STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Employer, and OAKLAND EDUCATION ASSOCIATION, CTA/NEA, Employee Organization.	)	Case No. SF-R-200X PERB Decision No. 102 September 20, 1979

Appearances: Michael Sorgen, Legal Advisor for Oakland Unified School District; Duane Beeson, Attorney (Beeson, Tayer, Kovach and Bodine) for Oakland Education Association, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Oakland Unified School District (hereafter District) to the attached hearing officer proposed decision. The District has excepted to the hearing officer's decision that the following unit is appropriate for meeting and negotiating:

> All certified substitute teachers, who are on the Oakland Unified School District's current active list and who have worked in the current year or the prior year. This unit includes K-12, adult education, and children's center substitutes.

It argues that per diem substitues are not "employees" under the Educational Employment Relations Act (hereafter

EERA),[1] and that no appropriate unit of substitutes can be established.

Thus, the issue before the Board is whether a separate unit of substitute teachers is appropriate for meeting and negotiating. A majority of the Board finds, for different reasons, that a separate unit of substitute teachers is not an appropriate unit under the EERA.

Based on the entire record in this case, the Board adopts the procedural history and findings of fact contained in the attached proposed decision.

DISCUSSION

I believe that the hearing officer was incorrect in finding a unit of substitute teachers to be appropriate for meeting and negotiating. I continue to adhere to my opinion, set forth in my dissent in Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No. 84, that the EERA does not require this Board to extend negotiating rights to groups whose employment relationship with any particular school district is as attenuated as that of per diem substitutes. The facts in this case are not sufficiently different from those in Palo Alto/Jefferson to require a

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[1]The EERA is codified at Government Code section 3540 et seq. All statutory references hereafter are to the Government Code.

different analysis; I will not here repeat the arguments I made in that case.

I additionally note, however, that in this case, the alternatives of either placing substitutes in the same units with regular teachers or placing all substitutes in one separate unit would result in some substitutes being represented in two negotiating units in the Oakland District, since some full-time K-12 and children's center teachers work as substitutes in the adult education program and some adult education substitutes are on the K-12 or children's center substitute list. For example, under the first alternative unit structure, a regular K-12 teacher who moonlighted as a substitute in the adult education program would potentially be in two units: a K-12 unit of regular and substitute teachers and an adult education unit of regular and substitute teachers.[2] Under the second alternative structure, the same teacher would also be in two units: a K-12 unit and a substitute unit.

In Palo Alto/Jefferson, I stated that because substitutes often work in more than one district, the majority's decision

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[2]There is currently no unit of adult education teachers in the Oakland District. However, the United Teachers of Oakland, AFT, Local 771 has requested recognition in a unit of all certificated hourly, non-contracted adult education employees, while the Oakland Education Association has requested recognition in a unit of all certificated hourly employees not included in the Units A (K-12) and B (children's center) and the substitute unit.

giving substitutes full negotiating rights would give them "several bites at the taxpayers' apple." This is true in the present case as well; many substitutes work in several districts. But in this case, some substitutes would be in two units in the same district and would be in a position to get "two bites at the same taxpayers' apple." I believe that this would be an absurd result and should be avoided by recognizing that substitutes do not have a sufficiently substantial and continuing relationship with a district to justify extending negotiating rights to them.

In this case, a new issue is raised as to whether substitutes and regularly employed teachers for whom they substitute can be appropriately included in the same units.[3] In my opinion, substitutes are not "classroom teachers" within the meaning of section 3545(b)(1).[4] (Peralta Community

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[3]Currently there are two units of certificated employees in the Oakland Unified School District: K-12 and children's center employees. Requests for recognition in a unit of adult education teachers have been filed. See note 2, ante.

[4]Section 3545(b)(1) states:

> In all cases:
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> 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.

College District (11/17/78) PERB Decision No. 77, concurring opinion.) However, even under the majority's theory in Peralta, I would find that a unit of substitutes and regularly employed teachers does not meet the criteria in section 3545(a).[5] I believe that creation of such units would be totally antithetical to the Legislature's command that the Board consider community of interest in determining unit appropriateness.

As I stated in my dissent in Rio Hondo Community College District (1/25/79) PERB Decision No. 87, relative to community of interest:

> [T]he purpose of examining community of interest in making unit determinations is to group together employees with mutual interests in terms and conditions of employment so that conflicting interests do not impede effective representation. (P. 18)

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[5]Section 3545(a) states:

> 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.

It seems clear to me that substitutes and regularly employed teachers have sufficiently disparate interests arising from their different employment conditions to make effective representation of both groups in the same unit very difficult. When two groups have completely different employment conditions, their negotiating priorities are also likely to differ significantly. For example, substitutes, who currently receive no benefits, may want health insurance, while teachers may place greater importance on a salary raise. While such conflicts may arise in any unit, I do not believe that we should create units in which severe conflicts in priorities are almost assured.

In addition, the two groups have at least one diametrically opposed interest--salaries. In the event that a teacher is absent long enough to exhaust his/her sick leave, that teacher is then paid the difference between a full-time teacher's salary and the cost of a substitute for the next 100 days. Clearly, teachers have a direct interest in keeping the costs for substitutes as low as possible, while substitutes have an interest in higher wages and benefits. Such a direct conflict could cause severe divisiveness within a unit, thus rendering an exclusive representative's task of fairly representing the unit almost impossible.

I continue to believe that substitutes are not employees entitled to negotiating rights under the EERA. However, since

the majority, in Palo Alto/Jefferson, has granted substitutes such rights, I believe it is necessary to state that the way to implement this decision is not to place substitutes and teachers in the same unit, a solution which can only fail "to promote the improvement of personnel management and employer-employee relations within the public school system . . .". (Gov. Code sec. 3540.)

Raymond J. Gonzales, Member

The concurring opinion of Chairperson Gluck begins on page 8.

Harry Gluck, Chairperson, concurring in result:

I would dismiss the petition for a separate unit of substitutes with leave to petitioner to file a request for unit modification under Board rule 33260 et seq.[1]

In the consolidated cases of Palo Alto Unified School District and Jefferson Union High School District (1/9/79) PERB Decision No. 84 the Board, by majority vote, established a separate unit of substitute teachers. That decision was principally founded on the conclusion that the authorization of such units was essential to avoid "potential disruption" of relationships between the District and the exclusive representatives of existing units of "regular" teachers. In Palo Alto, an employee organization other than the petitioner represented the regular unit, though in Jefferson, the petitioner also represented the regular unit. In each case, long-term negotiated agreements were in force in the previously established units.

The facts here are somewhat different. CTA, the petitioner, represents two existing units, one of regular, full-time teachers (hereafter regular teachers) and another of children's center teachers. The latter unit was established upon a finding that regular teachers and children's center

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[1]California Administrative Code, title 8, sections 33260-33266.

teachers lacked sufficient community of interest to include both groups in one unit. See Oakland Unified School District (3/28/77) EERB Decision No. 15. Each of these units is covered by an agreement expiring on June 30, 1980.[2]

It is also relevant to note that the PERB order in Palo Alto/Jefferson was dated January 9, 1979, prior to the effective date of unit modification rules adopted by the Board.[3]

In the present case, three separate "categories" of substitute teachers are identified in the record: regular teacher substitutes, children's center substitutes and adult education substitutes. Further, there is evidence that

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[2]Notice is taken of PERB's records which indicate that the United Teachers of Oakland, AFT (hereafter AFT) has filed a petition for a unit of "all certificated hourly, noncontracted adult education teachers", and that CTA has intervened for employees other than those in the existing units and the substitutes included in its current petition. No hearing has yet been held on AFT's petition. The possibility is thus raised that the District, should CTA's present petition be granted, will eventually be obligated to negotiate substitute and nonsubstitute teachers' issues, not only in separate units but with separate employee organizations. Obviously, evidence as to the impact of such an obligation on operational efficiency is not before the Board. I do consider the question as further justification for the conclusion reached and the order I would recommend.

[3]These rules have since been modified and adopted as emergency measures effective on 6/14/79. California Administrative Code, title 8, sections 33260-33266, supra at fn. 1.

substitutes actually cross categorical lines and that some regular teachers are also employed as substitutes from time to time.

The hearing officer, in proposing a unit of all substitutes, found a sufficient community of interest among the three categories. In view of Oakland Unified School District, supra, EERB Decision No. 15, two related questions are raised by that finding: do substitutes assume the community-of-interest characteristics enjoyed by those whom they replace, or are their interests sufficiently disparate from those of regular teachers to mandate unit segregation?

The hearing officer did not consider the question of community between the various teachers and their substitutes, since the parties did not pursue that issue. The record nevertheless contains sufficient evidence to conclude that such a community of interest does indeed exist. The District described the duties and working conditions of substitutes in considerable detail. Furthermore, exhibits in the record, especially the substitutes' "handbook" published by the District, support the conclusion that a community of interest does exist. The facts in this case are comparable to those in Palo Alto/Jefferson wherein the Board majority reached the conclusion that substitutes are employees under the EERA. The finding there, as I find here, is that substitutes are an integral part of the instructional function of the District,

performing the same work and under the same general conditions as do the teachers they replace. They teach the same courses, deal with the same students and perform, as circumstances require, virtually all of the replaced teachers' duties. As the hearing officer found, "[a] substitute is supposed to assume the role of the absent regular teacher as completely as possible." (Proposed decision, p. 7.) The very word "substitute", defined as "one who takes the place of another",[4] testifies to such community. On a day-to-day basis, the most significant differences are the availability and frequency of employment.

The primary question is whether an employee brought in to fill the vacancy of an absent member of a bargaining unit should be placed in a different unit. Only extraordinary circumstances would justify creating a separate unit for those substitute workers.

Even though the hearing officer's finding of community among the various substitutes may be correct, it is not inconsistent with a finding that a community of interest also exists between substitutes and the teachers for whom they substitute, making that combination a more appropriate unit.

A question remains as to whether inclusion of substitutes in the existing units would create the "potential for disruption" the Board was concerned with in Palo Alto/Jefferson. There is no evidence here that such would

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[4]Funk and Wagnall's Standard College Dictionary (1973) p. 1335.

be the case. The collective agreements presently in effect will expire in June 1980. Negotiation of supplementary agreements covering substitutes would impose no greater burden on the parties than would negotiating a separate agreement for them should a comprehensive substitute unit be established. Nor, in the future, would a single set of negotiations for permanent employees in each of the existing units and their substitutes present greater potential for disruption or have a more adverse impact on operational efficiency than would bifurcated negotiations based on unit segregation.
In this case the record reflects some crossing of categorical lines by the substitutes and regular teachers who also act as substitutes. Thus, a separate unit of substitutes would lead to individual regular teachers being placed in two or more negotiating units and being covered eventually by two or more agreements. I do not see this possibility as beneficial to the efficiency of District operations.[5] While this may still occur if the substitutes are added to the existing units, there is in such a possibility at least no greater potential for harm.

For these reasons, I would dismiss the petition for a separate substitute unit as inappropriate in light of the

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[5]See Government Code section 3543.5(a) which specifies efficiency of operations as one criteria to be considered by the Board in unit determinations.

Board's previous holding in Oakland Unified School District, supra, EERB Decision No. 15, the evidence of an existing community of interest among substitutes and the employees for whom they fill in, and the absence of evidence indicating that such a separate unit is necessary to avoid disruption in employee relations or to protect the efficiency of District operations. Dismissal would be with leave to CTA to file petitions for unit modification to include substitutes in the appropriate comparable existing units. I would also direct the general counsel to consolidate the hearings on such petitions, if filed, with the hearing of AFT's petition, should he find overlapping issues.[6]

Harry Gluck, Chairperson

The dissenting opinion of Board Member Moore begins on page 14.

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[6]SB 1122, a proposed amendment to EERA currently under consideration, would amend section 3545 to prohibit units of only substitutes. By noticing this matter, I do not imply that a proposed amendment to an existing statute may be considered as evidence of legislative intent. I do note, however, that on the one hand the conclusion I reach here would conform to legislative requirements should that amendment pass; on the other hand, that amendment's failure would not make this conclusion inconsistent with current legislative direction.

Barbara D. Moore, Member, dissenting:

I would affirm the hearing officer's decision to establish a separate unit of substitutes as requested by the petitioner, Oakland Education Association, CTA/NEA (hereafter OEA or CTA). In reaching his decision, the hearing officer relied on the consolidated cases of Palo Alto Unified School District and Jefferson Union High School District (1/9/79), PERB Decision No. 84. I do not believe there are sufficient differences between the facts in that decision and those in the instant case to warrant a different conclusion.

I agree with the holding in Palo Alto/Jefferson, supra, that substitutes are employees under the Educational Employment Relations Act (hereafter the Act or EERA).[1] In that case, the Board examined section 3540.1(j) of the Act which defines the term "employee" as follows:

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, appointed by the Governor of this State, management employees, and confidential employees.

Noting first that substitute teachers are not specifically excluded from coverage under the section, the Board examined

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[1]The Educational Employment Relations Act is codified at Government Code section 3540, et seq. All section references herein are to the Government Code.

the role of substitutes and concluded that substitutes "as a class form an integral, essential component of the instructional staffing program." The Board decided that the "continuing role" and the "important staffing function" performed by substitutes provided a substantial basis for finding that the coverage and representational rights of the EERA were meant to apply to these employees. I agree with that result.

Having determined that substitutes are employees under the Act, the next question is the appropriateness of the unit of substitutes petitioned for herein. Were the Board to apply the policy established in Peralta Community College School District (11/17/78) PERB Decision No. 77, there would be a rebuttable presumption that substitutes would not be placed in a unit separate from other teachers. However, based on the specific factual circumstances in Palo Alto/Jefferson, the Board declined to follow Peralta because it determined that retroactive application of that decision would disrupt the parties' existing relationships. In analyzing this case, I find no reason to speculate whether a possible future unit of substitutes and the teachers they replace would pose a greater potential for disruption than the separate unit of substitutes as requested herein.[2] Rather, the instant case arose in

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[2]Dismissing the petition with leave to request unit modification in the future implies that this option was

substantially the same factual context and warrants the same analysis as Palo Alto/Jefferson where the factors considered by the Board were: the existence of negotiating units which specifically excluded substitutes, the existence of contracts between the districts and the exclusive representatives, and the existence of recognition clauses in those contracts that specifically excluded substitutes.

The same factors are present in the instant case. Negotiating units which exclude substitutes have been established in the Oakland Unified School District. (See Oakland Unified School District, 3/28/77 EERB Decision No. 15.) Contracts are in existence covering employees designated as units A and B.[3] These contracts include

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heretofore unavailable to petitioner. Although the specific requirements have varied, there have been provisions for unit changes as early as July 6, 1976. (See California Administrative Code, tit. 8, section 33260, enacted in July 1976, and amended November 1978, February 1979 and July 1979.) Without speculating as to how this Board would have treated a request for unit modification from OEA, I find it persuasive that OEA did not submit such a request and as late as July, 1979, in its petition for intervention, appears to have reaffirmed its desire for a separate unit of substitutes.

[3]OEA currently represents Unit A, which includes all classroom teachers, teachers on special assignments, counselors, librarians, nurses, psychologists and adult education teachers under contract. Unit A specifically excludes substitutes. OEA also represents Unit B, which includes children's center teachers, teacher assistants and assistant supervisors. This unit also specifically excludes substitutes.

recognition clauses that specifically exclude substitutes. The agreements expire on June 30, 1980, the same date the contracts expired in Palo Alto/Jefferson, supra.

In this case, the petitioner OEA represents the employees in the units of regular classroom teachers (K-12), adult education teachers under contract and regular teachers in the children's centers. The chairperson noted that in the Palo Alto case an employee organization other than the petitioner represented the employees in the regular teachers unit. While the hearing officer in Palo Alto did find that the Substitute Teachers' Section was an employee organization distinct from the Palo Alto Educators Association with which it was affiliated, the organizational identity of the petitioner was not cited as an element in the Board's rationale for its disposition of the case. Neither is it central to my analysis here. It is the existence of units under contract that most aptly foretells disruption, not whether the petitioner represents those units.

I join my colleagues in taking official notice of the fact that recognition of a unit of certificated, non-contracted adult school teachers was requested by the United Teachers of Oakland, AFT Local 777, on June 11, 1979. OEA intervened on June 21, 1979, requesting a unit of certificated hourly employees specifically excluding those employees in units A and B outlined above as well as the substitutes which comprise the

unit requested herein. I do not find, however, that the lack of an established unit of non-contracted adult education teachers is sufficient cause to reach a result different from that in Palo Alto/Jefferson, since as to regular classroom teachers (K-12), adult education teachers under contract and children's center teachers, potential disruption is envisioned because established, recognized units exclusive of substitutes are in place and under contract.

Following the Board's precedent in Palo Alto/Jefferson, I find that the retroactive application of the Peralta presumption is unwarranted in the instant case. It now remains to determine if a unit of substitutes as petitioned for is appropriate in light of the criteria set forth in section 3545(a) of the EERA.[4] I am in agreement with the hearing officer's proposed decision which finds that regular substitute teachers, children's center substitutes and adult education substitutes share a community of interest. The

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[4]Government Code section 3545(a) provides in pertinent 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.

record shows similarities among substitutes with regard to hiring procedures, working conditions, supervision, qualifications, duties and responsibilities, and evaluation procedures.[5] The hearing officer's detailed analysis of these factors, based on the testimony introduced at the hearing, provides persuasive support for establishing a separate unit of substitutes and is incorporated herein. I reject, as did the majority in Palo Alto/Jefferson, the assertion that because of the alleged "casual" nature of the substitutes' working relationship with the Oakland School District, the petitioned-for unit should be denied. Consistent with applicable decisions arising under the National Labor Relations Act (hereafter the NLRA), I find that, as a class, substitutes have a reasonable expection of re-employment based on the District's continuing need for the services of substitutes. (Trans World Airlines, Inc. (1974) 211 NLRB 733 [86 LRRM 1434]; Wm. J. Keller, Inc. (1972) 198 NLRB 1144 [81 LRRM 1048].) Moreover, I find that the flexibility and irregularity of the substitutes' service for the district characterizes common concerns not shared by regular teachers and underscores the community of interest that they share.

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[5]I note that in excluding both children's center and K-12 substitutes from the unit of regular full-time certificated employees in Oakland Unified School District, No. 15, the Board found that these two groups of substitutes' working conditions were essentially the same.

Chairperson Gluck recognizes these common concerns since he notes that "the most significant differences" between the regular teachers and the substitute teachers are their "availability and frequency of employment." Likewise, were Dr. Gonzales to grant substitute teachers coverage under the EERA, his opinion advises that the substitutes' community of interest warrants their placement in a separate unit.

With regard to the District's argument that establishment of a unit of substitutes would impair the District's efficiency of operations, I find that the District seems to object to any action granting collective negotiating rights to substitutes rather than offering factually supported evidence of proliferated units. I note with approval the hearing officer's finding that the comprehensive substitute unit, rather than three separate units, may well work to further the efficiency of the District's operations.

Finally, I do not find that the formation of the substitute unit is impeded by the fact that some full-time teachers may also act as substitutes and, as a result, may be members of two units and eventually may be covered by two negotiated agreements. Such an argument ignores the basic tenet of labor law which focuses questions concerning appropriateness of units on the employment classification or position, and the working conditions which attach thereto, rather than on the specific individual employees who occupy those positions. In

discussing appropriate bargaining units under the NLRA, Gorman in Labor Law-Basic Text states:

> Several important and sometimes misunderstood features of this statutory design should be noted. First, the unit is comprised of jobs or job classifications and not of the particular persons working at those jobs at any given time. (p. 66)

The result in this case is consistent with this principle and in accord with cases under the NLRA holding that individual employees are appropriately included in a bargaining unit even where they are also employed by another employer. (Henry Lee Co. (1972) 194 NLRB 1107 [79 LRRM 1159]; All-Work, Inc. (1971) 193 NLRB 918 [78 LRRM 1401].) To suggest that approving separate negotiating units which may have individual employees as common members would generate conflict minimizes the fact that, even if placed in a single unit, any agreement must address the potentially divergent interests urged by the regular and the substitute unit members.

Based on the foregoing, I would affirm the hearing officer's determination that the unit of subtitutes requested by the petitioner is an appropriate unit based on the criteria in the EERA and consistent with PERB precedent.

By: Barbara D. Moore, Member

ORDER

RE: OAKLAND UNIFIED SCHOOL DISTRICT

CASE NO. SF-R-200X

The Public Employment Relations Board has determined and ordered that:

1. The petition filed by the Oakland Education Association, CTA/NEA, in the Oakland Unified School District, Case No. SF-R-200X, for a separate unit of substitutes as described below is hereby dismissed.

2. In the above-captioned case, the following unit is not appropriate for the purpose of meeting and negotiating:

   All certified substitute teachers, who are on the Oakland Unified School District's current active list and who have worked in the current year or the prior year. This unit includes K-12, adult education, and children's center substitutes.

Public Employment Relations Board

by

J. STEPHEN BARBER
Executive Assistant to the Board

9/25/79

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND UNIFIED SCHOOL DISTRICT, Employer, and OAKLAND EDUCATION ASSOCIATION, CTA/NEA, Employee Organization.	Case No. SF-R-588 PROPOSED REPRESENTATION DECISION May 3, 1978

Appearances: Michael Sorgen, Legal Adviser for Oakland Unified School District; Duane Beeson, Attorney (Brundage, Beeson, Tayer and Kovach), for Oakland Education Association, CTA/NEA.

Before Michael J. Tonsing, Hearing Officer.

PROCEDURAL HISTORY

On September 1, 1977, the Oakland Education Association, CTA/NEA (hereafter OEA) filed a request for recognition with the Board of Education of the Oakland Unified School District (hereafter District). The request sought the following unit:

> All regular certificated substitute teachers who work day-to-day, part-time, or long-term. (Long-term defined as having worked 20 or more consecutive days.)
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> All substitutes in Children's Centers and Adult Day and Evening Schools.

On October 3, 1977, the District filed with the Public Employment Relations Board, formerly the Educational Employment Relations Board (hereafter PERB), its Petition for Board Investigation asking the Board to determine the appropriateness of the unit requested by OEA. A formal hearing was conducted on November 30, 1977.

ISSUES

The parties stipulated that the following issues are in dispute:

1. Whether per diem substitute teachers are employees within the meaning of the EERA with a right to negotiate with the public school employer?

2. If so, can or should an appropriate unit be established?

3. If an appropriate unit can and should be formed, what is the appropriate composition of that unit?

4. If there is an appropriate unit, which members are eligible to vote for an exclusive representative?

As to the fourth issue the parties also stipulated that if a separate unit is found appropriate, the test of eligibility to vote for the exclusive representative shall be that the substitute must be on the current active list of the District and have actually worked a minimum of nine days between the beginning of the 1976-77 school year and the date of the election.

FINDINGS OF FACT

The District hires per diem substitutes other than contract substitutes,[1] from lists that are created annually. The

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[1]Contract substitutes are kept on a salary and are available for work with the District during the school year. These substitutes are in the District's present certificated classroom teacher unit, which was created by Board decision in Oakland Unified School District (3/28/77) EERB Decision No. 15. The Board excluded only per diem substitutes from the certificated classroom teacher unit in this decision.

lists are made up of credentialed teachers who have been approved for employment after an interview.[2] According to Dr. William Weichert, coordinator of certificated personnel for the District, the active K-12 list includes 481 substitutes, the active Children's Center list includes 83 to 87 substitute teachers and the active Adult Education Center (AEC) list includes approximately 280 substitute teachers. Mrs. Georgia Culbreth, the substitute teacher clerk, says that the Children's Center list has only 25 teachers and the K-12 list has between 400 and 500 teachers.[3]

The District recruits substitutes through placement offices, employment offices, and the recommendation of teachers and administrators. The K-12 active list expands throughout the school year by the addition of 40 to 50 persons each week, offset by the deletion of approximately ten persons each week. During the year this list may be built up to as many as 700 substitutes. Substitutes are deleted from the list primarily on their own initiative and are either put temporarily on the inactive list or removed altogether. If a teacher refuses five or six assignments in a row, the District will place that substitute on the inactive list. In circumstances in which a

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[2]The record is not clear as to who decides, ultimately, to hire or not to hire substitutes.

[3]This disparity can be explained by the testimony of both witnesses that the size of the substitute lists changes frequently. It is not necessary to make a conclusive finding about the size of the lists because none of the disparities will affect the legal conclusions herein.

substitute is considered incompetent or has allegedly broken District rules, he or she may be terminated from the list for that reason.[4] Substitute teachers are automatically terminated at the end of each year. At the end of the school year a letter is sent by the District to each substitute telling them to submit a new form in order to be put on the list the following year. If a substitute's credential needs to be renewed, the substitute clerk makes sure they get the forms to do this. Substitutes with valid credentials who ask to be put on the next year's list will be put on that list.

Each year approximately one-half of the persons on the list the year before return.[5]

An entirely separate but apparently similar procedure is used for the hiring of adult education substitutes and a separate list is kept by the adult education office.

There is no way to specifically predict in advance what the substitute needs will be on a particular day, but the demand does follow a consistent pattern. Mrs. Georgia Culbreth, the substitute clerk, gave testimony about the amount of time

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[4]There is a follow-up interview with the substitute. This sort of termination generally results from a complaint by the principal of the school to which the substitute has been assigned.

[5]The record is unclear on exactly how many substitutes come back. Mrs. Georgia Culbreth says "at least 200" and "about one-half". The list of the year is variously described as containing 400-500 and 700 teachers. Apparently between 200-350 substitutes return the next year, with the core group consisting of 200 reliable persons who return year after year.

typically worked by substitutes during a year. On an average day, 100 to 200 substitute assignments are made. Typically, 250 to 300 calls must be made to fill all the assignments. As a result of this volume, approximately 200 individual substitutes each work more than half of the school days during the year. This is based on an active K-12 list of about 480 substitutes. Of the remaining 280 substitutes, most of these individuals work twice a week or maybe three times a week if they are available. But of this number, 100 or 150 will work less than one-quarter of the school days. According to the uncontradicted testimony of Mrs. Culbreth, when a substitute works as few days as this, it is almost always because that substitute has made himself or herself unavailable for various periods during the school year. Furthermore, even though many substitutes limit their availability, it is quite uncommon for a substitute on the active list to serve fewer than ten days during a year.

On the other hand, it is rare for a substitute to work more than 75 percent of the time. The apparent reason is that Education Code section 13337.3 gives substitutes who work more than 75 percent of the school days eligibility for permanent positions that might become available the following year, and the year in which they serve 75 percent or more of the school days is considered a probationary year for purposes of establishing permanency in the full-time position. For this

reason, substitutes are generally not asked to work more than 75 percent of the time unless they are favored for employment as a regular teacher. Approximately three substitutes in the K-12 group worked more than 75 percent of the school days last year.

Substitutes are allowed to, and often do, work in other districts. Approximately 50 percent of the substitutes are also working in other districts. Adult education substitutes may also have regular teaching jobs during the day, and, consequently, some adult education substitutes are already in a bargaining unit for full-time teachers. Adult education substitutes may also be on the regular K-12, or children's center substitute list.

Substitutes are assigned on either a long term[6] or a day-to-day basis. Particular substitutes are given particular work assignments primarily on request of the classroom teacher or the school administrator. If a specific substitute is not requested, or the requested substitute is not available, the substitute clerk and assistants make the assignment by matching experience and background and teacher preferences for schools, grades, and location as closely as possible. Separate lists are used for secondary and elementary substitutes because, for

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[6]More than twenty days in the same assignment is the definition of long term. Long term substitutes are paid more per day. A regular day-to-day substitute receives $38.75 per day. A long-term substitute receives an increase to $47.50 per day. The testimony in this regard was not qualified to suggest any difference in payment among K-12, adult education, and children's center substitutes.

secondary substitutes, subject matter competence is a relevant selection criterion, while for elementary substitutes it usually is not. Substitutes have the right to refuse assignments, including long term ones. Long term assignments in particular are often made by request of the principal or the regular teacher. Substitutes may or may not favor long term assignments, depending on their personal circumstances.

A substitute is supposed to assume the role of the absent regular teacher as completely as possible. Substitutes carry on the program that the regular teacher has set up for the class, following the lesson plan, if there is one. All substitutes have the authority to give exams and grades. When a substitute is in the same position for ten consecutive days, an evaluation by a site administrator is required. Forms similar to that one used for the regular teacher evaluations are filled out. Substitutes may rebut the evaluation if they wish. Evaluations are then placed in the substitute's personnel file. A bad evaluation may lead to an interview to discuss the problem and, eventually, removal from the substitute list. Good evaluations may lead to substitutes being given preference when regular teaching vacancies occur. Substitutes receive no fringe benefits (sick leave, health benefits) but the teachers retirement system is available to them. Long term substitutes are responsible for developing a teaching plan, attending school meetings, and involving themselves in curriculum development. Day-to-day substitutes have none of these responsibilities.

Records are kept for each substitute. The number of days worked is recorded, and a record is kept of the locations at which the substitute has worked, and the positions worked in at each location. A regular personnel file is maintained. A record of the substitute's credential is kept, but not a complete employment history.[7] All substitutes are paid two times a month. All the usual legal deductions are made from the substitute's check, and substitutes can, and do, authorize deductions for organizational dues. (This is the opinion of Dr. William Weichert.)

There are occasions where the regular teacher, in effect, "pays for" the substitute teacher. In the event that a teacher has a prolonged illness and exhausts his or her sick leave, that teacher is then paid the difference between a full-time teacher's salary and the cost of the substitute for the following 100 working days.

In the past, under the Winton Act's[8] meet and confer proceedings, the District discussed substitute issues with the certificated employee's council (hereafter CEC). Some of the organizations represented on the CEC had substitute teachers among their membership. Among matters discussed was the question of whether a preference should be given to qualified substitutes in filling permanent vacancies, the question of

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[7]A complete employment history is kept for regular teachers.

[8]Cal. Ed. Code section 13080 et seq., repealed, Stats. 1975, ch. 961, section 1, effective July 1, 1976.

whether teachers should have the opportunity to request particular substitutes, and whether the workload was to be equitably distributed by calling substitutes on a rotation basis. Substitute issues were included in the memorandum of understanding between the District and the CEC. The present negotiated agreements with the full-time teachers bargaining units do not include any matters directly relating to substitutes. Currently, substitutes do present "grievances" to the most appropriate one of several different people. Dr. Weichert resolves substitute grievances concerning disputes over the exact number of days a substitute has worked, complaints that someone else has been given preference though the complainant is better qualified or had worked with the District longer, and deals with questions as to why a substitute has not been given a regular job in the District. The most frequent complaints concern work evaluations made by the site administrator. Dr. Weichert handles fifteen to twenty such grievances a year. Mr. James R. Wilson, Coordinator of Staff Relations, has handled, on behalf of the District approximately three grievances from the certificated substitutes in the last seven years. These grievances were brought under a grievance procedure that was a consequence of the Winton Act meet and confer process.[9] The Oakland District already has eleven units, two of which are units of

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[9]The record is silent on the question of whether this "grievance procedure" has been informally retained or not.

certificated employees.[10] None of the units include any substitute employees. Some members of the K-12 unit also substitute from time to time. Mr. Wilson anticipates that if a substitute unit is certified the following problems will arise:

a) The District will have a problem determining who is being represented, due to the transiency of the work force;

b) Problems will be created because some unit members will not be "true" substitutes, in that they are regular full-time teachers using substituting as a secondary source of income;

c) The District will be burdened by having to negotiate with another unit;

d) The District will have to schedule additional clerical time and keep additional records in order to accommodate another unit;

e) Problems may be created for the District because of uncertainty about the number of days substitutes will work;

f) There might be more grievances filed with the District;

g) The District will have great difficulties negotiating health benefits;

h) Budgetary uncertainty will be imposed on the District due to uncertainty concerning the composition of the substitute unit;

i) Budgetary uncertainty will be imposed on the District due to the question of possible leaves for substitutes.

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[10](a) a unit of K-12 teachers, (b) a unit of children's center employees.

DISCUSSION AND CONCLUSIONS OF LAW

1. Per diem substitute teachers are employees within the meaning of the EERA with a right to negotiate with the public school employer

The District argues that per diem substitutes are not "employees" within the meaning of Government Code section 3540.1(j), because they have no written contracts,[11] and because they are not employed in "positions" within the meaning of that term as it is used in the Education Code. The hearing officer does not agree and finds instead that per diem substitute teachers are employees within the meaning of the EERA and therefore have a right to negotiate with the public school employer.

Government Code section 3540.1(j) defines "employee" thusly:

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

On its face, this language seems to include per diem substitute teachers. The role of substitutes has a number of commonly accepted indicia of employee status. These substitutes perform services for the District; they are on the public payroll; deductions are made from their paychecks; they are formally evaluated after 10 days of service; a personnel file is kept for each one of them. Furthermore, the teachers retirement

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[11]See Wood v. Los Angeles City School District (1935) 6 Cal.App.2d 400 [44 P.2d 644] in which the court found that the term "employed" as used in the California Education Code implies the existence of a written contract.

system is available to them. In the past, substitutes have brought grievances under a procedure adopted under the Winton Act; they presently make complaints to Dr. William Weichert, coordinator of certificated personnel in the District.

In light of these indicia of employment, to exclude per diem substitutes from the coverage of the EERA would require some basis in the language or intent of that statute.[12] The language of the statute, however, indicates no such intent. Section 3540.1(j), contains explicit exclusions from the statutory definition of "employee", but "per diem substitutes" is not among them. It must be presumed in the absence of other information that the Legislature intended to exclude only those categories specifically mentioned.

Section 3540.1(j), does not by its terms require a written contract, and case-law interpretations of the term "employee" as used in the Education Code need not be read into the EERA. The purposes of the two acts are quite different and their

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[12]To date the Board has not excluded any employees from coverage under the Act other than those excluded by the terms thereof, i.e., management and confidential. In Pittsburg Unified School District (10/14/76) EERB Decision No. 3, p. 6, the Board refused to exclude noon duty supervisors from the classified employees unit even though Ed. Code section 45103 (former sec. 13581) excludes noon duty supervisors from the classified service. In Lompoc Unified School District (3/17/77) EERB Decision No. 13, p. 20, a concurring opinion stated that the EERA "indicates an intent to make negotiating rights broadly available." For this reason, the exclusion of persons from all rights as management employees was viewed "narrowly." In excluding confidential employees the Board has limited their number to a "small nucleus of individuals." Sierra Sands Unified School District (10/4/76) EERB Decision No. 2, p. 2.

respective definitions of "employee" diverge in other areas. For example, section 3540.1(j) specifically excludes confidential employees, a class of persons who are unquestionably "employees" within the meaning of that term as used in the Education Code.[13]

In other states using similarly broad definitions of "employee" in their public sector employee bargaining laws, the majority in which applicable precedent has been found hold that per diem substitutes are "employees." Eugene Substitute Teachers Organization v. Eugene School District 4-J (Oregon 1976) 1 PECBR 716, aff'd. sub nom Eugene School District No. 4-J v. Eugene Education Association (Oregon Ct. App. 1977) 572 P.2d

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[13]In any event a reading of Education Code section 44917 which states:

> Except as provided in Sections 44888 and 44920, governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. [emphasis added]

shows that that section arguably includes per diem substitutes as "employees". The District's other argument, that a person must have a "position" to be employed is not persuasive, but if it otherwise were, section 44917 refers to substitutes as being "employed in positions". But, as mentioned above, the Education Code use of the word "employee" is not ultimately determinative of the issue under consideration - negotiation rights under the EERA, since a person might well be considered an employee for one purpose but not for another.

650; Philadelphia School District (Pa. 1975) 5 PPER 113; Milwaukee Board of School Directors (Wisc. 1969), Decision No. 8901; Reese Public School District (Mich. 1969) 1969 MERC Lab. Op. 253. Cf. Roncocas Valley Regional High School (N.J. 1976) 2 NJPER 68 (evening teachers are "employees"). In New York, however, per diem substitutes were held not to be "employees." Bernard T. King, Esq. (N.Y. 1973) 6 PERB 3132. The King case can be distinguished from the present one. There, over 40 percent of the per diem substitutes, worked less than ten days during the year,and 70 percent worked less than one quarter of the school days. Also, the New York Board has established a minimum 60 percent return rate for seasonal employees to be included in a unit, Matter of State of New York (1972) 5 PERB 3040, a seemingly arbitrary criterion with doubtful relevancy.

Under the National Labor Relations Act (hereafter NLRA),[14] "casual" employees who lack a sufficient interest in conditions of employment may be excluded from the bargaining unit of regular employees. Merkel & Sons (1977) 232 NLRB 12 [97 LRRM 1081]. But this exclusion is not based on a finding that these individuals are not "employees", but rather on a finding that they lack an adequate community of interest with the other employees.

Having found that per diem substitutes are employees within the meaning of section 3540.1(j), it follows necessarily that

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[14]It is well established that the Board will rely on NLRB precedent where it is applicable. Firefighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507, 526 P.2d 971].

these employees must have the same right to negotiate as do all other public school employees under section 3543, assuming that an appropriate unit can be identified.

2. An appropriate unit can and should be established

The District first argues that the lack of "continuing relationship" between individual substitutes and the District is a bar to forming a per diem substitute unit. The District points to Government Code section 3540.1(h) and (d), which define "meeting and negotiating" and "employee organization" in such a way as to manifest a legislative intent that only those employees who have a regular and continuing employment relation should be allowed to form or join a negotiating unit. The District then argues that a unit of per diem substitutes would not be in accord with the criteria of Government Code section 3545(a), due mainly to a lack of community of interest among the per diem substitutes resulting from the different reasons they may have for substituting and their lack of contact with each other, and also because of the burden on the efficient operation of the District that this unit would create.

The OEA argues that per diem substitutes are not "casual" within the meaning of NLRB decisions that exclude "casual" employees from units of regular employees, and argues that per diem substitutes, therefore, have an employment relation sufficient to warrant inclusion in a negotiating unit. They contend that the fact that some individual substitutes may have a casual employment history should not prevent formation of a unit. The OEA also contends that per diem substitutes do have

a community of interest among themselves, and that the additional burdens caused to the District by the establishment of this unit would be only those burdens necessarily incident to any negotiating relationship and therefore not the sort of burdens on the efficient operation of the District contemplated by Government Code section 3545(a). Section 3545(a), argues the OEA, addresses itself only to the question of whether particular employees should be put in a separate unit or included in a larger unit, not to whether particular employees should be allowed to negotiate at all.

The choice presented here is whether to find a unit of per diem substitutes to be appropriate, or whether to find no appropriate unit and thereby in effect to exclude these employees from all rights under the EERA. The Board has decided already that per diem substitute teachers in Oakland cannot appropriately be included in the unit of regular classroom teachers.[15] Having already found herein that per diem substitutes are "employees" within the meaning of Government Code section 3540.1(j), the intent of the EERA will be best served by attempting to find an appropriate unit and thus protect the rights granted by this legislation to all public school employees.[16] Absent strong reasons why the proposed unit is inappropriate due to circumstances that would

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[15]Oakland Unified School District (3/28/77) EERB Decision No. 15.

[16]Government Code section 3543 et seq.

cause the unit to collide with the directives of section 3545(a), this policy-based reasoning should prevail. Government Code section 3545(a) requires that:

> (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.

a) Established practices

There has been no PERB decision in which the facts have demonstrated prior negotiating practices sufficient to form the basis for a decision. The prior negotiation practices in this case were unilateral in nature and therefore are given little weight.

b) Community of interest

The facts show a community of interest among the per diem substitutes in that they are all subject to the same hiring procedures, working conditions and supervision, must meet the same or similar qualifications, have the same basic duties, are paid the same or similar amounts, and have the same benefits, or lack of them. They are subject to the same evaluation procedure, the same grievance procedure, and the same re-employment procedure at the end of each year. The fact that they may have different reasons for substituting and that they have no contact with one another does not, when balanced against the similarities, disturb this conclusion.

Among the K-12 substitutes, there is little question regarding their community of interest. Long-term and short-term substitutes have some different duties, but the similarities in their employment situation override this difference. As for the adult education and children's center substitutes, the parties offered little helpful information regarding community of interest. In the absence of testimony as to differences, the hearing officer assumes that the evidence presented generally about substitutes' working conditions applies equally to the adult education and children's center substitutes. There is testimony that the adult education substitute list is kept at a different location by someone other than the clerk who keeps the K-12 and the children's center lists. Presumably, calls for these substitutes are made at a different time of day. This is the only difference adverted to in the record between the adult education substitutes and the other substitutes and the hearing officer finds it to be insufficient to overcome the community of interest otherwise found to exist.

The children's center substitute list on the other hand is kept at the same location as the K-12 list, but there is little other information regarding the children's center substitutes in the record. In Oakland Unified School District (3/28/77) EERB Decision No. 15, the Board, in excluding both children's center and K-12 substitutes from the unit of regular full-time certificated employees, found that these two groups of substitutes' working conditions are essentially the same.

Official notice is taken of the finding there that although there are some differences in pay structure between K-12 and children's center employees, these differences were not determinative considered in light of the community of interest otherwise found to exist. (Id., at p. 9.) The fact that separate lists are kept is not, by itself, significant. Separate lists are kept for primary and secondary teachers within the K-12 group, as well.

Thus, it is found that these three groups have a sufficient community of interest to be included in the same unit.

The major issue to be resolved here is whether per diem substitutes have a sufficient ongoing interest in their employment to warrant their being in a negotiating unit at all. In this regard the District argues that per diem substitutes do not have such an interest, but are "casual employees."

This term "casual employees" is a term of art used by the NLRB in unit determinations. The NLRB excludes employees who are too "casual" from participation in bargaining units. The extensive NLRB precedent on this issue makes this "casualness" analysis a useful reference point for determination of this issue.

In making unit determinations the NLRB has identified a class of employees whose employment relation is too "casual" to

justify inclusion in a negotiating unit.[17] These "casual employees" are often seasonal or temporary workers who do not have a reasonable expectation of re-employment.[18] Aside from the employee's expectation of re-employment, the NLRB has relied upon regularity of work and length of service in determining whether an employee is "casual".[19] This determination is made on a case by case basis.

The above mentioned rules are most commonly applied in situations where a unit is sought that will include arguably "casual" seasonal or temporary employees in a unit of regular full-time or part-time employees. At issue along with the question of an expectation of future employment for the seasonal or temporary workers is the question of a community of interest between the seasonal or temporary employees on the one hand and the regular employees on the other. The standard for inclusion varies. Typical are the ruling in Trans World Airlines, supra, 211 NLRB 733, including seasonal workers who had worked a minimum of three prior seasons,[20] the ruling in

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[17]e.g. Merkel & Sons (1977) 232 NLRB 12 [97 LRRM 1081]; Maine Sugar Industries Inc. (1968) 169 NLRB 186 [67 LRRM 1142]; Glynn Campbell dba Piggly Wiggly El Dorado Co. (1965) 154 NLRB 32 [59 LRRM 1759].

[18]Children's Hospital of Pittsburgh (1976) 222 NLRB 588 [91 LRRM 1440]; Aquacultural Research Corp. (1974) 215 NLRB 1 [87 LRRM 1496]; See's Candy Shops, Inc. (1973) 202 NLRB 538 [82 LRRM 1575].

[19]Transworld Airlines Inc. (1974) 211 NLRB 733 [86 LRRM 1434]; See's Candy Shops, Inc., supra, fn. 18.

[20]The employer here had a regular, predictable, seasonal demand for temporary workers.

See's Candy Shops, Inc., supra, 202 NLRB 538, that only those saleswomen who had worked 350 hours and in more than the peak sales periods would be included in the unit,[21] and the ruling in G. C. Murphy, Co. (1968) 171 NLRB 45 [68 LRRM 1108] excluding a part-time employee who worked only intermittently, when regular employees were absent or ill.

However, those cases in which a unit is sought which is composed entirely of temporary or seasonal workers, as is the unit sought here, present a different problem. In these cases the irregularity of employment and variation in time worked is less important because it need not be measured against the working conditions of regular full-time employees. In such cases, the standard applied by the NLRB seems to require less regularity of employment.

A recent NLRB unit determination case, Berlitz School of Languages (1977) 231 NLRB 116 [96 LRRM 1644], has many factual similarities to the case at hand. There, the employer hired language teachers on an "on call" basis. There was a much greater demand for some languages taught by the employer than for others and, as a consequence, there was a wide variation among the teachers in the number of hours worked. Teachers were free to refuse assignments, and this fact added to the variation. If a teacher refused all assignments for six months, that teacher was declared "inactive", but if a teacher

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[21]The employer here had five peak sales periods annually offering a maximum of 320-400 hours for purely seasonal employees.

did not work for more than six months because of lack of demand, then that teacher remained on the active list. The NLRB Regional Director decided that the appropriate unit included all teachers who had taught in the last six months and who had not quit voluntarily, been dismissed for cause, or expressed their unavailability to teach. The NLRB reversed this determination, finding that it was too limiting because it excluded some employees who had a reasonable expectation of re-employment. Some teachers who taught languages for which there was not much demand had not taught in the last six months but could reasonably expect to be called in the future when a demand for their language eventually occurred. The Board held that the correct unit included all those teachers who had taught on more than one occasion within the last year. Thus, a teacher who had taught for as little as two hours in the previous year could be included in the unit and would be eligible to vote in the representation election.

The NLRB has exhibited a similar emphasis on the practical question of expectation of future employment in unit determinations of film industry employees. In this industry, employees are hired for a particular production and then their employment is terminated without any promise of re-employment. Employment for some individuals may be only for one day per production. As a practical matter film industry employees who perform satisfactory work have a reasonable expectation of being employed on future productions. Because of this the NLRB in American Zoetrope Productions, Inc. (1973) 207 NLRB 102 [84

LRRM 1491], gave voting eligibility within a group of film editorial workers to all such workers who had been employed on at least two productions during the prior year, even if only for one day on each production.[22]

The reasoning of these decisions, if applied to the present case, leads to the conclusion that a unit of per diem substitutes can indeed be formed. As a practical matter, these substitutes have a reasonable expectation of re-employment. The District has a predictable and stable need for the services of many substitutes. Once on the substitute list, substitutes can be assured of being called often. The substitute clerk's testimony establishes that substitutes who work less than one quarter of the school days must have made themselves to some degree unavailable, and that it is highly unusual for a substitute to work less than ten days during the year. A substitute who has performed satisfactorily is assured of an invitation to sign up for the next year's list. Obviously, the individuals in any unit of per diem substitutes in this District will have an expectation of future employment. This expectation, coupled with the regularity of their employment and the amount of time worked far exceed the standard required by the NLRB when it made favorable unit determinations in Berlitz, supra, 231 NLRB 116, and American Zoetrope Productions, supra, 207 NLRB 102. Therefore, it is concluded that all the per diem substitutes in the requested

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[22] Accord Medion, Inc. (1972) 200 NLRB 1013 [82 LRRM 1037].

unit have a sufficient community of interest and that the formation of an appropriate unit of per diem substitutes is not prevented by any "casualness" of employment.

(c) Effect of the size of the unit on the efficient operation of the school district

The hearing officer finds that the size of the proposed unit may well work to the advantage of the District with respect to efficiency of operations in that it includes all of the District's per diem substitutes.[23] The District has many objections to the unit in terms of its efficiency of operation, as outlined in the Findings of Fact, supra. But, there is nothing in the record substantial enough to support a finding that efficiency of operations will be significantly impaired.

(d) Possible membership in other units

Finally, the fact that some persons on the substitute list are also on the substitute lists in other districts, or are members of another unit within the same district does not impede the formation of a unit here. Under the NLRA, employees have been included in bargaining units even though they also may work for other employers.[24] There is no reason not to do the same here. Some conflict may be created for individuals who also belong to the regular certificated unit,[25] but this

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[23]An alternative, which would arguably work to the District's disadvantage, would be to divide up the per diem substitutes into separate units of K-12, adult education, and children's center substitutes.

[24]E.g. Henry Lee Co. (1972) 194 NLRB 1107 [79 LRRM 1159]; All Work, Inc. (1971) 193 NLRB 918 [78 LRRM 1401].

[25]Regarding the fact that regular teachers on some occasions must "pay for" the substitute.

is not of a nature that would tend to destroy the community of interest within a substitute unit.

In the light of the above analysis, it is found that an appropriate unit of per diem substitutes can and should be established. It should be noted in this regard that among other states with similar public employment statutes, of those who have considered this same issue, many have found that per diem substitute units are appropriate.[26]

3. The unit should be composed of all substitutes on the current active list who have worked in the current year or the prior year.

Using the reasoning of Berlitz, supra, 231 NLRB 116, and American Zoetrope Productions, Inc., supra, 207 NLRB 102, that all those employees with a reasonable expectation of employment should be included in the unit, the hearing officer concludes that all those persons on the District's current active list who taught last year or this year should be within the unit. By "on the active list" is meant all those substitutes who have not made themselves completely unavailable for an indefinite period of time. Included in the unit are those substitutes who have partially limited their availability (e.g., as to schools

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[26]Eugene Substitute Teachers Organization v. Eugene School District 4-J (Oregon 1976) 1 PECBR 716 aff'd. sub nom Eugene School District No. 4-J v. Eugene Education Association (Oregon Ct. App. 1977) 572 P.2d 650; Philadelphia School District (Pa. 1975) 5 PPER 113; Milwaukee Board of School Directors (Wisc. 1969) Decision No. 8901; Reese Public School District (Mich. 1969) 1969 MERC Lab. Op. 253.

at which they are willing to teach), or who have made themselves unavailable for a determinate period (e.g., a week, a month, Fridays). Not included in the unit are those substitutes who have made themselves unavailable until further notice, or who have been declared to be "inactive" by the District because they have refused too many work calls. Also not included are substitutes who have been removed from the list by the District for cause.

Once a substitute is on the District's "active" list that substitute has every expectation of being called to work, and is assured of being invited to re-apply for placement on the list the following years if he or she has performed satisfactorily and has up-to-date credentials. For this reason, whether and how often a substitute has worked for the District in the past has no bearing on inclusion in the unit. It should be noted that in a recent decision the Court of Appeals of Oregon affirmed the determination by that state's Employment Relations Board that a unit of per diem substitutes was appropriate, without any unit delineation based upon number of days employed.[27] That board had decided that there was no logical place to draw a line between a substitute who has worked one half day per year and one who has worked 182 days, when both have a reasonable expectation of re-employment. Other state boards have shown no more persuasive analysis in

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[27]Eugene School District No. 4-J v. Eugene Education Association (Oregon Ct. App. 1977) 572 P.2d 650.

their unit determinations.[28]

The NLRB also has followed a practice of including all temporary and seasonal workers in a unit of those workers, without drawing a line based on the number of days served in previous years, at least when there is some other basis for a conclusion that the employees have a reasonable expectation of re-employment.[29] In light of the above analysis, it is found that the unit should include all active substitutes who have worked at any time in the current or prior year, without regard to the amount of time worked.

(4) Voting eligibility

The parties have stipulated as to the eligibility of unit members to vote in the representation election and this stipulation is adopted. All per diem substitutes who are on the District's current active list and who worked a minimum of nine days between the beginning of the 1976-1977 school year and the date of the election are found eligible to vote. The record shows that it is highly unlikely that substitutes on the active list will serve less than ten days in a given year. Therefore, this limitation is reasonable in that it excludes those persons without an ongoing interest in substitute employment.

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[28]See, e.g. Philadelphia School District, supra, 5 PPER 113, (per diem substitutes who worked less than the median, 22 days, were excluded from the unit); Milwaukee Board of School Directors, supra, Decision No. 8901, (all included in unit but only those who had taught 30 days the previous year were eligible to vote).

[29]Berlitz School of Languages, supra, 231 NLRB 116; American Zoetrope Productions, Inc., supra, 207 NLRB 102; R.B. Butler Inc. (1966) 160 NLRB 1595 [63 LRRM 1733] (construction industry); Trammel Construction Co., Inc. (1960) 126 NLRB 1365 [45 LRRM 1489].

Proposed Order

It is the Proposed Order that the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

> All certificated substitute teachers, who are on the Oakland Unified School District's current active list and who have worked in the current year or the prior year. This unit includes K-12, adult education, and children's center substitutes.

Members of the unit are eligible to vote in an election for exclusive representative if they have worked a minimum of nine (9) days between the beginning of the 1976-1977 school year and the date of the election.

The parties have twenty (20) calendar days following the date of service of this Proposed Decision in which to file exceptions in accordance with section 32300 of the Board's rules and regulations.

If no party files timely exceptions, this Proposed Decision will become final on May 26, 1978 and a Notice of Decision will issue from the Board.

Within ten (10) workdays after the District posts the Notice of Decision, the OEA shall demonstrate to the Regional Director at least thirty (30) percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if the OEA qualifies for the ballot and the employer does not grant voluntary recognition. Voluntary recognition requires majority proof in all cases. Government Code sections 3544 and 3544.1.

The date used to establish the number of employees in the above unit will be the date of this decision unless another date is deemed appropriate by the Regional Director and noticed to the parties. In the event another date is selected, the Regional Director may extend the time for the OEA to demonstrate at least thirty (30) percent support in the unit.

Dated: May 3, 1978

MICHAEL J. TONSING
Hearing Officer