

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

PETALUMA CITY ELEMENTARY AND	)	
HIGH SCHOOL DISTRICTS,	)	
Employer	)	
	)	
and	)	
	)	Case Nos.  SF-R-31
ASSOCIATION OF PETALUMA AREA	)	SF-R-265
TEACHERS, CTA/NEA,	)	
Employee Organization	)	EERB Decision No.  9
	)	
and	)	February 22, 1977
PETALUMA FEDERATION OF TEACHERS,	)	
LOCAL 1881, CFT/AFT,	)	
Employee Organization	)	
	)	
	)	
	)	

Appearances: Richard V. Godino, Attorney, for Petaluma City Elementary and High School Districts; Sharrel Wyatt, Attorney, for Association of Petaluma Area Teachers, CTA/NEA; David Rosenfeld, Attorney, (Van Bourg, Allen, Weinberg and Roger) for Petaluma Federation of Teachers, Local 1881, CFT/AFT.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

PROCEDURAL HISTORY

In petitions submitted April 1, 1976, the Association of Petaluma Area Teachers, CTA/NEA (APAT) and the Petaluma Federation of Teachers, Local 189, (PFT) sought to represent certain units of certificated employees of the Petaluma City Elementary and High School Districts. Specifically, APAT sought to represent all certificated employees except persons working regularly less than three hours each day, and persons designated as management. PFT's petition included all adult education teachers within its proposed unit of certificated personnel, excluding only management-designated positions and day-to-day substitutes. The governing board<sup>1</sup> of both Petaluma districts subsequently filed a petition pursuant to Government Code Section 3544.5<sup>2</sup> claiming as an appropriate unit the following:

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<sup>1</sup> The employer is a common administration district having one Superintendent and one Board of Education.

<sup>2</sup> References to Government Code Section 3540 et seq. are hereinafter noted as the Educational Employment Relations Act or

All certificated employees (except for casual employees, substitutes, summer school teachers, home teachers, consultants, and emergency employees) excluding those named by the governing board as management or confidential employees.

As a result of the foregoing, on August 3, 1976, a representation hearing was conducted by a hearing officer of the Educational Employment Relations Board. At the hearing the parties stipulated to the exclusion of day-to-day substitutes and the inclusion of temporary teachers as the term is used in Education Code Section 13337, 13337.3, 13337.6. Additionally, APAT clarified its position regarding exclusion of certificated employees, noting that it sought to exclude adult education teachers.

#### ISSUES

The parties dispute the status of summer school teachers, long-term substitute teachers, home teachers, and adult education teachers. In this regard, a two-fold analysis is presented. First, this Board must determine whether or not these employees are "classroom teachers" within the meaning of Government Code Section 3545(b)(1) and, therefore, necessarily included within the unit of other certificated personnel not in dispute. And second, if these teachers are not classroom teachers within the meaning of that section, do the criteria set forth in Government Code Section 3545(a) nevertheless warrant their inclusion in the negotiating unit. Both questions must be answered in the negative for all disputed employees for the reasons set forth in the following discussion.

#### DISCUSSION

In the Belmont Elementary School District<sup>3</sup> decision, the Board found it necessary to address the issue of "who is a classroom teacher in all cases where the issue is logically presented." Consequently, the Board agreed that the definition of a classroom teacher for the purposes of the EERA is limited "only to the regular full-time probationary and permanent teachers employed by the district...." Accordingly, with regard to disputed status in this case of summer school teachers, long-term substitute teachers, adult education teachers, and home 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 stipulated unit.

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the EERA.

<sup>3</sup> EERB Decision No. 7, December 30, 1976.

## Summer School Teachers

As in Belmont, supra, we decide that summer school teachers shall be excluded from the unit of regular teachers. The evidence in this case on established practices in regard to the summer school teachers was minimal, and no party presented any evidence on the matter of efficiency of operation. Hence, the community of interest criterion is the basis for our conclusion that the summer school teachers should be excluded from the unit.

In contrast to the regular classroom teachers, summer school teachers are not offered a written contract of employment. They are paid on a weekly basis and according to a different salary schedule than are the regular teachers. Summer school positions are dependent on sufficient student signups. Additionally, the summer school program is not a mandatory program.<sup>4</sup> Teachers in the summer school, unlike regular teachers, do not receive tenure nor do they receive any guarantee of reemployment.<sup>5</sup> With the exception of a sick leave benefit, which is based on a different formula than that of regular teachers, summer school teachers do not receive any of the other fringe benefits accorded regular teachers. And finally, summer school teachers are not evaluated under prescribed method as are regular teachers. Therefore, we exclude summer school teachers from the unit of regular classroom teachers.

## Long-Term Substitutes

We likewise find that the facts in this case, as in Belmont, supra, warrant the exclusion of long-term substitutes from the unit. In that regard, we again by any of the parties on the other criteria set forth in Section 3545(a) of the EERA.

The record indicates that the primary distinction between the day-to-day substitutes and the long-term substitutes is that the long-term substitute replaces a teacher who is absent for more than 10 consecutive days. Consequently, as in Belmont, supra, long-term substitutes receive a higher rate of pay than do day-to-day substitutes. The substitute is advanced on the 11th day of consecutive teaching at a single post to a daily rate that would correspond to his or her placement on the regular salary schedule, but not to exceed a maximum of \$50 per day. There was no evidence that the duties of the day-to-day substitutes changed dramatically when they became long-term substitutes. Also, as in Belmont, supra, there is no job security for long-term substitutes, since Education Code Section 13445 allows the governing board of the district to dismiss substitutes at will. Long-term substitutes, like per diem substitutes, receive no benefits. On the basis of an insufficient community of interest

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<sup>4</sup> Education Code Sections 5208 (1976 Supp.) and 5554.

<sup>5</sup> Education Code Section 13332 (1976 Supp.)

between long-term substitutes and nondisputed certificated employees and in the absence of any testimony regarding established practices or efficiency of operation criteria, we would exclude long-term substitutes from the unit.

#### Home Teachers

We find that home teachers lack a sufficient community of interest with regular classroom teachers and should therefore be excluded from the overall unit of certificated employees. There are four home teachers in the Petaluma School Districts. Like regular classroom teachers, they are certificated employees. Additionally, they must have a "special fitness" to perform the duties of the home teacher according to Education Code Section 13286 and 13287. Home teacher instruct those students who are unable to attend regular class because of hospitalization, long-term illness or some other incapacitating factor.<sup>6</sup>

The community of interest standard as discussed and applied in Belmont, supra, and in this case, for long-term substitutes and summer school teachers, is also not sufficiently established in this case for home teachers. Ususally home teachers teach students on a one-to-one basis away from the school site. They are not required to have any responsibility for extracurricular activities. Home teachers are not on the regular classroom teachers' pay schedule; they are paid on an hourly basis. Further, home teachers do not have any job security in the district. They do not enter into a written contract with the district. Their employment is based upon the number of students needing their services at any given time. Though their status may not be viewed as entirely casual, it is dependent upon the unpredictable needs of the district. Like day-to-day substitutes and long-term substitutes, they are called upon by the district on an as-needed basis and are not guaranteed any reemployment rights. Additionally, they are not supervised by a school principal as are regular teachers. Instead, they are supervised by the Director of Instructional Services who is located at the districts' main offices.

There was no evidence presented on the efficiency of operation criterion. Regarding established past practices and the extent of organization, the record indicates that home teachers have not in the past been the subject of meet and confer under the Certificated Employee Council (CEC) process.<sup>7</sup> On the basis of this lack of sufficient community of interest and the absence of testimony on established practices and efficiency of operation, we shall exclude home teachers from the unit of regular classroom teachers.

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<sup>6</sup> See also Education Code Section 6152.

<sup>7</sup> Education Code Section 13080, et seq., repealed July 1, 1976.

## Adult Education Teachers

Adult education teachers shall not be included in the unit of regular classroom teachers. There were 108 adult education teachers teaching in the district in the beginning of the school year 1975-76, and 98 at the end of the school year. Fifty-nine of the 108 were employed solely as adult education teachers. Forty-nine of the teachers were employed by the district in the regular day program, only 44 of which were regular certificated teachers. Five of the adult education teachers were classified employees.

The evidence presented at the hearing on established practices and the extent to which employees belong to the same employee organization was of a limited nature. It showed the negotiations between the teachers and the district have been conducted via the Winton Act.<sup>8</sup> No evidence was offered that either of the employee organizations, PFT or APAT, negotiated on behalf of adult education teachers in the past. However, the President of the Petaluma Adult Educators Association, a separate professional organization, was chairman of the Certificated Employees Council in 1974-75. This Association has had one seat on the CEC. No evidence was presented as to how many adult education teachers are members of either of the employee organizations involved in this case. There was some testimony, however, that 102 adult educators are members of the Petaluma Adult Educators Association. There is not sufficient evidence to allow us to rely upon established practices.

Regarding the community of interest, adult education teachers are easily distinguishable from regular classroom teachers. In order to teach in adult school, persons are not required to have a college education. At least four years of experience in the area of instruction is sufficient for the purposes of teaching certain courses in the adult program. The recruitment of adult education teachers varies somewhat from the recruitment process of regular school teachers. For example, where a person who is certificated or qualified to be certificated as an adult school teacher approaches the adult school principal with a course offering, that person may be asked to teach the course. Classes taught by adult teachers are more vocationally oriented than regular day school classes, although there are some courses offered which may be applied toward credit for a high school diploma. Consequently, adult school classes are not covered by the same cost guidelines approved by the Board of Education for regular day classes. For example, there are generally no district funds available for materials in adult courses; students are required to purchase their own supplies. If there is not sufficient sign-up in classes other than those classes leading to a high school graduation or diploma, the teacher is not employed

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<sup>8</sup> Id

for the course.

The adult school teachers are supervised by the Principal and Vice-Principal of the adult whereas the day school principals supervise the regular teachers . In contrast to the regular high school program, the decision to approve or disapprove of adult education classes depends on the needs of the community, the availability of qualified instructors, the availability of facilities, and the availability of funds. Though the adult budget is considered part of a total budget for the high school district, the adult school is supported in part by tuition charged to the persons attending adult school. Support staff, such as school nurses, school psychologists, and aides, are not available in adult schools as compared to regular day school. Testimony, however, by the Director of Personnel, indicated the vocational counseling was available at the adult school.

Some job security does exist for adult education teachers. The district's policy statement regarding adult teachers notes the follows:

All adult education instructors shall be employed on an hourly basis and shall be classified as probationary adult education instructors. To be classified permanent instructors, they would have to complete 75% of the number of days the adult high schools of the district are in session for three consecutive years and be employed for the fourth year.<sup>9</sup>

Similarly, a probationary regular day school teacher may achieve tenure after teaching three consecutive years and being employed the following year.<sup>10</sup> However, the achievement of tenure by adult school teachers is separate from that for regular teachers. Dual tenure is not achievable by the same employee in both adult school and day school by reason of having served the required probationary period in both systems. In such a case, the employee must select between the two permanent classifications.<sup>11</sup>

In summary, evidence on the community of interest standard is too lacking to allow the adult education teachers to be included in the group of nondisputed certificated personnel.

ORDER

The Educational Employment Relations Board directs that the

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<sup>9</sup> See also Education Code Sections 13328 and 13309 (1976 Supp.).

<sup>10</sup> Education Code Section 13304 (1976 Supp.).

<sup>11</sup> Education Code Section 13311 (1976 Supp.).

following unit is appropriate for the purpose of meeting and negotiating, provided an employee organization becomes the exclusive representative:

All certificated employees, excluding adult education teachers, home teachers, summer school teachers, day-to-day and long-term substitute teachers, management employees, supervisory employees, confidential employees, consultant employees and emergency employees.

Upon posting of the Notice of Decision, the employee organizations have a 10 workday period in which to demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if: (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

By: Raymond J. Gonzales, Member

Dated: February 22, 1977

Reginald Alleyne, Chairman, in concurrence.

I concur in the decision to exclude summer school teachers, long-term substitutes, homebound and adult education teachers from the stipulated unit of regular teachers and other certificated employees. Unlike the principal opinion, however, my reasoning is based solely on the community of interest criterion contained in Section 3545(a) of the EERA. Little evidence was offered on other Section 3545(a) criteria.

I disagree with the principal opinion to the extent that it raises, considers and resolves an issue the parties in this case were given no opportunity to address, either at the hearing or in their post-hearing briefs.

In describing the issues in this case, the principal opinion states:

First, the Board must determine whether or not these employees are 'classroom teachers' within the meaning of Government Code Section 3545(b)(1) and, therefore, necessarily included within the unit of other certificated personnel not in dispute.

The opinion then defines a classroom teacher as "a regular full

time probationary and permanent teacher...employed by a district..." The definition conveniently allows the Board to exclude some teachers from a negotiating unit without having to interpret the word "all" in Section 3545(b)(1) of the Act. When read literally and in isolation, that section requires the placement of all classroom teachers in the same district-wide negotiating unit, and does not permit the exclusion of any teachers on community-of-interest or other grounds.

The definition of classroom teacher as an issue in this case must come as a complete surprise to the parties. No party made a contest over a definition of classroom teachers, and no party was told at the hearing or at any other time that the Board would take it upon itself to construct such a definition.

In enacting the EERA, the Legislature did not attempt to define classroom teacher, probably because it is so clear that anyone who teaches in a classroom in a district school is performing the duties of a classroom teacher for whatever length of time the duties are carried out. Yet, in this case, as in Belmont Elementary School District, the Board has taken on the legislative function of making up a definition for an ordinary statutory term that ought to be given an ordinary meaning. This is quite different from deciding, as we have many times in the past, how the Legislature's definition of a term in the Act ought to be interpreted.<sup>12</sup>

The principal opinion does not say why it is necessary for this Board to make up a definition of "classroom teacher". All parties in all of the certificated cases so far considered and decided by the Board have presumably accepted the natural and plain meaning of the term. The argument that all classroom teachers must be in the same district-wide negotiating unit was made by no one in the Belmont case and by no one in this case. Every party in this case and both parties in the Belmont case wanted to exclude at least one group of teachers from the negotiating unit. This will not always be so, and we will have ample opportunity to decide this issue in a contested case.

My disagreement with the Board's approach here is twofold: First, I believe that, with rare exceptions the Board should not consider a matter unless it is disputed. It is the Board's stated policy that the exceptions should be limited to those instances in which parties reach an agreement in violation of one of the few clear and specific provisions in the Act, not arguably subject to a contest in respect to meaning.<sup>13</sup> Second, the

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<sup>12</sup> Thirteen terms used in the Educational Employment Relations Act are defined in Section 3540.1 of the Act.

<sup>13</sup> In Tamalpais Union High School District (EERB Decision #1, July 20, 1976), this Board stated:

In this case, the unit described as appropriate in the consent-election agreement is not inconsistent with a clear



principal opinion, having improperly taken up this matter, has in my view made the wrong decision. The problem with decisions on subjects not raised by anyone is that parties in the case are provided no opportunity to state their views on the subject in advance of the decision. Further, a decision made in the absence of conflicting viewpoints of the parties is more likely than otherwise to be incorrect. Since our decisions are likely to disappoint at least one of the parties, I think we should not compound the disappointment of the decision-loser by basing a decision on a theory the decision-loser never had the opportunity to address. I think we should not risk an unsound decision that would not have been made had the subject involved been argued and briefed by the parties. I believe that the attempt to define the term classroom teacher in a manner in conflict with its plain meaning suffers in both respects.

The Board's novel definition of a classroom teacher is arbitrarily tailored to support the desired result of permitting the Board to exclude some classes of teachers from a negotiating unit containing full time regular teachers. I think the Board should avoid that kind of inverse reasoning. It oftens traps and disrupts the reasoning process in subsequent cases.

The potential for mischief inherent in the Board's definition of classroom teacher is illustrated by an issue in one case now before the Board. In the Oakland Unified School District<sup>14</sup> case, one issue, among others, is whether teachers in children's centers may form a separate negotiating unit, apart from the unit of regular kindergarten through grade 12 teachers and other certificated employees. The facts in the case present a

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and specific mandate in the unit criteria provisions in the [EERA]. Accordingly, we decide that the consent-election agreement is controlling in this case...

In addition on May 5, 1976, the EERB adopted the following motion:

The Executive Director is directed to approve all consent-election agreements in accordance with the rules of case deliberation meetings to be adopted by the Board, with the exception of those that violate a specific mandate in a unit criterion section of the Educational Employment Relations Act (for example Section [3545(b)(3)] precludes the inclusion of classified and certificated employees within the same unit).

In consent agreement, 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.

<sup>14</sup> Case No. SF-R-119, 200, 400.

reasonable close question on the application of community of interest criteria. If, on community of interest grounds, children's center teachers are entitled to a separate negotiating unit they will not receive one if the Board's new definition of classroom teacher is followed. Children's center teachers are regular "probationary" or "permanent" teachers within the following options open to the Board: (1) exclude the children's center teachers on community of interest grounds and avoid applying the new definition of classroom teacher since it does not permit their exclusion; (2) include the children's center teachers on the ground that they are classroom teachers within the meaning of the Board's definition of classroom teacher; (3) exclude children's center teacher on community of interest grounds, and then make up a definition of classroom teacher that does not cover them. I think there is a less oblique and less arbitrary means of coping with the work "all" in Section 3545(b) (1).

In a subsequent case before the Board, if this issue is presented as a contested matter; that is, if at least on party seeks the inclusion of all teachers, and at least one other party seeks to include some but not all teachers in the unit, I would favor the following reasoning:

By reading Government Code Section 3545(a) and 3545(b) (1) together and not in isolation, all classroom teachers with a community of interest, and who satisfy other Section 3545(a) criteria, must be in the same districtwide negotiating unit.<sup>15</sup> This permits the exclusion of teachers who fail to meet the criteria provided in Section 3545(a). Section 3545(a) requires that the Board consider community-of-interest and other enumerated criteria "[i]n each case." Section 3545(a) does not exclude from its application the classroom teachers mentioned in Government Code Section 3545(b). This interpretation is at least based on language in the statute and not on language with not statutory basis, as in the Board's definition of classroom

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<sup>15</sup> The pertinent portions of Government Code Section 3545 provides:

(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.

teacher. Reading Sections 3545(a) and 3545(b)(1) together also avoids the absurd result of placing in the same unit teacher groups with so clear an absence of a community of interest that effective bargaining would be indisputably impeded. This interpretation is also consistent with the obligation placed on us by the courts of this state to interpret legislation in manner consistent with its overall purpose and to avoid literal interpretations in conflict with that overall purpose.<sup>16</sup>

Even with this fairly firm tentative view on the interpretation of the word "all" in Section 3545(b), I would not favor imposing it on anyone without first providing all parties involved in a case presenting the issue an opportunity to expose error in this reasoning. At the very least, the parties in this case should have been warned in advance of the filing of briefs that the Board would consider a definition of classroom teacher and the interpretation of the word "all" in Section 3545(b) of the Act.

Reginald Alleyne, Chairman

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

I disagree with the conclusion of the majority to exclude the classifications of summer school, home education and substitute teachers from the overall certificated unit. I agree, but for somewhat different reasons, that adult education teachers should be excluded from the overall unit.

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Before explaining why I dissent as to the three enumerated classifications, I address myself to the interplay between subdivisions (a) and (b)(1) of Section 3545 of the Act.<sup>17</sup> The interpretative issue is discussed in two of the post-hearing briefs in this case,<sup>18</sup> a fact overlooked in the Chairman's

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<sup>16</sup> See *Silver v. Brown*, 63 Cal. 2d 841, 845, 48 Cal. Rptr. 609 (1966) "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history appear from its provisions considered as a whole."

<sup>17</sup> Government Code Sections 3540 et seq.

<sup>18</sup> The Brief on behalf of Petaluma Federation of Teachers,

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Local 1881, CFT/AFT, AFL-CIO, Plainly addresses the definition of "classroom teachers" in regard to several types of teachers. For example:

"Government Code Section 3545(b)(1) does not require that day-to-day substitutes be included in a unit of classroom teachers. The Education Employment Relations Board will of course be required to define what is meant by 'classroom teachers,' since the defintional portion of the Rodda Act does not define the term. See Government Code Section 3540.1. Just as the National Labor Relations Board has interpreted the meaning of 'employee' to exclude certain individuals who might otherwise be characterized as employees, the E.E.R.B. must now exclude substitutes from the meaning of 'classroom teachers.' Basically, just as the National..." At page 2 of the brief.

"There is in fact no argument to exclude homebound teachers do not perform their services in the 'classroom,' they perform all the functions of classroom teachers; i.e., the Education Code does not require that those teachers included in the classroom teacher unit perform their services within the confines of a particular classroom or building. The fact that homebound teachers perform their services for the most part in the homes of students is no basis for exclusion, because such an exclusion would be based upon an unreasonable reading of the word 'classroom.'" At pages 6-7 of the brief.

The brief of the Petaluma School District also discusses 3545(b)(1). The district argues that adult education teachers are classroom teachers and "full clearly within the code section," but that some teachers should be excluded from the unit:

"It is the position of the District that home teachers should be excluded from the Unit. Although such employees do perform classroom functions, it is submitted that, under Government Code Section 3545(b)(1), they are not regular employees to be included in the unit but are rather 'casual employees' who must be excluded." At page 5 of the brief.

concurring opinion.<sup>19</sup> Indeed, since the construction of the Act presents a question of law, this Board's duty to apply the law to the facts requires that we resolve all relevant issues of statutory construction even where they have evoked no comment by the parties. Cf. People v. Jones, 6 Cal. 2d 544 (1936).

I differ from the Chairman about the basic rules of statutory construction. In my view, a general provision, such as Section 3545(a) of the Act, is controlled by one that is specific, such as Sections 3545(b)(1), (2), and (3), with latter treated as an exception to or qualification of the former. Rose v. State of California, 19 Cal. 2d 713, 723 (1942). While it is true that this rule of construction is merely an aid in determining legislative intent and should not be used to defeat the apparent purpose of the statute,<sup>20</sup> I cannot accept the Chairman's contention that "classroom teachers" is a term of plain meaning.

"The 'plain meaning' rule rests upon the fallacy that so-called clear and unambiguous words have independent existence and meaning [citation.] Words take color from their context, and language of fairly certain significance becomes equivocal in relation to its surroundings. Sometimes plain meaning disappears in the reflected light of the provision's objectives and policy."

Redevelopment Agency v. Malaki, 216 Cal. App 2d 480, 488 (1963); cf. Pacific Gas & Co. v. G.W. Thomas Drayage etc., 69 Cal. 2d 33, 38-39 (1968). The legislative purpose apparent from the statute as a whole will not be sacrificed to a literal construction of part of the Act. Friends of Mammoth v. Board of Supervisors, 8 Cal 3d 247, 259 (1972); Select Base Materials v. Board of Equal., 51 Cal. 2d 640, 645 (1959). I find it inconsistent for the Chairman to argue that "classroom teachers" is unambiguous, while at the same time advocating that "classroom teachers" are subject to the criteria enunciated in Section 3545(a).<sup>21</sup>

## II

As I indicated in Belmont, supra., the definition of the unit is the cornerstone of the obligation to negotiate and further determines the parameters of this obligation. Once having concluded that the disputed classifications are not "classroom

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<sup>19</sup> The Chairman's concurring opinion also overlooks that the same issue was raised at pages 9-10 of the post-hearing brief filed by the Belmont Faculty Association in the Belmont Elementary School District case (EERB Decision No. 7, December 30, 1976).

<sup>20</sup> California State Employees' Association v. Regents of University of California, 267 C.A. 2d 667, 670 (1968).

<sup>21</sup> I do not believe it is proper to prematurely debate the merits of a case under submission to the Board. I reserve my response to those portions of the Chairman's concurring opinion regarding Oakland until we issue our formal opinion in that case.

teachers," we are required by the statute to consider three criteria in determining an appropriate unit in each case: (1) The community of interest between and among the employees; (2) the established practices of the employees, including, among other things, the extent to which such employees belong to the same employee organization; and (3) the effect of the size of the unit on the efficient operation of the school district.

As I will more completely set forth, I believe that the classifications of summer school, home education and substitute teachers share a community of interest with other teachers. Equally important, however, is the failure of the majority to give any weight to the other enumerated criteria of the statute in including that these classifications should be excluded from the unit. Summer school, home education and substitute teachers, as discrete classes of people, are certainly employees within the meaning of the Act. As such, they are entitled to representation, if not in the overall unit, then in separate unit or units. Thus, excluding these three classifications from the overall certificated unit encourages unnecessary proliferation of units, which is detrimental to the efficient operation of the school district. Further, with respect to the classification of summer school teachers, a separate unit will compress the formation of the employee organization, its recognition or certification, and negotiation into the brief summer school period. This would place a burden on the employees and the employer which is likely to interfere with their more important responsibilities to the students and the public in general.

#### Summer School Teachers

As in Belmont, the summer school teachers in Petaluma have the same training, qualifications and skills as teachers in the overall unit. They teach the same children, in the same facility, using the same materials, for a similar number of hours each day. As with the teachers in the overall unit, summer school teachers are required to prepare lesson plans, conduct examinations and submit grades. Summer school teachers also confer with parents, accept extra-duty assignments and are required to attend faculty meetings, just like all other teachers.

The summer school program is part of an integrated, year-round academic program.<sup>22</sup> The district employs a high percentage of its regular teachers as summer school teachers:<sup>23</sup> in the 1976 summer school program, 62 percent of the elementary teachers and 90 percent of the high school teachers were also teachers during the regular school year. Further, there is substantial

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<sup>22</sup> See Van Burden Public School, and Van Buren Education Association, Case No. R73 F-258 (Michigan).

<sup>23</sup> See Great Neck Board of Education, Union Free School District No. 7, N.Y. PERB, 4-3017, Case No. C-0482 (1971).

reemployment of previous summer school teachers: 62 percent of the 1976 summer school teachers had taught summer school in 1975 and 49 percent in 1974. In fact, the district sends notices each spring to its regular teachers and those previously employed as summer school teachers requesting a synopsis of the course that each proposes for the coming summer school session.

Finally, three schools in this district operate on a "45-15" schedule in which school is in session for 45 days and in recess for 15 days. During the 15 day recess period, the district offers students in these schools the opportunity to take special remedial or enrichment classes. Teachers of these intersession, or recess, courses are identical in every respect to summer school teachers except that they teach at different times of the year. Notwithstanding this close identity of interest, the majority includes these intersession teachers in the overall unit but excludes summer school teachers. I find the dissimilar treatment of these two nearly identical groups of employees perplexing at best.

I would, accordingly, include the classification of summer school teachers in the overall unit.

#### Home Teachers

My colleagues find that a community of interest is not sufficiently established between home teachers and other regular classroom teachers in Petaluma district. I disagree.

The majority opinion studiously avoids mentioning the multitude of interests and working conditions which home teachers share with classroom teachers. Four certificated teachers work exclusively as home teachers. In addition, the district supplements the home instruction program by also assigning, whenever possible, regular classroom teachers to provide home instruction. Teachers providing home instruction are all fully certificated personnel who teach the same curriculum, and perform virtually all the same duties performed by regular classroom teachers. They also often teach as many as six students at the same time. Home teachers share common supervision with many of the teachers in the overall unit, and are fully integrated with the remainder of the certificated staff in the day to day performance of their duties. They rely on such persons included in the overall unit as librarians, reading teachers, nurses and school psychologists. Although home teachers, whether regular classroom teachers who perform this work as extra duty or persons who are employed only as home teachers, are paid on an hourly basis, all home teachers are entitled to the same fringe benefits on a pro rata basis as regular classroom teachers.

Some of the characteristics cited by the majority as allegedly distinguishing home teachers from other certificated teachers in the overall unit are misleading. My colleagues claim that home teachers "are not supervised by a school principal as

are regular teachers. Instead, they are supervised by the Director of Instructional Services who is located at the district's main offices". This statement is correct as far as it goes. What the majority fails to disclose is that the Director of Instructional Services also supervises the entire spectrum of special education teachers, all of who are included in the overall unit.

The majority also alleges that home teachers do not have job security in the district. To the contrary, home teachers may qualify for tenure on the same basis as all other certificated teachers. Although, home teachers perform "as needed," the fact is that are needed daily, over extended periods of time. At least one home teacher works full time in the home instruction program.

In the final analysis, there is really very little which distinguishes home teachers from other certificated teachers included in the overall unit. Even the fact that home teachers interact with children on a one-to-one ratio and work outside the classroom are conditions common to persons included within the unit. And where my colleagues are able to identify minor differences between home teachers and other certificated teachers, there is no suggestion that any of these difference will result in conflicts of interest adverse to effective representation in a negotiating unit.

As in Great Neck Board of Education, Union Free School District No. 7, supra., where the New York PERB held that some bound teachers should be included in an existing teachers unit, the weight of the evidence in this case clearly favors inclusion of home teachers in the overall unit of certificated personnel. In Petaluma, the home teachers share a strong community of interest with the members of the negotiating unit and no conflict of interest is apparent which would disturb such a relationship.

On the other hand, the majority's decision to exclude the classification of home teachers from the overall unit leads to unnecessary fragmentation, and denies these admittedly non-casual employees effective representation in a unit of reasonable size.

#### Long-Term Substitutes

As I stated in Belmont, supra., I favor including in the overall unit those substitutes who have a substantial and continuing employment relationship with the district while excluding those whose employment relationship is so tenuous that they have no legitimate concern about those matters within the scope of representation.

All substitutes must possess the appropriate credential, just like regular teachers. They teach in the classroom, just like regular teachers. They are supervised by the principal, just like regular teachers. Long-term substitutes receive a daily rate of pay that corresponds to their placement on the regular



salary schedule, provided they do not earn more than \$50 per day. The duties of long-term substitutes increase as the number of days teaching increases. Instead of following the lesson plans prepared by the regular teacher, long-term substitutes are expected to prepare their own lesson plans; they are expected to take over extra duty assignments, prepare grades, meet with parents if necessary, and consult with other certificated employees regarding students. Occasionally a long-term substitute has become a temporary teacher.

During the 1975/76 school year elementary school long-term substitutes taught between two and 52 consecutive days beyond the ten consecutive days required to be classified as a long-term substitute and high school long-term substitutes taught between four and 63 consecutive days beyond the ten day requirement. Thus, long-term substitutes taught between 14 and 73 consecutive days during the 1975/76 school year. It is clear in this case whether any of all of these people also taught as day-to-day substitutes. However, since all substitute, both day-to-day and long-term, are selected from the same list, it stands to reason that at least some of the long-term substitutes also taught as day-to-day substitutes.<sup>24</sup>

We have included in the overall certificated unit part-time teachers who teach less than 51 percent of a full-time assignment and temporary teachers hired under a contract. Belmont, supra. If we could include these people in the overall unit in Belmont, I see very little reason to exclude substitutes who teach a semester or more; I see no meaningful distinction between those persons on a contract and those not on a contract who work the same or equivalent amounts of time performing the same duties. As I stated in Belmont, I favor devising a formula which would permit those substitutes with a substantial and continuing employment relationship to be represented in the overall certificated unit. Perhaps an appropriate line of demarcation and one consistent with our holdings on other part-time teachers would be to include in the overall unit those substitute teachers who teach a semester or more.

#### Adult Education Teachers

While I agree with the majority that the classification of adult education teachers should be excluded from the overall certificated unit, it failed to discuss several critical factors.

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<sup>24</sup> Thirty-eight substitutes worked between one and ten non-consecutive days during the 1975/76 school year; eight between ten and 20 days; three between 20 and 30 days; two between 30 and 40 days; three between 40 and 50 days; and five worked over 50 non-consecutive days. Fifty-four high school substitutes worked between one and ten non-consecutive days; 21 between ten and 20 days; nine between 20 and 50 days; and 13 worked over 50 non-consecutive days during 1975/76 school year.

The graveman of my disagreement rests with the majority's failure to distinguish the adult education program from the regular K-12 program. Unlike the summer school program, the adult education program is not integrated with the regular K-12 program. Adult education teachers do not attend faculty meetings, either their own or those of the regular teachers. Nor do they interact in any formal way with regular teachers. They are required to give grades only when a course is being taken for credit toward a high school diploma; even here, however, the adult education teachers are not required to follow the same course guidelines established for the same course taught in the regular program. Adult education teachers are not evaluated pursuant to the Stull Act. Unlike regular teachers, the salary schedule for adult education teachers does not allow for increased compensation for post graduate education.

The interests and concerns of adult education teachers are quite different from those of other certificated personnel with respect to several matters within the scope of representation -- wages, hours of employment, class size and evaluation procedures. Thus, although there is some overlap between regular certificated employees and adult education teachers, I do not think this overlap, unlike that of summer school teachers, is substantial enough to protect the discrete rights and interests of adult education teachers. Rather, I view their differences as more significant than their common characteristics and conclude that these differences, taken together, indicate the strong possibility of conflicting employment interests adverse to effect representation.

The district argues strenuously against a separate unit for adult education teachers, claiming that "...there are serious and perhaps disastrous, consequences if EERB begins to fragment the certificated and classified employees into small groups." Yet the district offers little evidence on the actual consequences of fragmentation. Its concern for the consequences of over-fragmentation apparently vanishes when it concurrently argues against inclusion of summer school, home education and long-term substitute teachers.

Jerilou H. Cossack, Member

