STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ST. HOPE PUBLIC SCHOOLS, Employer, and SACRAMENTO CITY TEACHERS ASSOCIATION, Petitioner.	Case No. SA-RR-1170-E PERB Order No. Ad-472 December 6, 2018

Appearances: Law Offices of Young, Minney & Corr, by Chastin H. Pierman, Attorney, for St. HOPE Public Schools; California Teachers Association, by Brian Schmidt, Attorney, for Sacramento City Teachers Association.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Sacramento City Teachers Association, CTA/NEA (Petitioner or SCTA) from an administrative determination (AD) dismissing its request for recognition (Request). Although the Petitioner established that it had support from a majority of the requested unit of classroom teachers at St. HOPE Public Schools (St. HOPE or Employer), the Office of General Counsel (OGC) concluded that the proposed bargaining unit was inappropriate because it excluded "day-to-day substitutes." For the following reasons, we reverse the AD and certify the Petitioner as the exclusive representative of the employees in the requested unit. We also take this opportunity to clarify the standards for determining unit appropriateness under the Educational Employment Relations Act (EERA).[1]

[1] EERA is codified at Government Code section 3540 et seq.

FACTUAL AND PROCEDURAL BACKGROUND

St. HOPE was established in 2003 as a public charter school system serving the Oak Park community of Sacramento. The Employer enrolls approximately 2,000 students in its elementary school (PS7 Elementary School), two middle schools (Oak Park Prep and PS7 Middle School), and high school (Sacramento Charter High School). In 2017, St. HOPE's approximately 96 regular classroom teachers began organizing with SCTA and their efforts culminated in the filing of this Request on April 28, 2017.[2] SCTA indicated that a majority of employees in the proposed bargaining unit supported the Request. The proposed unit was defined as "[a]ll certificated employees and classroom teachers within the meaning of Education Code 47605(1)" employed by St. HOPE, but excluding "[a]ll management, supervisory, day[-]to[-]day substitutes, classified, and confidential employees within the meaning of [EERA] section 3540.1."

On May 22, the Employer submitted to PERB the names of employees in the proposed unit, pursuant to PERB Regulation 33075.[3] On July 6, the OGC notified the parties of its determination that SCTA's petition included sufficient proof of majority support.[4]

On July 21, the Employer contested the appropriateness of the proposed unit and refused to recognize SCTA on that basis. Specifically, the Employer claimed that the

[2] All further dates refer to 2017 unless otherwise noted.

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

[4] Proof of majority support was established "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." (EERA, § 3544, subd. (a).)

exclusion of approximately 72 day-to-day substitutes rendered the unit inappropriate. Both parties asked PERB to investigate and resolve their dispute over unit appropriateness.

On August 30, the OGC issued an Order to Show Cause directing SCTA to file evidence and arguments concerning the appropriateness of a classroom teachers' unit that excluded day-to-day substitute teachers. The parties' filings revealed the following pertinent facts about day-to-day substitutes and regular teachers:[5]

The Employer's schools operate on a 196-day work year. Of the 72 employees serving as day-to-day[6] substitutes, 37 did not work a single day during the 2016-2017 school year when the Request was filed. Of the remaining 35 substitutes, 18 worked fewer than 20 days. The other 17 worked between 23 and 136 days, with an average of 60 days, or .31 of a full-time position.

Since the Employer has not recognized any employee organization, it retains relatively unfettered control over the working conditions, qualifications, and job duties of its employees, except where statutes prescribe otherwise. Substitutes are paid only a flat rate, initially of $155 per day—the minimum necessary to maintain their exempt status—which increases after 11 days of service. By contrast, regular teachers receive a salary, performance incentive pay, and benefits. Substitutes are required to hold a valid substitute credential or teaching

[5] Like the parties and the AD, we include long-term substitutes in the category of "regular" or "permanent" teachers, and we use the term "substitutes" interchangeably with "day-to-day substitutes." The parties have no dispute regarding long-term substitutes or any other category of employees, other than day-to-day substitutes.

[6] The parties use different definitions of "day-to-day" substitutes. For instance, in its Reply on Appeal, SCTA defined "day-to-day" substitutes as those who worked fewer than 35 days during the 2016-2017 school year, of which there are 64. For purposes of this appeal, we accept the Employer's representation that all 72 substitutes who are not designated "permanent" or "on site" are "day-to-day." The parties remain free to bargain over job titles and classifications in negotiations.

credential, which generally entitles them to work no more than 30 days in any one classroom, while regular teachers must hold a single-subject teaching credential. The Employer describes the job duties of both substitutes and regular teachers in vague terms, like "invest students in working hard to achieve big goals," and "present academic content." But it is apparent and natural that much more is expected of regular teachers and long-term substitutes, who are responsible for developing student goals and evaluating performance. Substitutes and regular teachers work at the same school sites. They also interact with each other, students, and parents as necessary, although substitutes' interactions are necessarily less frequent. Regular teachers participate on the Employer's school site councils, while substitutes do not.

After SCTA and the Employer submitted their responses to the Order to Show Cause, the OGC issued its AD, dismissing the Request as urged by the Employer. SCTA moved for reconsideration of the AD or, in the alternative, a hearing to resolve disputed questions of material fact. The OGC denied this motion on February 16. SCTA then appealed from the denial of the motion and the dismissal of its Request, to which the Employer filed a response.

In its appeal, SCTA asks the Board to overrule the AD and certify the unit, or grant the motion for reconsideration and remand the case for hearing. We grant the former request and deny the latter as moot.

DISCUSSION

As the AD notes, in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), the Board interpreted EERA section 3545 as creating a rebuttable presumption that all classroom teachers should be placed in the same unit. To rebut the presumption, SCTA has the burden to show that its proposed unit is more appropriate than one including day-to-day substitutes, based on three factors: (1) community of interest; (2) established practices,

including the extent to which employees in different categories have selected SCTA as their representative; and (3) employer efficiency. (EERA, § 3545, subd. (a).)

The AD correctly noted that neither party submitted any evidence regarding employer efficiency. Therefore, only the first two factors are at issue in this case, and our holding does not necessarily extend to a case in which an employer presents "concrete evidence" that separating out substitutes would cause its operations to "be unduly impaired by an additional [set] of negotiations." (*Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165, p. 8.)

The AD errs in the weight it gives the remaining two factors. First, while the AD is correct that substitutes and regular teachers share enough working conditions to establish a community of interest with one another, the AD understates the extent to which that community of interest is weakened by disparate pay structures and other differences, and particularly by the fact that a majority of substitutes did not work at all in the 2016-2017 school year. Second, the AD incorrectly finds that this somewhat weakened community of interest still trumps the other applicable factor—extent of organization—even where that factor points overwhelmingly toward approving the requested unit that excludes substitutes. In reaching this conclusion, the AD also fails to appreciate the fact that our precedent reflects that separate units of substitutes are not anathema to EERA's goals and purposes.

Community of Interest

Under longstanding precedent, substitutes share a community of interest with regular teachers. (See, *e.g.*, *Modesto City Schools* (1986) PERB Decision No. 567; *Oakland Unified School District* (1983) PERB Decision No. 320 (*Oakland USD*); *Dixie Elementary School District* (1981) PERB Decision No. 171 (*Dixie*).) Indeed, it is for that reason that substitutes

presumptively belong in a comprehensive certificated unit. Here, particularly given that the other relevant factor points toward rebutting the *Peralta* presumption, we must examine the strength of the community of interest.

The AD did not conclude that the traditional community of interest factors tipped decisively in favor of a comprehensive unit. Rather, the AD found clear differences between substitutes and regular teachers, especially with respect to compensation and teaching duties.

Significantly, the AD's community of interest analysis gave insufficient weight to the fact that the instant dispute pertains to 72 day-to-day substitutes, more than half of whom worked zero days in the year in question. Given that a majority of the disputed group did not work for the Employer whatsoever in the entire school year, their community of interest is necessarily somewhat weaker than average.

Extent of Organization

The OGC's over-emphasis on the traditional community of interest factors prevented the AD from giving proper weight to the fact that the organizing campaign took place almost exclusively among the regular staff, a majority of whom supported SCTA as their exclusive representative. In other words, the AD did not comply with *Peralta* and EERA section 3545, subdivision (a), which requires the Board to consider established practices, including the extent to which employees in the requested unit have organized themselves into a coherent bargaining unit. In our view, particularly given that day-to-day substitutes' community of interest with the rest of the unit was weaker than average, the evidence regarding extent of organization is sufficient to tip the analytical balance, rebut the presumption favoring a comprehensive unit, and demonstrate the appropriateness of the requested unit.

Briefly recounted, the evidence establishes that regular teachers began organizing with SCTA sometime in 2017. The campaign was almost exclusively led by and directed at regular teachers. This is not surprising since, as noted *ante*, more than half of the Employer's substitutes did not work even a single day during that school year. By the time SCTA filed the Request on April 28, a majority of regular teachers had selected SCTA as their bargaining representative. The Employer identified the employees in the requested unit and supplied a list of their names in May. From that list, the OGC confirmed that SCTA had the support of a majority of the regular teachers.

EERA section 3545, subsection (a), *Peralta*, and elaborating cases state that the Board is required to consider the extent of an employee organization in determining unit appropriateness. This mandate follows also from the fact that the Board is charged with effectuating the fundamental purposes of the EERA, which are found in EERA section 3540:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

To accomplish these important purposes, the Legislature granted employee organizations the right to "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." (EERA, § 3544, subd. (a).)

The AD does not appropriately weigh the relevant factors when it finds that even a weaker than average community interest trumps a strong employee preference indicated by the extent of employee organization. In weighing these two factors, we note that they are often linked. Here, for instance, the regular teachers may not wish to include a significant number of day-to-day substitutes, more than half of whom worked zero days in the relevant school year.[7]

PERB must honor the truism that a rebuttable presumption can be rebutted. Indeed, if the *Peralta* presumption is not overcome in this case—where there is no evidence that employer efficiency is unduly impaired, the community of interest is not strong, extent of organization weighs heavily toward excluding substitutes, a majority of substitutes performed no work in the school year, and the number of substitutes is almost as high as the number of regular teachers—then parties may have reason to wonder what facts might overcome the presumption. In our view, these facts are sufficient.

Indeed, notwithstanding presumptions regarding the appropriateness of certain unit configurations, the Board has approved of comprehensive certificated units with substitutes, units without substitutes, and stand-alone substitute units. In so doing, the Board has given maximum effect to employee choice, especially when necessary to avoid a result that would effectively leave employees without representation.

[7] The number of day-to-day substitutes could easily grow to eclipse the number of regular teachers in the future, and the Employer would have virtually sole control over that possibility. The dissent is correct that employees who work zero hours would not participate choosing an exclusive representative. However, once a representative is chosen, under the dissent's weighing of the factors in this case, employees who work zero hours could form a majority or near-majority of those voting in union elections, and the exclusive representative would owe a duty of fair representation to a substantial group of employees who worked zero hours.

As we noted in *Long Beach Community College District* (1989) PERB Decision No. 765 (*Long Beach CCD*), each of the factors found in EERA section 3545, subdivision (a), must be weighed, and no one factor can trump the others. In *Long Beach CCD*, approximately 700 part-time unrepresented instructors sought to form their own unit, separate and apart from the existing unit of approximately 300 regular, full-time faculty. While *Peralta* created a presumption that the part-time instructors should join the existing full-time unit, the Board noted that community of interest is not by itself dispositive. (*Id.* at pp. 6-7.) The most important factor was the employees' decision not to seek a comprehensive unit, and based on this factor the Board favored a separate unit for part-time faculty, despite the employer's opposition. (*Ibid.*)[8]

The evidence in this case compels a similar conclusion. St. HOPE's regular teachers organized their own unit, rather than seeking a comprehensive unit with the substitutes, and their choice is reasonable under the circumstances, for the reasons noted *ante*. While unorganized teachers at other schools may not be in a position to rebut the *Peralta* presumption if the facts are dissimilar from those at issue here, and such teachers may as a result have to choose between organizing a broader unit and remaining unrepresented, the facts in this case overcome the presumption. While the dissent believes this conclusion gives determinative

[8] The dissent dismisses the significance of this and other cases because the substitutes or part-time instructors in question were excluded from a comprehensive unit pursuant to an employer's agreement with an exclusive representative. But EERA and our precedent do not suggest that we should determine whether the *Peralta* presumption is rebutted based merely on whether the employer agrees with the requested unit, and indeed to do so would grant public school employers extraordinary influence to veto their employees' selection of a bargaining representative. Such a result would be especially problematic here, where St. HOPE has offered no statement or evidence regarding operational efficiency, which is an employer's primary bona fide interest in matters concerning representation.

weight to just one of the two salient factors, in our view it is the dissent that inappropriately privileges one factor over the other, whereas we have carefully weighed both factors.

We also note that our precedent reflects that in varied districts throughout the state, each possible variation exists: comprehensive certificated units with substitutes, units without substitutes, and stand-alone substitute units. For instance, in *Palo Alto Unified School District, et al.* (1979) PERB Decision No. 84, the Board certified a separate unit of substitute certificated employees. Subsequently, the Board approved of certificated units that excluded substitute employees. (*Paso Robles Union School District, et al.* (1979) PERB Decision No. 85; *Berkeley Unified School District* (1979) PERB Decision No. 101; *Jefferson School District* (1980) PERB Decision No. 133; *El Monte Union High School District* (1980) PERB Decision No. 142.) Then, in *Dixie, supra*, PERB Decision No. 171, the Board approved a certificated unit which included substitute employees. Similarly, in *Oakland USD, supra*, PERB Decision No. 320, the Board affirmed a hearing officer's decision granting a petition to add all regular certificated substitute employees to the certificated unit. This pattern was repeated in *Palo Alto Unified School District* (1983) PERB Decision No. 352, where the Board again approved a comprehensive unit of substitute teachers and regular teachers.

These varied configurations reflect the fact that many regular teachers organized, without substitutes, before the legislature enacted EERA. Some legacy units later sought to add substitutes, while in other cases the substitutes organized separate units. The Board approved both configurations, honoring employee choice in order to vindicate the right to representation.

The instant case tests under what circumstances employee choice and specific community of interest facts overcome the *Peralta* presumption in an unrepresented workplace.

We consider that question based on the record the parties created. While we are not restricted by legacy units in this case, we are cognizant that four decades of history show each of the aforementioned unit configurations to be workable. For that additional reason, we do not hesitate to create a new unit excluding substitutes, if and only if the petitioning union rebuts the *Peralta* presumption, as it has done here.

ORDER

Based on the foregoing and the entire record in this matter, the Public Employment Relations Board hereby ORDERS that the Request for Recognition filed by the Sacramento City Teachers Association, CTA/NEA is GRANTED. It is hereby CERTIFIED that Sacramento City Teachers Association, CTA/NEA is the exclusive representative of the employees in the following unit:

> INCLUDING:
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> All regular certificated employees and classroom teachers within the meaning of Education Code section 47605 (l), including long-term substitutes, and
>
> EXCLUDING
>
> All management, supervisory, day to day substitutes, classified, and confidential employees within the meaning of EERA section 3540.1.

Member Krantz joined in this Decision.

Member Shiners' dissent begins on page 12.

SHINERS, Member, dissenting: Sacramento City Teachers Association (SCTA) seeks to create a classroom teachers bargaining unit at St. HOPE Public Schools (St. HOPE) that excludes day-to-day substitute teachers. The majority finds this unit appropriate under the Educational Employment Relations Act (EERA).[9] I disagree because the majority's conclusion is contrary to PERB's longstanding interpretation of EERA section 3545. Rather than upending decades of settled law, I would conclude on the record before us—as the Office of the General Counsel (OGC) did—that the bargaining unit sought by SCTA is inappropriate because it excludes day-to-day substitutes. Accordingly, I would affirm the OGC's dismissal of SCTA's request for recognition.

1. EERA Section 3545 and the *Peralta* Presumption

EERA section 3545 provides, in relevant part:

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

In *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), the Board harmonized the above two provisions of EERA section 3545 by creating a rebuttable presumption that all classroom teachers should be placed in a single bargaining unit unless the

[9] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references are to the Government Code.

resulting unit would be inappropriate under the criteria in subdivision (a). (*Id*. at p. 10.) The party opposing creation of a comprehensive classroom teachers unit bears the burden of proving such a unit would be inappropriate. (*Ibid*.)

In *Dixie Elementary School District* (1981) PERB Decision No. 171 (*Dixie*), the Board applied the *Peralta* presumption to a petition that sought to add day-to-day substitutes to an existing unit of classroom teachers. (*Id*. at pp. 2-3.) The Board held the presumption was not rebutted because the substitutes shared a community of interest with the teachers in the unit and adding substitutes to the unit would not impair the efficiency of the district's operations. (*Id*. at pp. 4, 8.) Reaching the same conclusion with regard to a similar petition in *Oakland Unified School District* (1983) PERB Decision No. 320 (*Oakland USD*), the Board explained that, under the *Peralta* presumption, "a single unit will be directed unless disparate community of interest exists or such application would cause disruption or instability within an already established unit." (*Id*. at pp. 3-4, emphasis in original.)

As the majority notes, there is no evidence in the record—and St. HOPE does not argue—that excluding day-to-day substitutes from a comprehensive classroom teachers unit would have an effect on St. HOPE's operating efficiency. As to the remaining two factors, the majority gives unprecedented weight to the "established practices" factor while minimizing the community of interest between day-to-day substitutes and the teachers in the proposed unit. In my view, the conclusion the majority reaches is inconsistent with decades of our decisional law.

2. Community of Interest

In determining whether there is a community of interest among public school employees, PERB considers many factors, including qualifications, training, and skills; job duties; method of wages or pay schedule; fringe benefits; hours of work; supervision; interaction with other

employees; and interchange of job functions. (*Center Unified School District* (2014) PERB Decision No. 2379, p. 2; *Rio Hondo Community College District* (1979) PERB Decision No. 87, pp. 8-11.) No single factor is determinative and the overriding issue is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*Hartnell Community College District* (1979) PERB Decision No. 81, pp. 32-33.)

As the majority acknowledges, under *Peralta* there is a presumption that day-to-day substitute teachers share a community of interest with regular teachers.[10] (*Palo Alto Unified School District, et al.* (1979) PERB Decision No. 84, pp. 7-8.) This presumption is based on the premise that "substitute teachers virtually 'step into the shoes' of the teachers they replace." (*Palo Alto Unified School District* (1983) PERB Decision No. 352, p. 9.) Thus, despite some differences between substitutes' and regular teachers' working conditions on a case-by-case basis, the Board consistently has found that substitutes share a community of interest with regular teachers. (*Id*. at pp. 9-12; *Oakland USD, supra*, PERB Decision No. 320, pp. 4-8; *Dixie Elementary School District, supra*, PERB Decision No. 171, pp. 4-8.)

The evidence here shows that St. HOPE's day-to-day substitute teachers share a community of interest with the teachers in the proposed unit. Substitutes teach the same courses to the same students in the same classrooms as regular teachers. Substitutes also prepare lesson plans, take attendance, assign and correct homework, administer tests, work with teacher assistants, discipline students, attend faculty meetings, participate in professional development meetings, interact with other teachers and school employees, and perform hall monitoring duties. Like regular teachers, substitutes must possess a Bachelor's degree and a valid California

[10] Consistent with past Board decisions, I use "regular teachers" to refer to teachers who are not substitutes, whether they hold permanent, probationary, or temporary status.

teaching credential.[11] Substitutes work at the same locations, have the same work hours, and are subject to the same school calendar as regular teachers. Substitutes also may conduct parent-teacher conferences, communicate with parents about students, and enter student grades in the online grade book.

The evidence also shows possible differences between substitutes and regular teachers at St. HOPE. For example, it appears substitutes are not subject to the same evaluation procedures as regular teachers, are not eligible for extra-duty assignments or transfers, and are not supervised by the same individuals who supervise regular teachers. Yet, even if true, these differences do not outweigh the substantial commonalities between substitutes and regular teachers at St. HOPE.[12]

The majority points to three differences that it claims weaken the community of interest between substitutes and regular teachers. First, the majority notes that substitutes are paid a flat rate per day while regular teachers are paid according to a salary schedule. But the Board consistently has declined to give significance in the community of interest analysis to differences in wages, benefits, and other terms and conditions of employment because those matters are primarily controlled by the employer and may be changed through collective bargaining. (*Santa Clara County Office of Education* (1990) PERB Decision No. 839, adopting proposed

[11] Although substitutes and regular teachers may hold different credentials, this does not weigh against finding a community of interest between them. (*Oakland USD*, *supra*, PERB Decision No. 320, p. 8.)

[12] Because the undisputed evidence of those commonalities is sufficient to establish a community of interest between substitutes and regular teachers, I find no merit in SCTA's argument that the OGC should have conducted an evidentiary hearing to resolve conflicting evidence over these alleged differences between the two groups of teachers. (See *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 17 [a hearing is unnecessary when the OGC's investigation determines that no material issue of fact exists].)

decision at p. 12; *Oakland USD*, *supra*, PERB Decision No. 320, p. 5; *Redwood City Elementary School District* (1979) PERB Decision No. 107, p. 8; *Los Rios Community College District* (1977) EERB Decision No. 18, p. 11.)

Second, the majority claims there are differences in teaching duties but does not identify those differences. As noted above, substitutes at St. HOPE perform the same teaching duties inside and outside the classroom as regular teachers. To the extent the majority is relying on substitutes being ineligible for extra duty assignments, that difference hardly outweighs the fact that substitutes perform the full array of classroom duties.

Finally, the majority points out that of the 72 substitute teachers on St. HOPE's roster for the 2016-2017 school year, more than half did not work during that school year. From this, the majority concludes that the community of interest between the substitutes and the regular teachers is "weaker than average." (Maj. Opn. p. 6.) Our decisional law does not support this conclusion.

In *Dixie*, *supra*, PERB Decision No. 171, the Board observed that "it is reasonable for substitute teachers *as a class* to expect future employment given that the school employer repeatedly employs substitutes as a regular and integral part of the work force." (*Id*. at p. 5, emphasis added.) Further, this Board has found "no indication that the [substitute] teachers' interest and commitment to, or empathy with, the concerns of others within the bargaining unit, is proportional to their number-of-days-employment." (*Id*. at p. 7) Thus, the fact that some substitutes may not have worked in a prior school year does not mean they lack a community of interest with regular teachers.

The majority also ignores the significant number of substitute teachers who *did* work during the 2016-2017 school year. Substitutes who worked during the prior school year should

not be denied placement in an appropriate unit simply because some of their colleagues did not work during that year.

To the extent the majority is concerned that the inclusion of substitutes who did not work in the prior school year would improperly affect a representation election, such a concern is unfounded. As explained in *Poway Unified School District* (2015) PERB Decision No. 2441, "[t]here is a clear distinction between voter eligibility and unit membership eligibility." (*Id*. at p. 6.) With regard to substitute public school employees, the Board has long applied the "10 percent rule" whereby substitutes who worked less than 10 percent of the prior or current school year are ineligible to vote in a representation election. (*Id*. at pp. 5-6; *Oakland Unified School District* (1988) PERB Order No. Ad-172, pp. 3-5.) Thus, substitute teachers who did not work at St. HOPE in the prior school year would not be eligible to vote in a representation election, and therefore could not skew the election results one way or the other.

Additionally, the majority's concern that substitutes who did not work in the prior school year could "form a majority or near-majority of those voting in union elections" is speculative, at best. Such substitutes would only be eligible to vote in union elections if they chose to become SCTA members. But, on the evidence before us, we cannot determine whether any substitute would choose to become a member. The majority's conjecture as to the undisclosed membership views of substitutes does not justify excluding them from a comprehensive teachers' unit.

The majority also points out that, in a comprehensive teachers' unit, SCTA would owe a duty of fair representation to substitutes who did not work in the prior year. This is true, but this Board has never held that to weigh against including substitutes in a comprehensive unit. And there is no basis in the record for the majority's assumption that substitutes who did not work in the prior school year would have divergent interests from their fellow substitutes who did work

in the prior year. (See *Dixie, supra*, PERB Decision No. 171, p. 7 [differences in days of employment does not indicate lack of shared concerns among substitute teachers].) Thus, there is no reason to believe that SCTA's duty of fair representation would require it to put the interests of substitutes who did not work in the prior year above those of substitutes who did work in that year, or, for that matter, above the interests of regular teachers.

In sum, the evidence submitted by the parties establishes that day-to-day substitute teachers at St. HOPE share a community of interest with the school's regular teachers, one that is not weakened by the fact that many of the substitutes did not work during the 2016-2017 school year.

3. Established Practices

The remaining factor to be considered in the unit determination analysis is employees' "established practices including, among other things, the extent to which such employees belong to the same employee organization." (EERA, § 3545, subd. (a).) The majority gives dispositive weight to this factor but its reasons for doing so are flawed and contrary to our decisional law.

As we recently reiterated, "established practices, [include] both negotiating history and the extent to which employees belong to the same employee organization." (*Los Rios Community College District* (2018) PERB Decision No. 2587, p. 4.) Because both the regular and substitute teachers at St. HOPE currently are unrepresented, negotiating history is non-existent. The majority therefore relies on the fact that SCTA has only organized the regular teachers and does not seek to represent the substitute teachers. But this fact cannot be determinative in light of the governing statute and decisional law.

We have long recognized that to avoid a proliferation of bargaining units, "EERA calls for more general uniformity and a more limited range of units in the public school setting as

intended by the Legislature." (*Los Angeles Unified School District* (1998) PERB Decision No. 1267, pp. 5-6.) In *Peralta*, the Board observed that EERA section 3545, subdivision (b)(1), is "meant to minimize the dispersion of school district faculty into unnecessary negotiating units." (*Peralta*, *supra*, PERB Decision No. 77, p. 9.) Accordingly, subdivision (b)(1) prohibits "unit configurations based on geographical, or campus considerations, or split along lines of academic disciplines and teaching specializations." (*Ibid*.) Subdivision (b)(1) thus bars PERB from approving a unit of classroom teachers configured solely on the extent to which the teachers have organized. After all, if a unit of regular teachers is deemed appropriate based on the employee organization's conscious choice not to organize substitute teachers—as the majority does here—nothing would prevent an employee organization from establishing an appropriate unit of teachers at only one campus or in only a single academic discipline based on its decision to only organize teachers by location or discipline. Such a fragmented system of bargaining units clearly is contrary to the mandate of EERA section 3545, subdivision (b)(1), as interpreted in *Peralta*.

In support of its decision to approve the proposed unit despite its exclusion of day-to-day substitutes, the majority relies on *Long Beach Community College District* (1989) PERB Decision No. 765 (*Long Beach CCD*), in which the Board found appropriate a separate unit of part-time instructors. But that case had very different facts. There, the district strongly opposed a comprehensive classroom teachers unit. To eliminate this objection and pave the way for a consent election, the union modified the proposed unit to exclude part-time instructors. (*Id*., adopting proposed decision at p. 3.) Because the district agreed to the modified unit, its appropriateness was never litigated before PERB. (*Id*., adopting proposed decision at p. 4, fn. 4.) Over the next eight years, the teachers union refused to modify the unit to add part-time

instructors. (*Id*., adopting proposed decision at pp. 4-5.) The excluded part-time instructors then filed a request for recognition as a separate bargaining unit. (*Id*., adopting proposed decision at pp. 1-2.)

After noting that community of interest is not dispositive in unit determination analysis, the Board gave great weight to the fact that creation of a separate bargaining unit was the only way to effectuate the part-time instructors' statutory representation rights in light of the existing faculty unit's refusal to include them. (*Long Beach CCD*, *supra*, PERB Decision No. 765, p. 4-6.) Thus, instead of forcing the part-time instructors into the existing unit where they were not wanted, the Board found a separate unit of part-time instructors appropriate under the circumstances. (*Id*. at pp. 6-7.)

Here, we are making an initial unit determination, not deciding whether substitutes should have their own unit or be added to an existing regular teachers unit. Thus, the circumstances that led the Board to create a separate unit in *Long Beach CCD* are not present here. Indeed, the Board recognized there that the part-time instructors "likely would be included in the existing unit were the issue before us as part of an initial unit determination." (*Id*. at p. 7.) Accordingly, *Long Beach CCD* does not support the majority's decision to exclude day-to-day substitutes from the bargaining unit.[13]

The majority further asserts that, like the instructors in *Long Beach CCD* the teachers at St. HOPE have chosen not to seek a comprehensive teachers unit, a choice that should be given weight in the unit determination analysis. This claim fails for two reasons. First, in *Long Beach*

[13] I do not suggest, as the majority implies, that substitutes can never be excluded from a bargaining unit unless the employer agrees. Rather, I simply point out that the circumstances where this Board has decided not to put substitutes in a comprehensive unit under *Peralta* do not exist in this case.

CCD, *supra*, the union's decision to exclude part-time instructors from the unit was a compromise to obtain a consent election after the district expressed strong opposition to the union's original request for a comprehensive instructors unit. Thus, although the exclusion of part-time instructors was voluntary, it was not the union's first choice—as it is here.

Second, the majority's claim is inconsistent with our decisional law. In early decisions, the Board held that employees' wishes are to be considered in determining an appropriate unit, but are not determinative. (*Grossmont Union High School District* (1977) EERB Decision No. 11, p. 8.) Subsequently, however, the Board has held that employee choice has no bearing on unit determination. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, p. 9; *Regents of the University of California* (2010) PERB Decision No. 2107-H, p. 24; *Elk Grove Unified School District* (2004) PERB Decision No. 1688, pp. 27-28; *Los Angeles Unified School District*, *supra*, PERB Decision No. 1267, pp. 3-6.) Thus, the fact that regular teachers may not want substitutes in the same bargaining unit is irrelevant to the appropriateness of the proposed unit.

The majority also suggests that, notwithstanding EERA section 3545, subdivision (b)(1), a separate unit of substitute teachers is a permissible alternative in every case. In support of this suggestion, the majority relies on *Palo Alto Unified School District, et al.*, *supra*, PERB Decision No. 84, where the Board approved a separate unit of substitute teachers. In that case, the Board declined to apply the *Peralta* presumption because adding substitutes to the existing regular teachers unit during the middle of a contract term "would clearly carry with it [the] potential for disruption." (*Id*. at p. 8.) Because it involved a regular teachers unit that was in the middle of an

existing labor contract, *Palo Alto Unified School District*, is distinguishable from initial unit determination cases such as this one.[14]

The majority also cites several other early Board decisions where we allowed an existing unit that excluded substitute teachers to stand: *Paso Robles Union School District, et al.* (1979) PERB Decision No. 85; *Berkeley Unified School District* (1979) PERB Decision No. 101; *Jefferson School District* (1980) PERB Decision No. 133; *El Monte Union High School District* (1980) PERB Decision No. 142. In each of these cases, just as in *Long Beach CCD*, *supra*, PERB Decision No. 765, the parties had agreed to a unit that excluded substitute teachers. Critically, none of the cases required PERB to resolve the issue of whether the substitutes belonged in the existing unit. Accordingly, these decisions provide no support for the majority's suggestion that a unit composed solely of substitute teachers is an appropriate alternative in an initial unit determination by PERB.

In sum, I find no reason to give the "established practices" factor any weight in this case, much less the dispositive weight my colleagues give it. To do so—as the majority has done—allows employee organizations to usurp PERB's role as the decision maker in unit determination matters simply by choosing to organize only some of a district's classroom teachers.

4. Conclusion

I cannot condone the majority's disregard of the statutory mandate of EERA section 3545 and decades of our decisional law. Accordingly, based on the evidence before us, I would find that St. HOPE's day-to-day substitute teachers share a community of interest with the school's

[14] It is important to note that the Board later placed those same substitute teachers into the regular teachers unit when a unit modification petition was filed just prior to expiration of the existing labor contract. (*Palo Alto Unified School District*, *supra*, PERB Decision No. 352, pp. 4-5.)

regular teachers, and that their community of interest is not weakened by the variance among the substitutes in days worked during the prior school year. I also would find that no established practices exist that would weigh against placing the substitutes in the same bargaining unit as the regular teachers. Specifically, I would not—as my colleagues have done—allow unit determination to be controlled by the extent to which the employee organization has chosen to organize certain teachers but not others.

In sum, SCTA has failed to rebut the presumption that all of St. HOPE's classroom teachers belong in the same bargaining unit. Consequently, I would affirm the OGC's dismissal of SCTA's request for recognition.