STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Employer, and UNITED TEACHERS OF OAKLAND, AFT LOCAL #771, Petitioner, and OAKLAND EDUCATION ASSOCIATION, CTA/NEA Exclusive Representative.	Case No. SF-D-169 Administrative Appeal PERB Order No. Ad-172 July 14, 1988

Appearance: Ramon E. Romero, Attorney, California Teachers Association for Oakland Education Association, CTA/NEA.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

HESSE, Chairperson: On March 29, 1988, United Teachers of Oakland, AFT Local 771 (UTO) filed a timely Decertification Petition with the Public Employment Relations Board (PERB or Board). UTO seeks to replace the Oakland Education Association, CTA/NEA (OEA) as the exclusive representative of certificated employees in the Oakland Unified School District (District). The petition listed 3,000 as the approximate number of employees in the unit. The District indicated that the unit size was 3,400. OEA notified PERB on April 11 that, according to its

records, the unit size was in excess of 4,200 employees.

Investigation by the Board's agent revealed that the discrepancy in unit size was caused by the parties' differing interpretations as to (1) whether all substitute teachers employed by the District were included or excluded from the unit, and (2) even if the disputed employees were included in the unit for contract administration purposes, whether all the substitutes were eligible to vote.

On May 17, the Board's agent issued the administrative determination that is the subject of this appeal. The Board agent ruled that, although all substitutes were included in the unit for purposes of contract administration, only the substitutes who worked at least 10 percent of either the 1986-87 school year or the 1987-88 school year were eligible to vote.

OEA filed a timely appeal of the determination and requested a stay of the election itself. Pursuant to the directed order, the election was held, but the ballots were impounded by the Director of Representation pursuant to this dispute and have not been counted.

The heart of OEA's appeal is that the final list of eligible voters, totaling 3,751 names, disenfranchised 775 persons, as the bargaining unit size (including all substitutes) is 4,526 employees. A subsidiary issue is whether the 30-percent proof of support showing (required by PERB Regulation 32770(b)) that accompanied the decertification

petition should be calculated using the total unit size or the total number of eligible voters as the divisor.[1]

On June 22 and 24, 1988, OEA requested that its appeal in this matter be withdrawn without prejudice, and that the stay of the election be dissolved in order to permit the counting of the ballots. That request was denied by the Board itself on June 29, in PERB Order No. Ad-171. The Board had, in reviewing the record, determined that the voting rights of the 775 substitutes in question would be seriously compromised if the ballots were counted and the Board subsequently determined that the 775 should have been permitted to vote. Furthermore, the rights of the 775 substitutes may not be raised by OEA if it wins the ballot count. Therefore, the Board determined that the best method to ensure that the rights of all parties and employees were protected, regardless of the outcome of the ballot count, would be for the Board to stay the ballot count and then to rule expeditiously on the merits of OEA's appeal.

The major issue of OEA's appeal is the question of whether Oakland Unified School District (1983) PERB Decision No. 320 (Oakland I) overrules the 10-percent rule established in Palo Alto Unified School District/Jefferson Union High School District (1979) PERB Decision No. 84 (Palo Alto/Jefferson). The latter case held that, while substitutes could be included

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[1]The Board agent determined that UTO had met the 30-percent standard showing no matter which number was used. OEA does not dispute this determination.

in a bargaining unit along with full-time teachers, voting eligibility was restricted to substitutes who had been employed for at least 10 percent of the prior or the current school year. The purpose of the 10-percent rule was to prevent substitutes without an established interest in employment relations with the district from being able to overwhelm the votes of full-time employees and the substitutes who worked more than 10 percent of the school year, who had a greater stake in the outcome of collective bargaining than those who worked only minimally during the school year.[2]

OEA has not directly confronted the reasonableness of the percentage of the 10-percent standard; instead, OEA has argued that the 10-percent standard should not be applied at all because Oakland I overruled Palo Alto/Jefferson and thus abolished the 10 percent rule.

We do not agree with OEA's interpretation of Oakland I. That case dealt with a unit modification petition to add

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2some states restrict, by statute, the eligibility of some, if not all, substitutes to vote in a representation election. (See, e.g., Indiana Stats, sec. 20-7.5-1-2(e) "School employee means any full-time certificated person in the employment of the school employer;" Code of Iowa section 20.4(5) "The following public employees shall be excluded from the provisions of this chapter . . . temporary public employees employed for a period of four months or less." See also, Title 26, Revised Stats, of Maine secs. 962.6(F) and 962.6(G); Consolidated Laws of New York, Civil Service Law section 201,7(d).)The various states employ a variety of methods to determine when eligibility attaches, but the common element in all of the methods seems to be that the substitutes must have a reasonable expectation of continued employment.

substitutes to the certificated unit. The petition was granted and the substitutes were placed in the unit. That substitutes are in the unit is not in dispute here, however. A substitute who teaches one day a year is covered by the collective bargaining agreement negotiated by OEA for the entire unit. Therefore, we read Oakland I as defining who is in the unit, not who is eligible to vote. Voter eligibility is not addressed in Oakland I and, thus, is still governed by Palo Alto/Jefferson.

With respect to voter eligibility, OEA would include as eligible to vote all employees who have worked for the District. Under such a standard, the employees' choice of a representative (or no representative) would be affected by individuals who have no recent employment record with the District, who no longer have an interest in future employment and who may have secured permanent employment elsewhere. On the record before us,[3] and in fashioning an eligibility formula which will protect the voting rights of employees, the purposes of the Educational Employment Relations Act can best be achieved by affirming the Board agent's application of a 10-percent formula to limit voter eligibility to substitutes who have a recent history of employment with the District. We hold that in addition to the established interest in employment

[3]We note the record is devoid of facts such as the work histories, categories of substitutes, or other criteria to support a different voter-eligibility formula.

relations standard, consideration must be given to substitutes who have a reasonable expectation of continued employment.

A second argument raised by OEA is that the 30-percent showing by the decertifying group must be based on 30 percent of the "established unit." (See PERB Reg. 32770(b).) Here, the established unit numbers 4,526 persons.

While OEA's argument has some superficial appeal, we reject it as being inconsistent with the reasoning set forth in Palo Alto/Jefferson for the 10-percent rule. If employees who worked less than 10 percent of the year were ineligible to vote in a decertification election (or representation election) but had to be considered in the formula for the 30-percent showing, the mere presence of those non-voters could result in the petitioning union not being able to make the 30 percent showing, even though it had signatures from 30 percent of the eligible voters. For all practical purposes, this is akin to giving the non-eligible employees veto power over representation matters. We decline to read the regulations so narrowly as to produce this anomaly. Hence, we concur that the 30-percent showing needs to be based on the number of eligible voters.[4]

Finally, OEA argues that, even if Palo Alto/Jefferson is good law, nothing in that case dictates that it be applied to decertification elections. In other words, the 10 percent rule

[4]In this case, we note that the Board's agent found proof of support in the entire unit so this argument is moot.

may be appropriate for initial representation elections, but not for decertification elections.

This argument is without merit. Palo Alto/Jefferson established a 10-percent rule for representation elections — a broad term that encompasses a decertification election. The reasoning behind the 10-percent rule is as valid in a decertification election as it is in an initial representation election. Therefore, based on the facts of this case, we will apply the 10-percent rule to determine voter eligibility in this decertification election.

ORDER

The Board agent's determination is hereby AFFIRMED and the appeal is DISMISSED. The stay of election is hereby DISSOLVED, and the Director of Representation is ORDERED to proceed with the ballot count.