates against consolidation because there is no reason to conclude that a good bargaining relationship between the parties will not continue if the requested unit is granted. As a result, the District has not met its burden of demonstrating the inappropriateness of the proposed consolidated unit.

In deciding unit questions, PERB is directed by Government Code section 3545(a) to consider . . . "established practices including, among other things, the extent to which such

[7]We note that in Livermore, a different organization was seeking the severance.

employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district."

Regular contract teachers, hourly adult education teachers and substitute teachers are all members of the Association.[8] In addition, the Association presented evidence that it has previously attempted to represent these employees in one comprehensive unit for purposes of collective bargaining. Finally, many substantive provisions in the collective bargaining agreements of the three units are identical.

The hearing officer's finding, that the efficient operation of a school district is generally served in the form of reduced negotiating time by establishment of a comprehensive teacher bargaining unit rather than smaller, fragmented units, is a reasonable conclusion.

The District has claimed that "conflicts of interest" between substitute and regular teachers will affect the District's efficient operations, pointing to the fact that

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[8]There was testimony that the substitute unit is a section separate from the Association and it selects its own officers; however, the internal relationship between the Association and its sections is not as separate an entity as the District would have us believe. For example, both the substitute and the hourly adult education teacher sections are governed by the Association's constitution and bylaws. Dues of both are based on the same formula as the dues of regular contract teachers - proportional to the hours taught. Both sections have representation on the Association's representative council.

regular teachers who are absent may suggest particular substitutes. However, this "conflict" is not supported in the record. The fact they may suggest a particular substitute does not obligate the District to accept the suggested individual - the District maintains ultimate control over such a decision. See Oakland Unified School District No. 320, supra.

In the instant case, the parties have both exhibited a preference, as evidenced by past bargaining history, for treating the negotiations for all units in a similar fashion; and, in fact, the parties have conducted negotiations for two separate units during the same negotiating session. This natural preference supports the conclusion that considerations of efficiency will be served by consolidation.

CONCLUSION

As discussed above, consolidation of the three units would place all teachers with a community of interest in the same bargaining unit. It would insure efficiency of operations by avoiding fragmentation of units, and it would permit the parties to negotiate a single contract in much the same way as they have in the past. Therefore, the proposed consolidation of the three certificated units is deemed appropriate.

ORDER

Based on the foregoing and the entire record in this matter, it is the ORDER of the Public Employment Relations Board that the unit modification petition filed by the Palo

Alto Educators Association, CTA/NEA is GRANTED. Therefore, the regular classroom teacher unit, substitute teacher unit and hourly adult education teacher unit are hereby modified to be combined into one comprehensive certificated unit.

Chairperson Gluck's concurrence follows.
Member Morgenstern's concurrence is on page 19.

Chairperson Gluck, concurring: The District contends that the facts here satisfy its burden of rebutting the Peralta presumption. Particular emphasis is placed on a comparison of the collective bargaining agreements reached in each of the three units CTA seeks to consolidate. The District points to the fact that only the contract for regular teachers includes provisions concerning performance evaluations, insurance premium payroll deductions, consultation rights, released time and certain other matters. This fact, it asserts, demonstrates that there is a lack of community of interest among the employee groups.

The District's argument unjustifiably asserts that the absence of a particular provision in a negotiated agreement

manifests employee disinterest in the subject. Such omissions may represent the employees' willingness to forego the provision in the interest of securing another or others of greater current importance. It may also reflect a relative lack of bargaining power -- and a reason for seeking consolidation with another and more effective group. I find no authority for the proposition that a finding of community of interest is dependent on the willingness of different groups of employees to pursue a given issue with equal vigor and determination.

The selected issues upon which the District bases its argument may not be insignificant, but they cannot be said to blanket the area of negotiability so completely as to permit the extreme inference drawn by the District. There is no reference to wages, hours of work, health benefits, transfers, leaves and reassignments, classroom size and other subjects emphasized by their explicit inclusion in subsection 3543.2. I cannot help but wonder what provisions indicative of common concerns may be found in the current agreements.

The District claims that the consolidation of these units would impair the efficiency of its operations. Providing no concrete evidence in support of its conclusion, the argument seems to be based on the contention that the absence of community of interest among the three groups would result in disputes within the unit and make it difficult, if not

impossible, for the District to reach agreement with its employees. Even if we were to grant for argument's sake that the various employee groups do not share comparable interests in all of the subjects the District lists as evidence of its claim, it is not the absence of such mutual concern that raises the spectre of disruption. Rather, it is evidence that the employees hold contradictory or mutually hostile positions on given issues that justify the fear that internal unit disharmony will frustrate the bargaining process. The District has provided no evidence that consolidation is likely to produce such a consequence.

As to other District arguments, I find no need to add to my colleagues views and I join them in granting the petition for consolidation.

Member Morgenstern, concurring: I am in agreement with both the author's conclusion and the additional points made by Chairperson Gluck.