DECISION OF THE
STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

EL MONTE UNION HIGH SCHOOL DISTRICT, Employer, and EL MONTE UNION HIGH SCHOOL DISTRICT EDUCATION ASSOCIATION, CTA/NEA, Employee Organization.	)	Case No. LA-R-795 LA-R-810 PERB Decision No. 142 October 20, 1980

Appearances: David G. Miller, Attorney (Paterson and Taggart) for El Monte Union High School District; Sandra Paisley, Attorney (California Teachers Association) for El Monte Union High School District Education Association, CTA/NEA.

Before Gluck, Chairperson; Moore, Member.

DECISION

The El Monte Union High School District (hereafter District) has excepted from a Public Employment Relations Board (hereafter PERB or Board) hearing officer's proposed decision holding that the requests for recognition covering summer school teachers, home teachers, enrichment teachers, evening continuation high school teachers and driver training teachers filed by the El Monte Union High School District Education Association, CTA/NEA (hereafter Association) should be construed as unit modification petitions. Under the specific facts of this case, the Board affirms the construction of the

petitions for representation[1] as petitions for unit modification[2] and grants the petitions.[3]

PROCEDURAL HISTORY AND FACTS

On April 7, 1976, the El Monte Union High School District Education Association filed a request for recognition for a unit of all certificated employees.[4] The District responded on May 26, 1976 that it doubted the appropriateness of the unit

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[1]Pursuant to the Educational Employment Relations Act (EERA) section 3544, the Association requested recognition as the exclusive representative of units described as "all summer school teachers" and "all certificated hourly employees including, but not limited to, evening continuation high school teachers, home teachers, drivers' training teachers, and enrichment teachers." The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated all statutory references are to the Government Code.

[2]PERB rule 33260 et seq. PERB rules are codified at California dministrative Code, title 8, section 31000 et seq.

[3]The hearing officer also found that the petitioned-for teachers are employees for purposes of the EERA, which is codified at Government Code section 3540 et seq. Since no exceptions were taken to this finding, it is not an issue before the Board.

[4]An administrative body may take official notice of its records. A copy of the request for recognition was filed with the Board.

The unit included: all certificated employees excluding the district superintendent, assistant superintendents, principals, assistant principals, adult school teachers who teach fewer than sixteen hours per week, and non-contract substitutes.

but did not contest the sufficiency of majority support.[5] The next day, the Association petitioned for a hearing to determine if the unit was appropriate. On December 30, 1976, Belmont Elementary School District EERB Decision No. 7 issued, holding that summer school teachers lacked a community of interest with regular academic year teachers and should be in a separate unit. The Association withdrew its petition for hearing on March 7, 1977, and was recognized as the exclusive representative for classroom teachers, among others,[6] on March 14, 1977. On May 11, 1977, the first negotiation session between the District and the Association was held. The same day, the Association filed a petition for recognition of a unit

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[5]PERB rule 33190(a).

[6]PERB rule 33190(a). The District voluntarily recognized a unit comprised of the following positions:

> classroom teachers, attendance coordinators, counselors, counselor- psychologists, nurses, librarians, work experience teachers, coordinators-career planning activities and excluding all other positions not designated, including, but not limited to, district superintendent, assistant superintendent, director of adult education, principals, assistant principals, specialist-experimental programs, continuation school principal, adult school principal, work experience coordinator, compensatory education coordinator, adult education teachers, adult education counselors also functioning as principals, substitute employees.

of all summer school teachers. This request was denied on July 14, 1977 by the District on grounds that the unit was inappropriate and that summer school teachers were not "employees" under the Act. On September 20, 1977, the Association and the District signed a collective agreement.[7] The next day the Association petitioned for recognition of a unit comprised of "all certificated hourly employees including, but not limited to, evening continuation high school teachers, home teachers, drivers' training teachers, and enrichment teachers." This request was denied on October 31, 1977 by the District on grounds that the unit was inappropriate and that the above described teachers were not employees under the Act. The District did not doubt the sufficiency of proof of majority support for either petition.

The unit determinations were consolidated on November 3, 1977, and a hearing was held on December 1 and 7, 1977. In late October 1978, the parties agreed that a decision in this case should be postponed until the Board decided another case involving the "summer school" issue that was currently before it. Summer school teachers were subsequently found by the Board to be employees for purposes of the Act in Redwood City Elementary School District (10/23/79) PERB Decision No. 107. In addition, the Board issued Peralta

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[7]PERB rule 32120.

Community College District (11/17/78) PERB Decision No. 77, holding section 3545(b)(1)[8] requires PERB to place all instructional personnel in the same negotiating unit absent a finding they lack a community of interest.

The attached hearing officer's proposed decision issued on March 28, 1980, and the District filed timely exceptions on April 17, 1980. The Board adopts the findings of fact in the proposed decision with the addition of the facts noted above.

DISCUSSION

In Redwood City, supra, this Board, as a matter of equity, construed a petition for a separate unit as a petition for unit modification rather than dismissing it. This case presents a very similar factual situation.

It appears from the record that the Association has sought to represent the petitioned-for employees since its first attempt at recognition in April 1976. The original petition requested recognition on behalf of all certificated employees, and the District recognized a unit which included all classroom

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[8]Section 3545(b)(1) provides:

> 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.

teachers but excluded adult education teachers and substitute employees. It can be assumed that if the District had intended to exclude summer school and other hourly teachers they would have been listed with the other excluded classifications. This finding is bolstered by the testimony of Dr. Platz, the District's assistant superintendent for instruction. He had participated in negotiations of the first collective agreement and stated that the salary of hourly employees, including summer school employees, was a matter of discussion during the negotiations.

The District then apparently changed its mind based on Belmont, supra, and refused to continue negotiating over summer school teachers. The Association found itself in the position of having to petition again for employees who it originally thought it represented. The Association argues that a petition for a change in unit determination (former Board rule 33260) would have been futile in light of Belmont and that the most effective way for the Association to regain the right to represent these employees was to file petitions for separate units. A hearing was held regarding these separate petitions in December 1977. Nearly a year later, but before issuance of a proposed decision by the hearing officer, PERB issued Peralta, supra. This decision modified the teachings of Belmont, by finding a rebuttable presumption in favor of a single unit of all teachers in a district. Following this

and issuance of Redwood City, supra, the hearing officer issued her proposed decision in this case. Thus, it was PERB's changing policies, not errors by the Association, which precluded the Association from reaching its goal.

The only means which the Association could presently utilize to add the petitioned-for employees to the established unit is section 33260 et seq., unit modification. To successfully petition for a unit modification, the petitioner must present a showing of majority support. Unfortunately, the signatures gained by the petitioner in 1977 are now stale.[9] If the Board were to dismiss these petitions with leave to file a petition for unit modification, the Association would be required to gather signatures of the unit members for the third time.

The equities of this case preclude dismissal. The petitioned-for teachers' right to representation and the Association's legitimate interest in avoiding further obstacles

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[9]PERB rule 32700(b) provides in part:

> The proof of support shall indicate each employee's printed name, signature, job title or classification and the date on which each individual's signature was obtained. A signature without evidence that it was obtained within one calendar year prior to the filing of the petition requiring employee support shall be invalid for the purpose of calculating proof of support.

to representation of these employees require that the petitions for recognition be treated as a petition for unit modification.[10]

The appropriateness of a unit comprised of regular classroom teachers (those presently covered by the collective agreement between the District and Association) and the petitioned-for teachers was not specifically litigated by the parties. However, the record is replete with evidence regarding the community of interest between the two groups.

All home teachers are credentialed and have also been employed by the District as either regular teachers or as substitutes. They teach the regular curriculum to students who are physically unable to attend regular classes. They give tests and grade them. They are recruited and supervised through the principal's office. In some cases where the student is being taught an advanced course, the home teacher works through the student's regular teacher. The hours of instruction received by the students are reported to the state

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[10]Section 3541.3 empowers the Board:

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> (a) To determine in disputed cases, or otherwise approve, appropriate units.
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> . . . . . .
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> (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

for purposes of Average Daily Attendance (hereafter ADA). There is no procedure for formal evaluation, but their performance is measured through feedback from the parents. Future assignments are based on this feedback as well as on qualifications and availability.

The enrichment teachers are credentialed and almost all of them are also regular District teachers. The subjects taught are extracurricular but include courses such as chemistry, music, creative writing and ecology. Requests for such classes can be initiated by teachers, students, or the school board but must have a minimum number of students and be approved by the District. The teachers are supervised by the principal. No formal evaluation procedure exists, but notations could be made on the teachers' regular evaluation with respect to his or her willingness to perform such services.

The evening continuation high school teachers are all regular teachers recruited by the principal from the day continuation high school program. They give grades and students receive credit for their work. The student's attendance is reported to the state for purposes of ADA. The subjects taught parallel those taught during the day: English, history, science and mathematics. There is no formal evaluation procedure, but teachers are informally measured by their ability to maintain students' attendance throughout the length of the course.

Driver training teachers are credentialed and perform their services in a state-mandated program. They are recruited by the principals and driver training coordinator. Ninety percent of these teachers are also regular District instructors. As do regular teachers and other hourly teachers, these teachers work directly with students.

Summer school teachers are required to have the same credentials as a regular District teacher. A substantial number of the summer school teachers are also regular full-time certificated employees of the District. Students select the courses through a sign-up process, but the District has final say as to which courses will be offered. Courses offered during the summer include those offered during the regular year, such as arts and crafts. These teachers give homework, prepare lesson plans, and give grades. They are generally supervised by the same administrators who supervise teachers during the regular year. There is no formal evaluation procedure, but the District will discipline teachers for misconduct.

Differences in compensation and fringe benefits between the petitioned-for teachers and regular year full-time teachers do not persuade us that the two groups lack a community of interest for two reasons. First, for all practical purposes, the wages, hours, and other terms and conditions of employment of the petitioned-for teachers are wholly within the control of

the District. Redwood City, supra. It should be noted that the District did adopt a sick leave policy for summer school teachers after a presentation was made by the Association. Second, the lack of fringe benefits for many of these teachers has no practical effect, as they are also regular full-time District employees whose benefits carry over whether they perform these additional jobs or not.

The District argues that inclusion of the petitioned-for employees in the unit of regular certificated employees would disrupt a stable labor relationship and force the District to make an agreement covering the newly included employees. This argument is rejected. The present collective agreement between the District and the Association covering the regular certificated employees is due to expire on August 31, 1981. As was stated in Oakland Unified School District (9/20/79) PERB Decision No. 102,[11] negotiation of a supplementary agreement covering the petitioned-for employees imposes no greater burden on the parties than would the negotiation of a separate agreement. Nor, in the future, do negotiations covering all employees in the modified unit present any more potential for disruption than bifurcated negotiations covering two separate units.

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[11]Concurring opinion of Chairperson Gluck p. 12.

The District also raises the objection that had the Association filed petitions for unit modification they would have been untimely under PERB regulation 33261(a)(1).[12] However, the time limit prescribed by this regulation was not in effect when the Association filed its petitions for representation in May and September of 1977. The rule should not be applied retroactively.

The facts of this case parallel those presented to the Board by Redwood City, supra, as one employee organization is involved, the Association has pursued its goal of representing both the regular certificated employees and the petitioned-for employees and it has been PERB's changing policies, not the

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[12]PERB rule 33261(a)(1) provides:

> (a) A recognized or certified employee organization may file with the regional office a petition for unit modification pursuant to Government Code section 3541.3(e):
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> > (1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit, provided such petition is filed at least 12 months after the date of said recognition or certification, except as provided in subsection (2) below;

Association's error, that caused it to petition for separate units. Based on these and the other unique facts of this case, we construe the Association's petitions as ones to modify the existing unit by adding summer school teachers, home teachers, enrichment teachers, evening continuation high school teachers and driver training teachers.

The Board finds the Association's petitions in substantial compliance with the unit modification rules. The petitions were accompanied by the required showing of majority support among the classifications to be added to the established unit. (Board rule 33261(f).) No election is necessary in this case, as majority support of the petitioned-for employees was not questioned by the District. Therefore, Board certification of the Association's modified unit shall issue forthwith. (PERB rule 33265(d).)[13]

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[13]PERB rule 33265(d) provides:

> (d) Board Certification of a Unit Modification.
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> (1) The Board shall issue a certification of unit modification whenever the disposition of a petition filed under this Article results in the modification of a unit.
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> (2) Such certification shall not be considered to be a new certification for the purpose of computing time limits pursuant to Section 32754(a).

ORDER

The Public Employment Relations Board ORDERS that:

(1) The petitions of the El Monte Union High School District Education Association, CTA/NEA, for recognition as the exclusive representative of units of all summer school teachers and all certificated hourly employees including, but not limited to, evening continuation high school teachers, home teachers, driver training teachers, and enrichment teachers, are construed as petitions to modify the existing certificated unit to include the petitioned-for employees, and are GRANTED;

(2) The Association shall be certified as the exclusive representative of a unit including:

attendance coordinators
certificated hourly employees
classroom teachers
coordinator-career planning activities
counselors
counselor-psychologists
librarians
nurses
summer school teachers
work experience teachers

and, excluding:

adult education counselors
adult school principal
adult education teachers
assistant principals
assistant superintendents
compensatory education coordinator (ESEA coordinator)
continuation school principal
coordinator/Title VII, Bilingual Education
director of adult education
director of compensatory education
director of curriculum and research
director of work experience, career and vocational education
district superintendent

principals
substitute employees
and further excluding management, supervisory and confidential employees as defined by the EERA.

By: Harry Gluck, Chairperson

Barbara D. Moore, Member, concurring:

I base my decision on the underlying similarities between this case and Redwood City Elementary School District (10/23/79) PERB Decision No. 107. In both cases, the employee organizations set out to represent units which included regular certificated employees, summer school teachers, and, in El Monte, other hourly teachers. In both cases, this goal was unrealized because of PERB's early decisions excluding summer school teachers and home teachers from the unit of regular certificated employees.[1] In both cases, the employee organizations attempted to represent the employees excluded from the unit in the only way left open to them--by filing separate requests for recognition in units composed of the excluded teachers. Before final decisions on their respective unit requests were reached, the Board issued Peralta Community College District (11/17/78) PERB Decision No. 77, holding that

[1]Belmont Elementary School District (12/30/76) EERB Decision No. 7; Petaluma City Elementary and High School Districts (2/22/77) EERB Decision No. 9; New Haven Unified School District (3/22/77) EERB Decision No. 14.

section 3545(b)(1) requires PERB to place all classroom teachers in the same unit absent a finding that they lack a community of interest.

In Redwood City, the Board found it would be inequitable to apply the Peralta presumption and dismiss the employee organization's petition. This case differs from Redwood City only in certain details;[2] as noted above, the fundamental facts are the same. Therefore, I reach the same result, based on the equities expressed in Redwood City.

One difference between this case and Redwood City which requires discussion is that in Redwood City there was no contract covering the existing unit, while in this case there is a contract covering regular certificated employees which expires in August 1981.

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[2]For example, in Redwood City, the initially-recognized unit arguably included summer school teachers, and the parties negotiated summer school issues until the Board issued Belmont, supra. In this case, on the other hand, the District recognized the Association after the Board's decision in Belmont narrowly defined the term "classroom teacher." Thus, it is doubtful that the recognition of a unit including "classroom teachers" was intended also to include summer school and other hourly teachers. Furthermore, evidence that the parties actually negotiated salaries for hourly employees is ambiguous, particularly in light of the fact that the Association filed its request for recognition in a summer school unit on the first day of negotiations. It is unlikely that in a single day the parties engaged in substantive negotiations, the District changed its mind and refused to negotiate further, and the Association in response filed a petition. However, these differences between this case and Redwood City do not detract from the central fact that since 1976 the Association has consistently sought to represent hourly employees in whatever way possible under PERB's changing policies.

In Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No. 84, the Board found that application of the Peralta presumption in that case, which would ultimately result in placing substitutes in an established unit of certificated employees covered by a negotiated agreement, clearly carried with it a "potential for disruption." It noted that in both the Palo Alto and Jefferson districts:

> there exist negotiating units of teachers which exclude substitutes. In both units there are contracts between the districts and the exclusive representatives, and these contracts contain recognition clauses for certificated units which also exclude substitutes.

The Board therefore refused to apply Peralta and instead created separate units of substitute employees. In Oakland Unified School District (9/20/79) PERB Decision No. 102, a case which I found virtually identical to Palo Alto/Jefferson, I agreed with this analysis, noting that "potential disruption is envisioned because established, recognized units exclusive of substitutes are in place and under contract." (Oakland, at p. 18).

This case involves a similar situation: construing the instant petitions as petitions for unit modification results in placing summer school and other hourly certificated employees in an already established unit covered by a contract. In accord with Palo Alto/Jefferson, and my position in Oakland, I acknowledge that this may carry with it a potential for disruption. The parties have already established a negotiating relationship; injection of a new element may disturb that relationship.

This possibility of disruption, however, must be balanced against other factors present in this case. It is clear that there has been a consistent effort to represent the hourly employees as part of the established unit: The Association's initial petition for representation included all certificated employees; it attempted to negotiate for hourly employees after its recognition by the District; and, in its response to the District's exceptions in this case, it supported the hearing officer's decision placing hourly teachers in the regular certificated unit. In Palo Alto/Jefferson and Oakland, on the other hand, the Board had no such indications on the part of the exclusive representatives of the already established units.

Furthermore, in Palo Alto/Jefferson and, in my view, in Oakland, substitutes constituted a substantial and distinct group of employees with common concerns, some of which they did not share with regular teachers. (Oakland, p. 19.) Thus, in the absence of the Peralta presumption, it was appropriate to place them in a separate unit. The teachers in this case, however, do not form such a distinct group. Some work during the school day, some after school, and some at night. Some have regular assignments for a specific period of time (summer school teachers, enrichment teachers) while others work sporadically on an as-needed basis (home teachers, evening continuation school teachers). Some teach in a traditional classroom environment, others teach in cars or in students'

homes. They appear to have no job related contact with each other.

In Palo Alto/Jefferson and Oakland, some of the common concerns of the petitioned-for employees separated their interests from those of regular teachers. Here, however, what common concerns hourly teachers share are also shared with regular certificated teachers. They have common work functions and goals. Home teachers, evening continuation school teachers and some summer school teachers teach courses similar or identical to those taught by regular teachers. In fact, home teachers, who work with students who are unable to attend classes for at least 30 days, teach the same subjects the student is taking at school, and have some work contact with the student's regular teachers.

There are only two alternatives to placing hourly employees in the certificated unit. The first is to create a separate unit of hourly employees. The Association, while proposing this solution at a time when Board decisions consistently excluded summer school and other hourly teachers from overall certificated units, has clearly indicated its wish to represent the certificated employees in one unit. Furthermore, on the basis of the record before us, a unit of certificated employees including hourly teachers appears more appropriate than a separate unit of hourly teachers only, and the District, in its arguments against the hearing officer's proposed decision, has offered no reasons or evidence supporting a separate unit.

The second alternative is to delay placing these employees in the unit until the contract expires. This solution has the obvious flaw of continuing to delay representation for these hourly employees. A major factor in our decision to construe the Association's request for recognition as a unit modification petition is the fact that hourly teachers, despite having indicated their wish to be represented by the Association, have been without exclusive representation for years. The certainty of further delay if we do not place these employees in the overall certificated unit far outweighs the possibility that such placement may cause some disruption in the existing unit.

Therefore, I find it preferable in this case to place the hourly employees in the unit of regular certificated employees despite the possibility that this may cause some disruption in the already established unit.

The District argues that the petitions should be dismissed as untimely filed under the Board's current unit modification rules. It is true that in Redwood City the Board found the employee organization's petition to be in substantial compliance with PERB's unit modification rules. It was both timely filed under PERB rule 33261(a)(1)[3] and accompanied by

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[3]PERB rule 33261(a)(1) is set forth at footnote 12 of Chairperson Gluck's opinion.

the requisite showing of support under PERB rule 33261(f).[4] Here, while the petitions were not timely under current rule 33261(a)(1), this is not a critical factor. The Board's current unit modification rules were enacted long after these petitions were filed. Furthermore, the 12-month time limit was developed to encourage unit stability by preventing an employee organization from gaining recognition in a unit and then immediately trying to add positions it could have petitioned for at the time it gained recognition. In this case, while the Association originally sought to represent summer school and other hourly teachers in its initial request for recognition, the issuance of Belmont made insistence on this position futile. The Association then attempted to protect its interest in representing these teachers in the only way left open to it: within two months of gaining recognition in the certificated unit, it requested recognition in a summer school unit and, a few months later, in a unit of other hourly

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[4]PERB rule 33261(f) provides:

> If the petition requests the addition of classification(s) or position(s) to an established unit pursuant to section (a)(1) above, it must be accompanied by proof of majority support of persons employed in the classification(s) or position(s) to be added. Proof of support is defined in Division 1, Section 32700 of these regulations.

employees. Application of the time limit for unit modification would not serve its intended function here since the Association could not, under the PERB policies at that time, have become the exclusive representative of a unit including both regular and hourly teachers. In my opinion, the Board should not dismiss the petitions in this case by applying a time limit that not only did not exist when the petitions were filed but also serves no function under the particular circumstances of this case. The petitions do meet the requirement that they be accompanied by a showing of majority support among the positions to be added to the units, and thus I agree with Chairperson Gluck's conclusion that they are in substantial compliance with PERB's unit modification rules.

For the above reasons, I concur in the decision to construe the Association's petitions for recognition as petitions to modify the existing certificated unit to include summer school and hourly teachers and in the Order in this case.

Barbara D. Moore, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA

EL MONTE UNION HIGH SCHOOL DISTRICT, Employer, and EL MONTE UNION HIGH SCHOOL DISTRICT, EDUCATION ASSOCIATION, CTA/NEA, Employee Organization.	Unit Determination Case No. LA-R-795 No. LA-R-810 PROPOSED DECISION (3/28/80)

Appearances: Jim Romo, Attorney (Paterson and Taggart) for El Monte Union High School District; Hirsch Adell, Attorney (Reich, Adell and Crost) for El Monte Union High School District Education Assoc., CTA/NEA.

Decision by Sharrel J. Wyatt, Hearing Officer.

PROCEDURAL HISTORY

On May 11, 1977, the El Monte Union High School District Education Association CTA/NEA (hereafter Association) requested recognition as the exclusive representative of a unit of all summer school teachers in the El Monte Union High School District (hereafter District). On July 14, the District denied the request, challenging the appropriateness of the unit, including the status of summer school teachers as employees under section 3540.1(j) of the Educational Employment Relations Act (hereafter EERA or Act).[1]

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[1]Gov. Code sec. 3540 et seq. All further statutory references are to the Government Code unless otherwise noted.

A second petition was filed by the Association on September 21, 1977, seeking recognition as exclusive representative for a unit of certificated hourly employees.[2] On October 31, 1977, the District denied the petition, again doubting the appropriateness of the unit, including the status of hourly teachers as employees under the EERA.

There is no dispute regarding management, confidential or supervisory employees. Neither request for recognition included adult education teachers or substitute teachers. Other unit disputes raised by the District in its response to the requests for recognition were withdrawn at the hearing.

Briefs were filed by the parties on March 23 and 24, 1978. In October of 1978, the parties stipulated to hold this decision in abeyance pending issuance of the Public Employment Relations Board's (hereafter PERB or Board) decision in Redwood City Elementary School District (10/23/79) PERB Decision No. 107. Following issuance of that decision, efforts to resolve this dispute informally were unsuccessful.

The cases were consolidated for hearing on December 1 and 7, 1977 and heard before Muriel Evens, hearing officer of

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[2]The request included, but was not limited to, evening continuation high school teacher, home teachers, driver training teachers and enrichment teachers.

the Board. At the direction of the Chief Administrative Law Judge, this matter was reassigned for decision.[3]

ISSUES PRESENTED

(1) Whether hourly employees, including summer school teachers, evening continuation high school teachers, home teachers, driver training teachers and enrichment teachers are employees within the meaning of section 3540.1(j).

(2) If so, whether the above listed employees constitute one or more appropriate units within the meaning of section 3545(a).

FINDINGS OF FACT

The El Monte Union High School District is located in Los Angeles County and has an enrollment of 7,250 students attending grades 9-12 at five sites. In addition, there are two adult schools.[4] Total enrollment as of October 7, 1977, was 16,971. Average daily attendance was 10,705.

The parties stipulated that the District is an employer, the Association an employee organization within the meaning of the Act, and that none of the positions in question are classified. These stipulations are accepted.

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[3]See Cal. Admin. Code, tit. 8, sec. 32168, as amended.

[4]"California Public School Directory" (1979) State Dept. of Education, at p. 190.

The parties also stipulated that should the employees petitioned for by the Association in LA-R-795 and LA-R-810 be found to be employees within the meaning of Government Code section 3540.1(j), then the appropriate unit shall include all hourly positions described in the requests for recognition. This latter stipulation cannot be accepted without inquiry and is discussed in the conclusions of law. (See Centinela Valley Union High School District (8/7/78) PERB Decision No. 62.)

Historical Background

Official notice is taken of the representation file in this case (LA-R-673). On April 7, 1976, the Association requested recognition for a unit described as:

> . . . all certificated employees excluding the District superintendent, assistant superintendents, principals, assistant principals, adult school teachers who teach fewer than 16 hours per week, and non-contract substitutes.

On May 26, 1976, the District responded that they doubted the appropriateness of the unit sought, did not contest majority support, that there was no intervenor, and that it did not desire an election.

The Association filed a petition for hearing which it withdrew on March 7, 1977. The District granted voluntary recognition on March 14, 1977.

A contract is in effect covering the period from March 13, 1979 through August 31, 1981.

Home Teachers

Home teachers provide bedside instruction to students who, through illness or injury, are unable to attend classes for at least 30 days. The teachers are recruited, generally by the school principal, from District teachers. Those applying from outside the District complete teacher application forms and are processed through the District personnel office. The school board authorizes all appointments to an approved list from which the District selects home teachers. Not all those approved were employed by the District as home teachers.

If students will be absent 30 days or more, state law requires that they be provided with 5 hours of instruction per week. The teacher generally is assigned to the student for the entire absence and teaches all of the student's subjects. Home teachers are paid by the District on an hourly basis for hours reported to the state for ADA. They are also paid for mileage to the student's home, but receive no health and welfare benefits. While there is no formal evaluation of home teachers, feedback from parents and classroom teachers, as well as subject area qualifications and availability are considered when assignments arise. Preference is given to regularly employed District teachers and supervision is by the school principal.

Of 26 home teachers employed from 1972 through October 1977, 16 taught during 1 year only and 10 taught during at least 2 years. Those teachers employed for 1 school year only averaged almost 45 hours of home instruction during that year with the range from 1 to 182 hours. Among those employed for at least 2 school years, the average was almost 174 hours per year, with a range of 7 to 638 hours taught.

Enrichment Teachers

The District has offered enrichment classes on a non-credit basis which have been taught outside the normal school day. The classes are individually designed extra-curricular offerings in a variety of subject areas including chemistry, music, creative writing, ecology and lifeguard training. Classes were offered through the 1970-1971 school year, but were cut back for financial reasons. They resumed in 1976.

Requests for enrichment classes can be initiated by teachers, students or the school board. Board approval is necessary, although all classes approved may not actually be taught, especially if student interest is not sufficient. Classes may be taught for just a few hours or for a school year.

Enrichment teachers, in almost all cases, have been regularly employed in the District. They are supervised by the principal and are not formally evaluated, although notations could be made in personnel records. They are paid the same rate as the other hourly teachers.

In the 1970-1971 school year, 14 teachers taught enrichment classes averaging 11 hours each, with a range from 4 to 30 hours. For 1976-1977, 9 teachers taught classes averaging almost 16 hours, with a range from 9 to 24 hours.

Evening Continuation Teachers

The District offers a Wednesday evening continuation program for those students working during the normal school hours and are unable to attend either the regular or regular continuation school classes.

Recruiting is done by the continuation high school principal from the day faculty, although teachers outside the District may be hired. The school board approves a list of teachers for possible assignments as needed. Evening continuation teachers receive no health and welfare benefits and have no formal evaluation process. They are paid hourly.

Students receive credit and grades for evening continuation courses. Enrollment fluctuates greatly, since it is tied to student day employment. As a result, evening continuation teachers may teach weekly or only sporadically, if at all. During the 1974-1975 school year, 3 teachers taught at least once. During 1975-1976, 3 taught, with 1 repeating from the previous year. In 1976-1977, 4 taught, including 1 teacher who also taught during 1975-1976 and 2 who taught during 1974-1975. For 1977-1978, at least 5 teachers had taught, including 1 repeater.

Driver Training Teachers

The District operates driver training as a state mandated program. Teachers give six hours of behind-the-wheel instruction to as many as three students per car. The number of teachers hired is keyed to enrollment. While enrollment for the classes fluctuates based on student interest, there is a waiting list.

Driver training teachers are recruited by the school principals or by the driver training coordinator. A separate application is required. Driver training teachers are paid hourly and receive no fringe benefits. On the average over 90 percent of the driver training teachers have been regularly employed by the District. On occasion a shortage of qualified instructors has occurred, and teachers outside the District have been hired to fill in. For the 5 years from 1972-1973 through 1976-1977, about one-third of the driver training teachers had taught the previous year. Among the teachers employed by the District during the last 5 years, 13 percent taught 1 year only, 9 percent taught 2 years, 17 percent taught 3 of the 5 years, 17 percent taught for 4 years and 43 percent taught each of the 5 years.

Summer School

Annually, the board of education decides whether or not to approve a summer school program. The program has been approved every year since 1959. The summer session lasts seven weeks

and includes courses offered during the regular school year as well as courses such as arts and crafts. Course offerings are the result of student selection of classes they wish to take during the summer session. The student selection process takes place in the spring using sign-up sheets.

Each year, teachers must file a new application and are hired based on the needs of the program that particular year. Teachers who have taught least recently are given preference in the selection process if possible. Continued employment in the program is dependent on enrollment. Summer school teachers receive two sick days as their only fringe benefit. They are paid hourly. There is no procedure established for evaluation.

Administrators are employed on a 12 month year. Generally, the same administrators who supervise regular teachers supervise summer school teachers.

CONCLUSION OF LAW

Employee Status

The major thrust of the District's argument is that the employment relationship of the classifications the Association seeks to represent is too tenuous to justify granting them representation rights under the EERA, that they are not

"employees" within the meaning of section 3540.1(j).

The Board itself has dealt with this argument and disposed of this issue. In Redwood City Elementary School District (supra, p. 2), the Board held that summer school teachers are public school employees within the meaning of section 3540.1(j). In Palo Alto Unified School District (1/9/79) PERB Decision No. 84, substitutes were found to be public school employees within the meaning of section 3540.1(j). Following the Board's reasoning, the definition of public school employee excludes only four specific categories.[5] Summer school teachers, home teachers, enrichment teachers, evening continuation teachers and driver training teachers are not among the excluded categories.

To the argument that these classes of employees are too tenuous to be included within the coverage of the EERA, as with substitutes in Palo Alto, supra, hourly employees do form an integral part of the educational programs offered by the District.

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[5]Section 3540.1(j) states:

"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.

Furthermore, the reasoning of the Board in Palo Alto is equally applicable to hourly employees:

> Second, exclusion from coverage under EERA would deny them far more than negotiating rights. Section 3543 of EERA endows public school employees with certain rights, including, among others, those of forming, joining and participating in the activities of employee organizations for the purpose of representation on all matters of employer/employee relations. Section 3543.5(a) prohibits, among other things, public school employers from threatening reprisals on or discriminating against employees for exercising any right granted to employees by EERA. Thus, defining substitutes as "nonemployees" would remove them from statutory protections against discrimination and reprisals for engaging in organizational activity in addition to denying them negotiation rights. Such protections appear especially significant for substitutes since they are not covered by tenure provisions of the Education Code and exist on a substitute list at the discretion of the district. Thus, substitutes who comprise such an important staffing function in the districts should not be denied the fundamental protections which EERA confers on public school employees.
>
> We believe that the Legislature intended the definition of "public school employee" to be inclusive, and extend broad coverage for representation and negotiating rights for persons who perform services for, and receive compensation from, public school employers. The Board thus finds that substitutes are public school employees within the meaning of the EERA.

In accordance with the Board's decision in Palo Alto, (supra), it is found that summer school teachers, home teachers, enrichment teachers, evening continuation teachers

and driver training teachers are public school employees within the meaning of section 3540.1(j).

Appropriate Unit

In Peralta Community College District (11/17/78) PERB Decision No. 77, the Board held that section 3545(b)(1)[6] requires that all instructional personnel be placed in the same negotiating unit absent a finding that they lack a community of interest. The presumption in this decision "should only have a prospective effect in situations where a retrospective application would cause disruption and instability." (See Palo Alto, supra, p. 8.) In Palo Alto, the Board declined to apply the Peralta presumption where units already in place were covered by a negotiated agreement. Separate teacher units were awarded to employees not previously represented.

In Redwood City, (supra), the Board carved another exception by holding that it would be inequitable to apply the Peralta presumption and dismiss the petition for a separate unit of summer school teachers.

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[6]Section 3545(b)(1) reads:

> (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.

Like Redwood City, it is clear that what the Association wanted from the beginning in this case was a comprehensive unit of all certificated employees excluding the superintendent, assistant superintendents, principals, vice principals, adult school teachers who teach fewer than 16 hours per week and non-contract substitutes. From this unit description, it is obvious that the Association did not intend to exclude summer school teachers, home teachers, enrichment teachers, evening continuation teachers, or driver training teachers.

As with Redwood City, but for Belmont Elementary School District (12/30/76) EERB Decision No. 7, the Association would undoubtedly have filed a unit modification petition rather than the requests for recognition filed on May 7, 1977.

For the reasons set forth by the Board in Redwood City, (supra) it is appropriate to construe the instant petitions as unit modification petitions to add summer school teachers, home teachers, enrichment teachers, evening continuation teachers and driver training teachers to the unit of regular certificated employees.

At the time that the instant requests for recognition were filed, the rules and regulations of the Board did not provide the current time limits found in California Administrative

Code, title 8, section 33261(a)(1)[7]. It would be inequitable to enforce this proviso some three years later. At the time the requests for recognition were filed, they would have been timely as petitions for unit modification. They are therefore construed as timely petitions for unit modification. In coming to this conclusion, it is noted that there was no intervenor and that the employee organization's majority support was not placed in question by the District's response at the time the original requests for recognition were filed.[8]

Finally, although there is a contract in place between the Association and the District covering regular certificated employees, it is found the negotiations covering summer school teachers and hourly employees will not be unnecessarily disruptive to that relationship because virtually all employees

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[7]Cal. Admin. Code section 33261(a)(1) provides:

> (a) A recognized or certified employee organization may file with the Regional Office a petition for a change in unit determinations pursuant to section 3541.3(e) of the Act.
>
> > (1) To add to the unit classifications which existed prior to the recognition or certification of the current exclusive representative of the unit, provided such petition is filed at least 12 months after the date of said recognition or certification[.]

[8]Section 3544(b) requiring that proof of majority support be filed with the PERB became effective subsequent to the filing in this case with the District.

in the added classification are already covered by that agreement as regular full time employees of the District. Only peripheral items such as work opportunity and hourly rate for extra assignments remain. Therefore, they are clearly distinguishable from substitute teachers in Palo Alto (supra), for whom a separate unit was found necessary to avoid disruption and instability under the agreement covering the regular unit.

PROPOSED ORDER

It is the Proposed Order that:

(1) Summer school teachers, home teachers, enrichment teachers, evening continuation teachers and driver training teachers are public school employees within the meaning of Government Code section 3540.1(j);

(2) The petitions of the El Monte Union High School District Education Association, CTA/NEA, for a unit of summer school teachers and for a unit which includes home teachers, enrichment teachers, evening continuation teachers and driver training teachers, which are construed to be petitions to modify the existing certificated unit to include summer school teachers, home teachers, enrichment teachers, evening continuation teachers and driver training teachers, are granted.

(3) The Association shall be certified as the exclusive representative of a unit including all regular full time

certificated and regular part time certificated teachers, and including summer school teachers, home teachers, enrichment teachers, evening continuation teachers and driver training teachers.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 17, 1980 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on April 17, 1980 in order to be timely filed. See Cal. Admin. Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, section 32305 (as amended).

Dated: March 28, 1980

Sharrel J. Wyatt
Hearing Officer