STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY UNIFIED SCHOOL DISTRICT, Employer, and POWAY SCHOOL EMPLOYEES ASSOCIATION, Exclusive Representative.	Case No. LA-UM-867-E PERB Order No. Ad-427 June 29, 2015

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by Gerald A. Conradi and Amy W. Estrada, Attorneys, for Poway Unified School District; Ochoa Legal Group by Ricardo Ochoa and Dovie Yoana King, Attorneys, for Poway School Employees Association.

Before Martinez, Chair; Huguenin and Gregersen, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Poway Unified School District (District) to the proposed decision (attached) of a Hearing Officer. A unit modification petition (Petition) was filed by the Poway School Employees Association (Association), the exclusive representative of the District's Office/Technical and Paraprofessional Unit (Unit). A formal hearing was held and the Hearing Officer issued a proposed decision concluding that 12 substitute classifications occupied by substitute employees of the District shared a sufficient community of interest with the employees in the existing Unit and therefore ordered that the substitutes be included in the existing Unit.

The Board has reviewed the entire record in this case, including the proposed decision, the District's exceptions, and the Association's response to the District's exceptions. Based on this review, we find the Hearing Officer's findings of fact supported by the record and his

conclusions of law well-reasoned and in accordance with applicable law. We therefore affirm the unit modification and adopt the proposed decision as a decision of the Board itself, subject to the discussion below of the District's exceptions.

PROPOSED DECISION

At issue before the Hearing Officer was the proposed inclusion of crossing guards, substitute crossing guards, and approximately 135 substitute classifications into the Unit.

With respect to the crossing guard classification, the Hearing Officer determined that while the parties stipulated to placing the classification into the existing Unit, the parties failed to present any evidence that such a configuration would be appropriate. No facts were presented establishing that the crossing guards shared a community of interest with Unit employees, and therefore the Hearing Officer declined to add crossing guards or the substitute crossing guards to the existing Unit.[1]

With respect to the remaining substitute classifications, the Hearing Officer declined to address any classification that was not currently filled. Of the 135 Unit classifications originally petitioned for, only 12 classifications were filled by substitute employees at the time of the filing of the Petition. Therefore, the Hearing Officer only looked at community of interest factors with respect to the twelve filled positions.

The Hearing Officer determined that the 12 petitioned-for substitute classifications shared mutual interests in numerous areas, including: job duties, interaction and interchange with other employees, qualifications, discipline, training, supervision, wages and work hours.

[1] In support of his holding, the Hearing Officer cited *Fremont Unified School District* (2014) PERB Decision No. 2397, citing *Centinela Valley Union High School District* (1978) PERB Decision No. 62, which held that a Board agent should not accept parties' stipulated units without scrutiny, which may include conducting a representation hearing and eliciting evidence in support of the stipulated unit, in a unit modification case before PERB. Nothing precludes parties from freely entering into an agreement to modify an existing unit without participating in the PERB unit modification process. (PERB Reg. 32781.)

In finding that substitutes are not casual employees, the Hearing Officer determined that, unlike casual employees, substitutes had a reasonable expectation of continued employment and therefore shared a sufficient community of interest with employees in the existing Unit.

DISCUSSION

Generally, the District's exceptions focused on the Hearing Officer's finding that the 12 substitute classifications at issue were not "casual" employees. PERB has long defined casual employees as those who have a sporadic or intermittent relationship with the employer and therefore lack a sufficient community of interest with regular employees to be included in the regular unit. (*Unit Determination for Employees of the California State University and Colleges* (1981) PERB Decision No. 173-H, citing *Mission Pak Co.* (1960) 127 NLRB 1097.) The District urges the Board to adopt a test similar to the one used by the National Labor Relations Board (NLRB) for determining unit membership eligibility based on a minimum threshold number of hours worked within a specified time frame.

In support of its argument, the District contends that over 73 percent of the employees in the petitioned-for positions worked fewer than 20 days in an eight-month period preceding the Petition, and that the majority of them worked fewer than 10 days. The District is essentially attempting to define a point at which an employee's relationship with the District is transformed from intermittent and sporadic to substantial and continuing. Such point would, according to the District, represent a threshold test as to when an employee would be eligible for bargaining unit membership. In support of its argument, the District provided citations to numerous NLRB cases wherein certain positions were excluded where such positions were held by employees who did not regularly average four or more hours of work per week during the quarter before a petition for unit modification was filed. (See *Five Star Transportation Inc.*

(2007) 349 NLRB No. 42; *Metro Cars* (1992) 309 NLRB No. 77; *Trump Taj Mahal Associates* (1992) 306 NLRB No. 57; *Davison-Paxon Co.* (1970) 185 NLRB No. 21.)

While PERB may take cognizance of NLRB precedent in order to interpret analogous provisions of PERB statutes (*Carlsbad Unified School District* (1979) PERB Decision No. 89), with respect to this issue, we decline to adopt such an approach.

PERB has a long history of rejecting such a formulaic approach to bargaining unit composition. In *Dixie Elementary School District* (1981) PERB Decision No. 171 (*Dixie*), the Board modified an existing unit of regular full-time substitute and temporary teachers by including certain day-to-day substitutes and temporary teachers. The Board stated:

> [There was] no indication that the [petitioned-for] teachers' interest and commitment to, or empathy with, the concerns of others within the bargaining unit, is proportional to their number-of-days-employment. Moreover, to impose a threshold requirement for inclusion in the unit based on number-of-days-employment would be inevitably arbitrary. There is no rationale instructing where the line establishing the minimum should be drawn. Accordingly, this Board does not require, as a condition of unit membership, that a classroom teacher work for a specified number of days.

(*Id.*, *supra*, at pp. 7-8, fn. omitted.)

The Board has also rejected the argument that less than 50 percent part-time employment alone should automatically result in the designation of an employee as casual. (See *Paramount Unified School District* (1977) EERB Decision No. 33; *Belmont Elementary School District* (1976) EERB Decision No. 7.)[2] The mere fact that an employee does not work a particular number of days or percentage of time does not, in and of itself, indicate that the employee does not share a community of interest with other unit members. (*Unit*

[2] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

Determination for Service Employees of the University of California (1983) PERB Decision No. 245c-H, at p. 10.)

The District further argues that since the issuance of *Dixie, supra*, PERB Decision No. 171, changes in PERB precedent have required a different finding regarding the minimum employment relationship between a substitute and the employer to include an individual into a bargaining unit. According to the District, since *Dixie*, PERB has used the "established interest formula" to determine when an employee is deemed sufficiently interested in employment-related matters to allow him or her to vote on representation issues. The District uses *Palo Alto Unified School District, et al.* (1979) PERB Decision No. 84 (*Palo Alto*) to articulate the "established interest formula."[3] In *Palo Alto* only the substitutes on the current substitute list who had taught at least 10 percent of the pupil school days in the current or previous school year were deemed eligible to vote in a PERB conducted representation election.

We disagree with the District's contention. There has been no change in applicable PERB precedent. Beginning with *Palo Alto, supra*, PERB Decision No. 84, the Board concluded that all substitute employees should be included in the bargaining unit, but established the "established interest formula" as the threshold for voter eligibility in PERB conducted representation elections. In reaching its decision, the Board reasoned that while it is presumed that salaries and other terms and conditions of employment affect all members of the unit, the choice of a negotiating agent should be limited to those substitutes with an established interest in employment relations with the employer. (*Id.* at p. 10.) PERB reaffirmed its distinction in *Oakland Unified School District* (1988) PERB Order No. Ad-172 wherein it held

[3] Despite the District's contention, the development of the "established interest formula" was not adopted after the *Dixie* decision, but in fact pre-dates *Dixie* as is seen in the District's citation to *Palo Alto, supra*, PERB Decision No. 84.

that a substitute who taught one day per year was in the bargaining unit, but may not be eligible to vote in a representation election unless he or she had worked 10 percent of the current or previous school year. (See also *State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S [finding that seasonal lifeguards are included in a bargaining unit but that "not all members of a bargaining unit ... are eligible to vote in a representation election"].) There is a clear distinction between voter eligibility and unit membership eligibility. PERB has consistently held that employees should be included in bargaining units regardless of how few hours they may work in a year, while at the same time limiting who may vote in representation elections. As such, we decline to use the "established interest formula" to determine eligibility for bargaining unit membership.

The District further argues that if the Board does not adopt the formulaic approach followed by the NLRB or extend the "established interest formula" to eligibility for bargaining unit membership, that the substitutes at issue should be excluded from the Unit because they lack a sufficient community of interest with other unit employees because of their "casual" status.

Despite its contention, nothing in the District's exceptions takes issue with whether the substitutes perform duties similar to those of other unit employees; receive the same rates of pay; have the same qualifications, skills and education; work the same shifts; or report to the same supervisors. None of the community of interest factors identified by the Hearing Officer are disputed at all by the District. Rather, the District focuses its argument on the conclusory premise that the substitutes at issue are "casual."

The Board has identified criteria for distinguishing "casual" employees from employees with collective bargaining rights. In addition to having a sporadic or intermittent relationship with the employer, casual employees also lack a reasonable expectation of future employment

with that employer. For example, in *Unit Determination for Technical Employees of the University of California* (1983) PERB Decision No. 241c-H, PERB held that, with respect to both the classifications of "Special Duty Hospital Assistant" and "Special Duty Vocational Nurse," "[t]here is no indication that the employees in [these] classification[s] do not have a reasonable expectation of continuing employment." (*Id.* at pp. 21-22.) PERB concluded that those classifications were not casual and therefore not included in the patient care technical unit. (*Ibid.*) Likewise, in *Unit Determination for Clerical Employees of the University of California* (1983) PERB Decision No. 244b-H, PERB held that employees in the "Clerk" classification were not casual employees because "[t]here is no evidence indicating that clerks do not have a reasonable expectation of continuing employment." (*Id.* at p. 11.) The Board went on to hold that, since "[t]here are no specific facts in the record indicating that employees in [the 'Assistant' classifications] are not reappointed or have no reasonable expectation of continued employment[,] ... we reject the claim that these employees are casual and include the classifications in the unit." (*Ibid.*)

This case was submitted on a stipulated record as can be seen in the attached proposed decision. Upon review, the stipulated record is devoid of any specific facts indicating that the substitutes at issue have no reasonable expectation of continued employment. More importantly, however, the District stipulated to the fact that the substitutes do have a reasonable expectation of future employment. Stipulated fact number 66 specifically states:

> The District maintains a list of available substitute employees, and employees on this list have a reasonable expectation of future employment as a substitute with the District, absent any concerns about their work performance or their conduct. The petitioned-for classified substitutes have no expectation of regular (i.e., non-substitute) employment with the District[.]

Stipulated fact number 70 further states in pertinent part that "many substitute employees have worked for the District in that capacity for a number of years." Given that

there is no dispute that these employees have a reasonable expectation of continuing employment as substitutes for the District, in some cases for several years, we reject the District's claim that these employees are "casual" for purposes of their exclusion from the bargaining unit.

Request for Stay of Activity

In addition to its exceptions, the District simultaneously filed a Request for Stay of Activity pending the issuance of this Board decision. According to the District, a stay of activity is imperative because PERB's findings herein will seriously alter the administrative time the District will expend in preparing to address matters relative to negotiations regarding the employees at issue. The Association did not respond to the District's request.

As a threshold matter, PERB Regulation 32370, "Request for Stay of Activity," appears under Article 3, "Administrative Appeals." Under PERB Regulation 32350(a), an administrative decision does not include "(3) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to Section 32215." At issue herein is precisely the type of decision arising out of PERB Regulation 32350(a)(3) and excluded from the definition of administrative decision, and therefore not subject to a stay.

As important, under PERB Regulation 32305, "Finality of Board Agent Decisions," "(a) Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final on the date specified therein." Unlike an administrative decision that is final and effective upon issuance, a proposed decision only becomes final and effective if no exceptions are filed. Since exceptions were filed in this matter, the proposed decision did not become final and the proposed order did not go into effect. As such, the District's Request for Stay of Activity is not proper and is therefore denied.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, the petition for unit modification by the Poway School Employees Association (Association) in Case No. LA-UM-867-E is hereby GRANTED, in part, consistent with the proposed decision.

Pursuant to the Educational Employment Relations Act section 3545, subdivision (a), and the Public Employment Relations Board (Board) Regulations, the Board adds the following job classifications to the existing bargaining unit represented by the Association: Office Assistant II, Library Media Technician, LAN Administrator, Campus Security Specialist, Health Services Technician, Program Aide ESS/ASES, Lead Middle School ASES Assistant, Instructional Assistant-Preschool, Instructional Assistant ELL, Instructional Assistant I-Special Education, Instructional Assistant II-Special Education, and Athletic Trainer employed by Poway Unified School District.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY UNIFIED SCHOOL DISTRICT, Employer, and POWAY SCHOOL EMPLOYEES ASSOCIATION, Exclusive Representative.	REPRESENTATION CASE NO. LA-UM-867-E PROPOSED DECISION (February 13, 2015)

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by Gerald A. Conradi and Amy W. Estrada, Attorneys, for Poway Unified School District; Ochoa Legal Group by Ricardo Ochoa and Dovie Yoana King, Attorneys, for Poway School Employees Association.

Before Yaron Partovi, Hearing Officer.

PROCEDURAL HISTORY

The Poway School Employees Association (PSEA) is the exclusive representative of the employees at Poway Unified School District's (District) combined Office/Technical and Paraprofessional classified bargaining unit (Unit). On March 25, 2013, PSEA filed a Petition for Unit Modification (Petition), pursuant to the Educational Employment Relations Act (EERA),[1] with the Public Employment Relations Board (PERB or Board) to add to the Unit: (1) Crossing Guards and (2) Substitutes who fill-in for absent Unit members.

On April 29, 2013, the District asserted that the proposed unit modification is inappropriate. During an October 10, 2013 settlement conference, the parties were unable to resolve this matter; however, the parties stipulated to the submission of a joint statement of

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code, unless otherwise specified.

facts and several exhibits. With the receipt of the parties' closing briefs on April 26, 2014, the record was closed and the case was submitted for decision.[2]

STIPULATED FACTS

The parties entered into a "Joint Stipulation of Relevant Facts" that provides, in relevant part:

1. The [District] is a public school district in San Diego and Poway, California. . . .

2. The [District] is a "public school employer" pursuant to the provisions of Government Code section 3540.1 (k).

3. The [PSEA] is the "exclusive representative" for the Office/Technical and Paraprofessional classified bargaining unit in the District pursuant to Government Code section 3540.1(e).

4. Local 221 of the Service Employees International Union ("SEIU") is the "exclusive representative" for the Operations Support Services classified bargaining unit in the District pursuant to Government Code section 3540.1(e). SEIU is not a party to the present Petition and has not sought to intervene in this matter.

5. The description of PSEA bargaining unit members is currently set forth in Article 1 of the collective bargaining agreement ("CBA") between the District and PSEA, at Section 1.1.7. That section states:

> "Members of the unit" refers to all classified employees who are part of a single unit which represents Office, Technical and Paraprofessional classified employees. All management, confidential, and supervisory employees and all other classified employees are excluded from the above unit. Specific descriptions of this single unit of classified employees are attached hereto marked as Appendix A.

[2] On June 17, 2014, PSEA filed an "Evidentiary Objection to Respondent's Closing Brief" asserting that the following facts contained in the District's closing brief were not part of the evidentiary record and are not relevant in this matter: "An employee is eligible to become a PSEA member if s/he remains current in dues owed to PSEA. . . . Voting may take place at 'membership meetings,' and approval by a majority of members is required to adopt, amend, or repeal any PSEA bylaw. . . ." PERB advised the District that PSEA's filing would be treated as a motion under PERB Regulation 32190 and that the District could file a response by no later than July 1, 2014. The District did not file any opposition to the motion. Given that the above facts are not contained in the stipulated facts, it is not proper to reference such facts in this decision. (See e.g., *Campbell Union High School District* (1988) PERB Decision No. 701.)

6. On March 25, 2013, PSEA filed a Petition for Unit Modification with [PERB]. The [P]etition sought to add the following unrepresented positions to PSEA's bargaining unit:

   a. Crossing guards; and

   b. Substitutes in the following positions: substitute crossing guards, child care substitutes, substitute clerks, substitute instructional assistants, substitute classified and campus security officers.

7. The District submitted its Response to the [Petition] on April 26, 2013. In its response, the District argued the necessity of presenting proof of majority support and asserted there was an insufficient community of interest between the petitioned-for classified substitutes and current bargaining unit members. On June 26, 2013, the District withdrew its contention that the Petition required proof of majority support. The District continues to maintain that the petitioned-for classified substitutes lack a sufficient community of interest with current bargaining unit members.

8. The District does not oppose the inclusion of regular crossing guards in PSEA's unit, and PSEA and the District have agreed that regular crossing guards should be included as paraprofessionals in the Classified Service.

9. The District has adopted the "merit system" which is codified in Education Code section 45240 et seq.

10. Personnel Commission Director Deborah Wulff oversees the employment of both substitute and contract employees in the classified service.

11. District Administrative Procedure ("AP") 4.301.1. . . exempts from the classified service:

    3. Temporary (Limited Term) Employees/Position [sic]

       a. Persons employed in temporary (limited term) positions are exempt from the classified service. These are persons employed to:

          (1) Perform a service of a temporary nature, the duration of which shall not exceed six months (short term).

          (2) Take the place of an absent employee not to exceed the period of absence of said employee (substitute).

12. Personnel Commission Rule ("PC Rule") 10.100 defines "limited term employee" as:

> An employee who is serving as a substitute for a regular member of the Classified Service or in a position established for a limited and specified period of time, not to exceed six months.

13. The term "substitute," as used in the Petition and these stipulations, refers to limited term employees as defined in AP 4.301.1 and PC Rule 10.100[.]

14. The CBA, at Section 1.1.9, defines a ["]permanent employee" as a "regular employee who has successfully completed an initial probationary period."

15. The CBA, at Section 1.1.10, defines a ["]probationary employee" as: [A] regular employee who will become permanent upon the successful completion of a prescribed probationary period. 'Six months' as it relates to 'probationary period' [sic] to be defined as six months or 130 days of paid service whichever is longer.

16. PC Rule 10.100 defines a permanent employee as:

> An employee who has completed a probationary period in the class to which assigned or who entered the class by transfer, demotion, or reinstatement/reemployment without serving a probationary period.

17. PC Rule 10.100 defines a probationary employee as "[a]n employee serving a probationary period." Rule 10.100 further defines probationary period as:

> A trial period of six months (or 130 working days, whichever is longer) or one year (as determined by the Commission) before being advanced into permanent status in the District. Immediately following an original or promotional appointment to a permanent position from an eligibility list. All leaves, paid or unpaid, are excluded from the probationary period.

18. The petitioned-for classified substitute employees are not deemed probationary or permanent.

19. In general, classified substitute work in the District is at-will/on-call based on District need.

20. The petitioned-for classified substitutes may elect whether or not to accept a substitute assignment.

21. Individuals may apply to the petitioned-for classified substitute positions through postings of the District's Personnel Commission.

22. In some cases, an individual work site may request that a particular individual be hired as a petitioned-for classified substitute.

23. If an individual applies to be a petitioned-for classified substitute through a Personnel Commission posting, the individual goes through a screening interview. If the Personnel Commission observes no obvious concerns, deems the person capable of communicating in English, and the individual has the minimal certifications for the specific assignments sought, the individual may be placed on the classified substitute list.

24. If an individual is recommended as a petitioned-for classified substitute by an individual site, the Personnel Commission will only verify if the individual has the minimal qualifications for the specific assignments sought; there is no screening interview.

25. PC Rule 30.200.4 relates to the appointment of "substitute or limited term positions." PC Rule 30.200.4 states:

A. Whenever the appointing authority shall require the appointment of a person to a limited term position in lieu of an employee on an approved leave as defined in Chapter 65, the appointing authority shall so notify the Commission office and indicate the probable duration of the appointment.

B. Whenever the appointing authority shall require the appointment of a person to a limited term position, the duration of which is not to exceed six months, the Commission shall be so notified, and informed of the duration of the appointment.

C. All appointments to substitute or limited-term positions shall be made from appropriate eligibility lists. Eligibles shall be certified in accordance with their position on the appropriate employment list and their willingness to accept appointment to such position as limited-term employees.

D. Limited-term employees shall not earn seniority credit, nor be granted benefits regularly given to the Classified Service, with the following exceptions:

1. Limited-term (substitute) employees who work continuously for more than six months shall be granted sick leave benefits as defined in Section 45191 of the Education Code.

2. Limited-term (substitute) employees whose assignment is for more than six months shall be paid for those holidays occurring during their assignment period.

26. The PC Rules which must be followed when selecting candidates for contract classified employment are set forth in Chapters 40 and 50 of the PC Rules. . . . These processes may include a competitive examination, ranking of candidates, and the creation of eligibility lists to determine appointment. Currently, all PSEA unit classifications are subject to PC Rule processes in their selection for employment.

27. Classified substitutes are not subject to the selection processes set forth in Chapters 40 and 50 of the PC Rules to be placed on an eligibility list.

28. The District's job postings for the petitioned-for substitute positions use the same description of the position and examples of duties as do the job postings of the equivalent contracted positions in the existing unit. For example:

    a. Exhibit 7 is a true and correct copy of a District job posting for an "Instructional Assistant I—Special Education" in the existing unit, whereas Exhibit 8 is a true and correct copy of a District job posting for a "Substitute Instructional Assistant I—Special Education," one of the petitioned-for titles;

    b. Exhibit 9 is a true and correct copy of a District job posting for a "Program Aide—ASES" in the existing unit, whereas Exhibit 10 is a true and correct copy of the District's current job posting for a "Substitute Program Aide—ASES," one of the petitioned-for titles[.]

29. In addition to required certifications and licenses, the applicable classification descriptions require contract classified employees to possess specified education or experience to qualify on the PC eligibility list. Based on recruitment necessities, parts of these qualifications may be waived. Such additional qualifications contained in the classification descriptions include, but are not limited to:

    a. An Administrative Assistant II must have completed college-level coursework in business, office management, or a related field and must have four years of responsible secretarial or administrative assistance experience involving public contact.

    b. A Library Media Technician must have two years of experience working in a library or media center.

    c. A Health Services Technician must have two years of experience providing health services to children and/or working in a school office.

d. A Computer Resource Assistant must have received training in the use of networks, computers, mobile devices, and software and must have two years of experience working in an educational environment.

e. A School Administrative Specialist I must have completed two years of college-level coursework in computer technology and must have two years of experience in a highly computerized technical office environment.

30. Although classified substitutes must meet the minimum certification requirements of a given position to substitute in that position, no classified substitutes are required to hold the education and/or experience qualifications called for in the applicable classification description.

31. Candidates for the petitioned-for substitute positions are required to possess the same CPR and First Aid certifications as employees in the existing unit, pass the same fingerprint background check as employees in the existing unit, and successfully complete the same functional physical exam as employees in the existing unit.

32. When the District hires an individual in a petitioned-for substitute employee position who has never previously worked for the District, that individual is required to attend the same District new employee orientation as are newly-hired members of the existing unit who have never previously worked for the District.

33. Individuals hired as Substitute Program Aides in the ESS or ASES programs are required to meet the same qualifications as are individuals hired as ESS/ASES Program Aides within the existing unit.

34. Individuals hired in the "substitute instructional assistant" position are required to meet the same qualifications under the federal No Child Left Behind ("NCLB") law as are individuals hired in Instructional Assistant positions within the existing PSEA unit.

35. Both the Instructional Assistant I-Special Education job description and the substitute Instructional Assistant I-Special Education job description require "coursework in child development related to students with special needs" and "one year experience working with students of various age levels requiring a specialized learning environment." In practice however, these requirements are waived for both positions. All applicants for any substitute instructional assistant position must pass the NCLB examination and may no longer meet this requirement with college/university credits.

36. In addition to the two-hour NCLB certification examination, contract Instructional Assistants must successfully complete a qualifying examination to be eligible to work in the position.

37. In addition to the two-hour NCLB certification examination, contract Library Media classifications must successfully complete a qualifying examination testing their library skills and knowledge.

38. Individuals substituting for absent Health Services Technicians in the existing PSEA unit are required by the District to attend the same Health Services orientation/training which the District requires newly-hired Health Services Technicians in the existing unit to attend.

39. The petitioned-for substitute positions represent all the substitute positions which substitute for absent members of, or temporarily fill vacancies in, the existing unit. Except for substitute teacher, there are no other substitute positions at the District which substitute for absent members of, or temporarily fill vacancies in, PSEA's unit.

40. The District currently utilizes other substitute job titles, such as "Substitute Custodian" and "Food Service Substitute," which substitute for absent members of, or temporarily fill vacancies in, the District's Operations Support Services classified bargaining unit represented by SEIU Local 221. These substitute job titles are not part of PSEA's petition.

41. The District and PSEA agree that the petition is not intended to bring confidential substitutes into the PSEA unit and therefore, if PSEA's petition is granted, the unit shall exclude substitutes for absent confidential employees.

42. With exception of the substitute crossing guards, the petitioned-for substitute positions only substitute for absent members of, or temporarily fill vacancies in, the existing unit. With the exception of the substitute crossing guards, these substitute positions do not substitute for absent employees of, or temporarily fill vacancies in, the District that are outside PSEA's existing unit. The substitute crossing guards only substitute for regular crossing guards who are absent, or temporarily fill vacancies of regular crossing guards.

43. In some instances, individuals providing substitute services for the District may alternate between working as a substitute for absent members of PSEA's unit, absent members of SEIU's unit, and/or absent confidential employees. PSEA's petition only seeks to represent these individuals when they are performing services for absent members of, or temporarily filling vacancies in, PSEA's existing unit.

44. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, that substitute employee is supervised by the same supervisor as the absent unit member or the vacant position. The District does not have a separate supervision structure for substitute employees.

45. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, the substitute employee is performing work at the same location as the absent unit member or the vacant position. The District does not have separate work spaces for substitute employees. Petitioned-for substitute employees may also share a physical workspace with members of the District' certificated bargaining unit, the SEIU bargaining unit, and/or other non-PSEA unit members.

46. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, the substitute employee is interacting with members of the existing unit, and with teachers and administrators, to the same extent as the absent unit member or vacant position would. The District does not segregate or otherwise separate substitute employees from existing unit members.

47. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, that substitute employee is performing some of the same job functions as the absent unit member, or employee in a vacant positon, would have performed that day. Supervisors assess the ability of a substitute to perform the duties of the position of the absent employee and work assignments for substitutes will differ depending upon the ability of the substitute to perform some or all of the duties of the absent employee. The District does not have a separate job duties [sic] to be performed only by substitute employees.

48. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, that substitute employee sometimes works the same hours as the absent unit member, or vacant position, would have worked that day. However, the substitutes occasionally perform substitute services for fewer hours than the regular employee. The District does not have a separate work schedule for substitute employees.

49. When a petitioned-for substitute employee is filling in for an absent unit member or temporarily filling a vacant unit position, that substitute employee's compensation is funded from the same sources of revenue as the absent unit member, or vacant position, would have been paid from. The District does not have separate funding sources for substitute employees.

50. Every individual working in the petitioned-for titles is paid an hourly rate which corresponds to the hourly rate for positions within the existing PSEA unit, and this rate of pay may differ daily based on the assignment accepted by the substitute. Most of the time, but not always, the rate the substitute employee is paid corresponds either to the specific position or the job family in which they are substituting. For example:

a. The rate which the District pays individuals who are substituting for Senior Information Systems Support Analysts in PSEA's unit is Step I of the current salary range for PSEA unit members serving in the position of Senior Information Systems Support Analyst (Range 48).

b. The rate which the District pays individuals who are substituting for Career Guidance Technicians in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Career Guidance Technician II (Range 27).

c. The rate which the District pays individuals who are substituting for Health Services Technicians in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Health Services Technician (Range 26).

d. The rate which the District pays individuals who are substituting for Computer Resource Assistant II in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Computer Resource Assistant II (Range 26).

e. The rate which the District pays individuals who are substituting for Campus Security Specialists in PSEA's Unit is Step 1 of the current salary range for PSEA unit members serving in the position of Campus Security Specialist (Range 23).

f. At the time PSEA filed its position [sic], the rate which the District paid individuals who were substituting for clerical employees in PSEA's unit was Step 1 of the current salary range for the unfilled position of Office Assistant I (Range 20). Since then, the Office Assistant I classification has been abolished, and the District anticipates that individuals substituting for clerical employees in PSEA's unit will henceforth be paid at Step 1 of the current salary range for PSEA unit members serving in the position of Office Assistant II (Range 22).

g. The rate which the District pays individuals who are substituting for Instruction Assistant I-Special Education in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Instructional Assistant I-Special Education (Range 20).

h. The rate which the District pays individuals who are substituting for Preschool Instructional Assistants in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Preschool Instructional Assistant (Range 20).

i. The rate which the District pays individuals who are substituting for Library Media Assistants in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Library Media Assistant (Range 20).

j. The rate which the District pays individuals who are substituting for Program Aides in the ESS or ASES programs in PSEA's unit is Step 1 of the current salary range for PSEA unit members serving in the position of Program Aide in the ERR or ASES programs (Range 16).

51. The petitioned-for classified substitutes do not attain seniority and are not considered to have a seniority date.

52. PSEA and the District have negotiated into their current [CBA] a provision that allows employees who retire from the existing unit to count up to five (5) years of service as an hourly employee toward eligibility for post-retirement health insurance benefits.

53. Substitute employees of the District participate in the same retirement plans (either CalPERS, PARS or, less frequently, CalSTRS) as do classified employees in the existing PSEA unit.

54. The petitioned-for classified substitutes are not eligible for transfers.

55. The petitioned-for classified substitutes do not accrue vacation.

56. The petitioned-for classified substitutes do not receive nor are they eligible for health and welfare benefits.

57. The petitioned-for classified substitutes do not earn sick leave or holiday pay, unless they fall within the exception set forth in PC Rule 30.200.4. . . . Under the PC Rules, only substitute employees "who work continuously for more than six months shall be granted sick leave benefits as defined in Section 54191 of the Education Code." Additionally, only substitute employees "whose assignment is for more than six months shall be paid for those holidays occurring during their assignment period."

58. With the exception of Health Services Technicians, neither employees in the petitioned-for substitute positions nor those in the existing PSEA unit are required to undergo any form of training as a condition of employment. Both groups of employees are expected to bring to the job their prior skills, knowledge and experience and learn additional skills while on the job.

59. The petitioned-for classified substitutes do not receive staff development training.

60. The petitioned-for classified substitutes are not provided District e-mail accounts.

61. To dismiss a current PSEA bargaining unit member from employment, the District must follow the procedures set forth in District AP 4.313.1 ["reasonable cause" for disciplinary action against probationary employees; enumerated causes

for permanent employees with a right to appeal]. The District also must, in most cases, adhere to a system of progressive discipline as set forth in District Board Policy [sic] 4.313.

62. A classified substitute need not be "dismissed" or "laid off"; the District may simply elect not to contact the individual to offer him/her an assignment.

63. When there is a reduction in force, current PSEA bargaining unit members may only be laid off in accordance with Article 15 of the CBA. . . . Article 15 provides unit members with rights regarding notice, bumping, and reemployment.

64. PSEA unit members are evaluated by their designated supervisors in accordance with Article 11 of the CBA. . . . According to Article 11, permanent employees are subject to a formal evaluation once every one or two school years, depending on their length of service. In practice, however, such evaluations of PSEA unit members often do not occur with the frequency anticipated in the CBA.

65. Classified substitute employees are not subject to any fixed method of evaluation.

66. The District maintains a list of available substitute employees, and employees on this list have a reasonable expectation of future employment as a substitute with the District, absent any concerns about their work performance or their conduct. The petitioned-for classified substitutes have no expectation of regular (i.e., non-substitute) employment with the District[.]

67. In some cases, employees who are first employed as substitutes for absent PSEA unit members or in vacant unit positions are subsequently hired into a position in the PSEA unit. For example, of the 139 individuals who performed services for the District as substitutes in the petitioned-for titles between July 2012 and March 2013, 11 of them (nearly 8%) were hired by the District into PSEA-represented classified positions by February 2013.

68. Some employees who have retired from the District in a position within PSEA's unit return to work for the District in the petitioned-for substitute employee positions.

69. It is common for less-senior employees in the existing PSEA unit to move from one job classification to another as they are laid off from their previous positions, or as other positions become available.

70. The petitioned-for substitute classified employees have a higher turnover rate than employees in the established PSEA unit. However, many substitute employees have worked for the District in that capacity for a number of years.

71. Approximately three out of four substitute employees who performed services for the District in the petitioned-for titles during the 2012-2013 school year worked as

substitutes for only one classification in the PSEA unit. Of the 139 people who worked in the petitioned-for titles between July 2012 and March 2013, only 32 substituted in more than one classification. Further, of those 32 individuals, 10 substituted exclusively for paraprofessional classifications.

72. Individual employees in the existing PSEA unit work as little as one (1) hour per day and as many as eight (8) hours per day, depending on how many hours per day they have been contracted for. Similarly, employees in the petitioned-for substitute positions may be scheduled to work for the District as little as one (1) hour in a day or as many as eight (8) hours in a day.

73. The work year for 9.5 (9½) month employees in the PSEA bargaining unit is 185 days.

74. The work year for 10 month employees in the PSEA bargaining unit is 195 days.

75. The work year for 10.5 (10½) month employees in the PSEA bargaining unit is 202 days.

76. The work year for 11 month employees in the PSEA bargaining unit is 209 days.

77. The work year for 11.5 (11½) month employees in the PSEA bargaining unit is 220 days.

78. The work year for 12 month employees in the PSEA bargaining unit is 245 days.

79. The payroll prior to the date PSEA filed the instant petition for unit modification ended on February 25, 2013.

80. Between July 1, 2012 and February 25, 2013, the District employed a total of 124 different individuals as classified substitutes in the petitioned-for positions.

81. [Seventy five] of the individual classified substitutes worked a total of 10 days or fewer between July 1, 2012 and February 25, 2013.

82. [Sixteen] of the individual classified substitutes worked between 11 and 20 days in total between July 1, 2012 and February 25, 2013.

83. [Twenty five] of the individual classified substitutes worked between 21 and 50 days in total between July 1, 2012 and February 25, 2013.

84. Eight of the individual classified substitutes worked between 51 and 113 days between July 1, 2012 and February 25, 2013.

ISSUE

Whether it is appropriate to add the Crossing Guard and petitioned-for Substitute classifications to the Office/Technical and Paraprofessional Unit represented by PSEA.

CONCLUSIONS OF LAW

I. Legal Status of Substitutes

Education Code section 45103 expressly exempts Substitute employees from the classified service in school districts that have not adopted a merit system.[3] (Ed. Code § 45103, subds. (b)(1) and (f).) Here, however, the District has adopted a merit system and established a Personnel Commission (PC) pursuant to Education Code section 45240. As such, personnel matters concerning classified employees are administered in accordance with the PC Rules. Pursuant to the District's PC Rules and Administrative Procedure—which also delineate exemptions for classified service—a classified Substitute serving as a "limited term employee" is not a classified employee and is not subject to the merit system.

Section 3540.1, subdivision (j) provides:

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

In *Center Unified School District* (2014) PERB Decision No. 2379 (*Center USD*), the Board held that employees excluded from the Education Code definition of "classified service" (in that case, Noon Duty Aides) could nonetheless be considered "public school employees" under the EERA. The Board explained that although "the Education Code expressly excludes such employees from the definition of 'classified service,'" the employees fell within EERA's

[3] Education Code section 45103, subdivision (b)(1) provides: "Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be a part of the classified service."

broad definition of "public school employee." (*Ibid.*, citing *Pittsburg Unified School District* (1976) EERB[4] Decision No. 3 [*Pittsburg*] and *Fontana Unified School District* (2004) PERB Decision No. 1623 [*Fontana*].) The Board noted that while section 3540.1, subdivision (e) formerly defined "exclusive representative" as the representative of "certificated or classified employees," the Legislature changed the definition so that it now defines the exclusive representative as the representative of "public school employees" as defined in subdivision (j)."[5] (*Id.*, p. 5.) The broad definition of "public school employee" under EERA "is not limited in any way to certificated employees or employees in the classified service." (*Id.*, pp. 3-4.) Like the Noon Duty Aides in *Center USD*, the Substitutes at issue here are school employees with representational rights under EERA: "the Board has long held that [Noon Duty Aides] are 'public school employees' within the meaning of section 3540.1, subdivision (j), and, that they may appropriately be included in a unit of classified employees for collective bargaining purposes." (*Id.*, p. 3.) It is therefore well-settled under *Center USD*, that despite the specific exclusion contained in the Education Code, employees falling within the broader public school employee definition provided in EERA "should enjoy the same rights afforded other public school employees to bargain collectively through a representative of their own choosing." (*Id.*, pp. 3-4.)

[4] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

[5] The Legislature enacted this change to the EERA in light of the Board's issuance of *Castaic Union School District* (2010) PERB Order No. Ad-384 in which a majority of the Board interpreted the EERA to conclude that Noon Duty Aides have no collective bargaining rights under the EERA because they are expressly excluded from the definition of "classified service" in the Education Code. In light of the Legislature's amendment to the EERA, the Board overruled this holding in *Center USD*, *supra*, PERB Decision No. 2379, p. 5.

The case of *California School Employees Assn., Tustin Chapter No. 450 v. Tustin Unified School District* (2007) 148 Cal.App.4th 510 (*Tustin USD*), cited by the District, is distinguishable. In that case, the parties' collective bargaining agreement required the district to deduct from an absent employee's salary, the "amount actually paid to a substitute employee." (*Id.*, p. 4.) The legal question presented was whether the district, when it assigns a classified employee to fill the position of an absent employee, may deduct any sum from the absent employee's salary. The Court of Appeal concluded that under Education Code section 45196, a school district may not deduct from the absent employee's salary the amount paid to "current [classified] employees" assigned during the absent employee's work hours, since such classified employees are not "substitutes." (*Ibid.*) The court also rejected the district's argument that a substitute employee may be "a classified employee" and vice-versa because a substitute designation is dependent upon the "purpose for which a school district hires the employee." (*Id.*, p. 6; emphasis added.)

Tustin USD, *supra*, 148 Cal.App.4th 510, therefore, addressed the issue of hiring, holding that current classified employees hired to also replace or fill in for other classified employees are not "substitutes." In the present case, by contrast, the Substitute classifications are individuals hired by the District to fill in for absent Unit members. These individuals are clearly "substitutes" and not the replacement employees at issue in *Tustin USD* (i.e., current classified employees filling in for other absent unit members).

Moreover, even if an individual already employed by the District concurrently serves as a Substitute employee, EERA does not bar employees from being represented by more than one bargaining unit. As stated in *San Francisco Unified School District* (1995) PERB Decision No. 1086,

> An employee holding two positions with the same employer, e.g., part-time instructional aide and part-time bus driver, might well be included in two separate bargaining units represented by two different exclusive representatives. Such a situation might result in the employee paying dues to two unions, and might even result in some confusion, but the result is not contrary to EERA's general provision of the right of employees to have a single exclusive representative.

The Board has also held that substitute employment in other school districts is not an impediment to the formation of a bargaining unit nor would it detract from substitutes' community of interest in the terms and conditions of employment with the school district in question. (*Palo Alto Unified School District, et al.* (1979) PERB Decision No. 84 ALJ decision, p. 16 [*Palo Alto USD*].)

The EERA should be liberally interpreted so as to effectuate its purpose of affording public school employees the right to organize and be represented in their employment relations by an exclusive representative. (§ 3540.) Therefore, in view of the foregoing discussion and authorities, and absent contrary Board precedent, it is found that Substitutes who fill in for absent Unit members are "public school employees" subject to section 3540.1, subdivision (j).

II. No Presumption of Appropriate Unit

In *Sweetwater Union High School District* (1976) EERB Decision No. 4 (*Sweetwater*), PERB held that there are three appropriate classified units under EERA: (1) an instructional aides (paraprofessional) unit; (2) an office-technical and business services unit; and (3) an operations-support services unit. In *Foothill-DeAnza Community College District* (1977) EERB Decision No. 10, the *Sweetwater* units were made presumptively appropriate, thereby creating what is commonly called the *Sweetwater* presumption. Although the *Sweetwater* unit configuration is "preferred," such configurations are neither the only nor the most appropriate units for classified employees as PERB has allowed a variety of other classified units.

(*Compton Unified School District* (1979) PERB Decision No. 109.) Here, the unit represented by PSEA is a combined unit comprised of Office-Technical employees and Paraprofessional employees. PERB records—of which official notice is taken—show that in or about July 1996, California School Employees Association, Chapter 313 (CSEA) was the exclusive representative of a separate Office-Technical Unit and Paraprofessional Unit. On July 22, 1996, PERB issued a Unit Modification Order granting a petition to combine these units into one, but warned "Issuance of this Order shall not be interpreted to mean that the Board would find this Unit, as modified, to be an appropriate unit in a disputed case." In other words, no determination was made by PERB to find this consolidated unit to be appropriate.

The configuration of this unit—two combined *Sweetwater* units (i.e., Office-Technical and Paraprofessional Unit)—shall not be disturbed by this decision. (*Arcadia Unified School District* (1979) PERB Decision No. 93, p. 13 ["The Board will not disturb an existing unit when its composition is not at issue"]; see also, *Santa Clara Unified School District* (2007) PERB Decision No. 1911, p. 6 [PERB is also disinclined to disturb units that are "stable and in existence for some time"].) Moreover, given that PSEA's consolidated Office-Technical Paraprofessional unit has not been found to be either appropriate or inappropriate by PERB, there is no presumption that the existing unit is appropriate. It logically follows that the standard against which the requested unit (i.e., the Unit plus Substitute employees) is judged shifts to whether it is an appropriate unit within the meaning of section 3545, subdivision (a). (See *Elk Grove Unified School District* (2004) PERB Decision No. 1688 (*Elk Grove USD*).)

III. Unit Determination

Given that there is no presumption to rebut, PERB must weigh the evidence to determine whether the proposed unit modification is appropriate based on the factors in section 3545, subdivision (a) which provides:

> In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of 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.

Therefore, in determining whether a unit is an appropriate unit, PERB balances: (1) the community of interest of employees; (2) the established practices; and (3) the effect of the size of the unit on the efficient operations of the employer.

Where, as here, the unit represented by PSEA is not a *Sweetwater* unit, the proper inquiry is whether the requested unit configuration is an appropriate unit—not whether it is more appropriate than the existing unit configuration. (*Long Beach Community College District* (1999) PERB Decision No. 1315; *Elk Grove USD, supra,* PERB Decision No. 1688.)

A. Community of Interest

In determining whether there is a community of interest, PERB considers multiple factors, including: (1) the extent to which employees share education and qualifications; (2) training and skills; (3) job functions; (4) method of wages or pay schedule; (5) hours of work; (6) fringe benefits; (7) supervision; (8) frequency of contact with other employees; (9) interchange with other employees; and other related factors. (See, e.g., *Elk Grove USD, supra,* PERB Decision No. 1688.) Additional relevant criteria were identified by PERB in *Redondo Beach City School District* (1980) PERB Decision No. 114, including sources of funding,

purposes of various programs, evaluation procedures, comparison of layoff [and dismissal] provisions, different instructional practices and working conditions. (*Id.*, citing to *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta CCD*); *Oakland Unified School District* (1977) EERB Decision No. 15.)

The overriding consideration is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*Fontana, supra*, PERB Decision No. 1623; *San Diego Community College District* (2001) PERB Decision No. 1445; *Monterey Peninsula Community College District* (1978) PERB Decision No. 76.) Unit determinations are based upon the actual work performed by the incumbents. (*Hemet Unified School District* (1990) PERB Decision No. 820.) The point of inquiry then is whether the petitioned-for classifications share substantial mutual interests in consideration of the totality of circumstances presented here. (*Monterey Peninsula Community College District, supra*, PERB Decision No. 76.)

The Board's treatment of unit determinations for substitute employees under EERA has evolved over the years. Early PERB cases found that found substitute certificated employees lacked a community of interest with regular classroom teachers. (*Belmont Elementary School District* (1976) EERB Decision No. 7; *Petaluma City Elementary and High School Districts* (1977) EERB Decision No. 9; *Oakland Unified School District, supra*, EERB Decision No. 15; *Los Rios Community College District* (1977) EERB Decision No. 18). Subsequently, in *Peralta CCD, supra*, PERB Decision No. 77, it was held that section 3545[6] establishes a rebuttable presumption that all classroom teachers should be placed in a single unit, absent a

[6] Section 3545, subdivision (b)(1), provides in relevant part, "In all cases . . . [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. . . ."

showing of a lack of community of interest between the groups. Two months later, the Board issued its decision in *Palo Alto USD, supra*, PERB Decision No. 84 finding that a separate unit of substitute certificated employees share a community of interest amongst themselves.[7] Subsequently, the Board issued several decisions excluding substitute employees from certificated bargaining units. (*Paso Robles Union School District, et al.* (1979) PERB Decision No. 85; *Berkeley Unified School District* (1979) PERB Decision No. 101; *Jefferson School District* (1980) PERB Decision No. 133; *El Monte Union High School District* (1980) PERB Decision No. 142.)

After these decisions, the Board shifted from its treatment of placing substitute employees in separate units and adopted a line of cases that applied a more nuanced framework when considering whether to include substitutes with regular employees. In the seminal case of *Dixie Elementary School District* (1981) PERB Decision No. 171 (*Dixie I*), the Board found that a certificated unit which included substitute employees was appropriate. In that case, the Board found that it was not relevant that individual substitutes may not have expectancy of continued employment because substitutes, as a class, do expect future employment. That decision was affirmed by the Board in *Dixie Elementary School District* (1983) PERB Decision No. 298 (*Dixie II*) where an unfair practice charge had been filed because the district refused to bargain with the certificated unit after substitutes and temporary employees had been placed in that unit pursuant to *Dixie I*. The Board found that the district failed to offer either new facts or arguments of law supporting its contention that substitutes were not properly placed in the unit of full-time classroom teachers. Subsequently, in *Oakland Unified*

[7] However, the Board determined that it would not apply the test formulated in *Peralta CCD, supra,* PERB Decision No. 77 where retroactive application of the test would cause disruption and instability in the existing certificated unit. (*Palo Alto USD, supra,* PERB Decision No. 84, p. 8.)

School District (1983) PERB Decision No. 320 (*Oakland*), the Board affirmed a hearing officer's decision granting a petition to add all regular certificated substitute employees to the certificated unit after finding a sufficient community of interest between these two groups of employees. Similarly, in *Palo Alto Unified School District* (1983) PERB Decision No. 352, PERB approved a unit comprised of both substitute teachers and regular teachers.

PERB's unit determination of substitute classified employees remains consistent with *Dixie Elementary School District, supra*, PERB Decision No. 171, and its progeny. For example, in *Santa Clara County Office of Education* (1990) PERB Decision No. 839, the Board affirmed the hearing officer's decision to grant a unit modification petition filed by the union, which sought to add substitute bus drivers to an existing bargaining unit containing full-time bus drivers. In making the unit determination of classified substitutes, the hearing officer utilized the same community of interest factors and principals applied to cases involving certificated substitutes. (*Id., pp.* 4-5.) The hearing officer concluded that, ". . . *the criteria used to determine community of interest are the same for certificated and classified employees*." (*Ibid.*; emphasis added.)[8] Thus, the community of interest criteria applies here to determine whether the proposed unit is appropriate.

1. Crossing Guards and Substitute Crossing Guards

The parties have stipulated that the Crossing Guard classification be placed in the existing Unit. However, the parties have not presented any evidence that such a configuration would be appropriate. "In a unit modification hearing, the importance of live testimony from

[8] Also relevant to this matter is the Board's earlier decision in *San Diego Unified School District* (1981) PERB Decision No. 170 where the Board denied the petitioner's request to carve out a separate unit of substitute bus drivers from the existing unit given that both groups share a strong community of interest and also to avoid the potential for a fragmented work force among all other occupational groups in the existing unit.

incumbents in the disputed positions cannot be overstated." (*Fremont Unified School District* (2014) PERB Decision No. 2397.) The Board has held that a Board agent should not accept parties' stipulated units without scrutiny, which may include conducting a representation hearing and eliciting evidence in support of the stipulated unit. (*Ibid.*, citing to *Centinela Valley Union High School District* (1978) PERB Decision No. 62.) The record is devoid of facts showing that Crossing Guards share a community of interest with Unit employees. For example, there is no showing that the Crossing Guards and Unit employees: share similar wages hours and fringe benefits; perform functionally equivalent work duties; share similar lines of supervision; or have similar education, certification or training. Accordingly, the Crossing Guards shall not be added to the Unit. Given that the proposed unit does not include Crossing Guards, the Substitute Crossing Guards—who presumably perform the same functions—are also excluded given the lack of evidence showing community of interest among other classified staff in the Unit.

2. Vacant Positions

The Petition seeks to add classified Substitute classifications to the existing Unit.[9] The record shows that there are approximately 135 classifications in the existing Unit. The record does not support that there are Substitute classifications corresponding to each of the 135 classifications. PERB has long declined to make a determination regarding the appropriate unit placement of a classification with no incumbent. (*Marin Community College District*

[9] Some clarification may be needed to define the difference between a "position" and a "classification." In *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, the Board defined "position" as "a group of duties and responsibilities which are intended to be performed by one employee." A "classification" was defined as "any number of positions which are sufficiently similar in duties and responsibilities that the same job title, minimum qualifications, qualifying tests, and salary range are appropriate for all positions in the class." (*Ibid.*)

(1978) PERB Decision No. 55.) This is true even when the parties have reached a stipulation as to the appropriate unit placement of vacant positions. (*Mendocino Community College District* (1981) PERB Decision No. 144a.)

Here, at the time of the filing of the Petition, only the following Unit positions were filled by Substitute employees: Office Assistant II; Library Media Technician; LAN Administrator; Campus Security Specialist; Health Services Technician; Program Aide ESS/ASES; Lead Middle School ASES Assistant; Instructional Assistant-Preschool; Instructional Assistant ELL; Instructional Assistant I-Special Education; Instructional Assistant II-Special Education; and Athletic Trainer. Excluding the above-referenced classifications, there is no evidence in the record to show that all the classified positions in the Unit are currently filled by an incumbent. PERB also cannot speculate that Substitutes will fill in for each type of absent classified position in the Unit. Thus, PERB cannot make a unit determination for the other petitioned-for Substitute classifications since there is no evidence that there are any employees occupying corresponding Unit positions.

3. Office Assistant II, Library Media Technician; LAN Administrator; Campus Security Specialist; Health Services Technician; Program Aide ESS/ASES; Lead Middle School ASES Assistant; Athletic Trainer; and Instructional Assistants

In determining whether a community of interest exists pursuant to section 3545, all further references to "Substitutes" shall be to the aforementioned classifications.

a. Job Functions and Duties

In *Santa Clara County Office of Education, supra*, PERB Decision No. 839, the Board approved a unit modification petition to add substitute drivers to a permanent bus driver bargaining unit finding that "[b]argaining unit drivers transport students in minivans . . . substitute drivers drive the same vans and transport the same students over the same routes as

unit drivers." Moreover, "like the permanent driver, the substitute driver is required to check the oil, gas, motor, lights, emergency buzzer, etc. . . before beginning the route." (*Id.*, p. 3 of the ALJ's Proposed Decision.) Similarly here, the relevant Substitutes are tasked with performing the same work as Unit members they temporarily replace. In reviewing the job descriptions and examples of job duties of the Substitutes, the disputed positions perform either the same job functions or a subset of those functions as would have been performed by the absent Unit members. The work function of Unit members varies on any given day; however, the Substitutes are assigned to perform the duties the absent Unit member would have performed that day. Accordingly, there are similar (if not identical) work duties and functions between these Substitutes and their classified counterparts.[10]

b. Qualifications and Education

Individuals may apply to substitute in classified District positions either through postings by the District's Personnel Commission (PC) or upon a request from a specific school site. If the individual applies through the PC, s/he undergoes a screening interview, but if a site recommends a specific individual, the PC will assess whether the individual meets the minimum qualifications. To be hired as a probationary or permanent employee, an individual must go through the PC's competitive examination process, which is more rigorous. I do not find these differences to be dispositive of whether both groups share a community of interest given that the Board recently observed, "the fact that an employer has a more complicated or lengthier hiring process for its classified employees whereas [the petitioned-for Noon-Duty Aides] are hired 'informally' and more or less at the discretion of the individual school

[10] The fact that substitutes do not have District e-mail accounts does not negate the showing that substitutes perform essentially the same work functions as the absent Unit members.

principals, does not dictate that [Noon-Duty Aides] belong in a unit separate from the classified employees. (*Center USD, supra*, PERB Decision No. 2379, pp. 5-6, citing to *Pittsburg, supra*, EERB Decision No. 3.)

The Substitute classified employees possess job qualifications similar to those possessed by the employees in the existing Unit. Generally, Substitutes are required to pass minimum qualifications that are also required of their classified counterparts including, but not limited to: first aid certifications; passing background checks and physical exams; and completing new employee orientation.

There is evidence that some Substitute classifications share similar qualifications with other Unit members. Substitute Program Aides in the ESS/ASES programs must possess the same qualifications as their regularly employed counterpart Program Aides in the same programs. Individuals occupying the Substitute Instructional Assistant classification share similarities with Instructional Assistants in the Unit since they meet the same qualifications requiring them to pass the No Child Left Behind (NCLB) examination. The record also shows that although the job description for the Instructional Assistant I-Special Education requires specialized coursework in child development for special needs students, plus one year of experience in a specialized work environment, this requirement is waived for the Substitute classification. Library Media Technicians are required to complete a two-hour NCLB certification examination in addition to completing a qualifying examination relevant to library skills. The Library Media Technicians in the Unit must also have at least two years of experience working in a library or media center. It is unclear from the record whether Substitute Library Media Technicians actually have similar qualifications; however, it is undisputed that Substitutes are not required to have the same level of education or experience

to perform the duties of Library Media Technicians. The Health Services Technician and their Substitutes are required to attend and complete a Health/Services orientation/training. Although a Health Services Technician must have two years of experience providing health services to children and/or working in a school office, such experience is not required to qualify as a Substitute Health Services Technician. As such, there is some evidence that they have similar qualifications.

No specific facts were provided concerning the work qualifications and education level of the Lead Middle School ASES Assistant, LAN Administrator, Campus Security Specialist, Office Assistant II[11] and Athletic Trainer. Also lacking from the record was similar evidence for their Substitute counterparts. However, the record shows that the Substitutes are not required to meet the same minimum certification requirement or possess the same qualification and education levels of the Substitutes' corresponding classifications. With the exception of the Health Services Technicians, the above Substitutes are also not required to undergo any form of training as a condition to employment.

c. Sources of Funding

The District funds a Substitute employee's compensation from the same revenue source used to pay the incumbent in the classified position. Notwithstanding, any differences in funding for the Substitutes and Unit employees is rendered moot under *Stanislaus County Office of Education* (1993) PERB Decision No. 1022, in which the Board approved a unit modification petition despite differences in, among other things, funding sources. (See also, *Fairfield-Suisun Unified School District* (1983) PERB Decision No. 370 [differences in

[11] However, the record provides that substitute "clerks" are not required to hold similar educational or experience qualifications to fill the substitute positions presumably for either the Office Assistants II or Administrative Assistants I.

funding between adult education teachers and regular certificated teachers "are not substantial enough to establish a lack of community of interest"].)

d. Employee Contact, Integration and Interaction With Others

Active Substitutes (i.e., those Substitutes who fill-in for absent Unit members for limited and temporary time) interact with other Unit members to the same extent as their counterpart absent Unit members. Additionally, it is not the District's policy to separate active Substitutes from members of the existing Unit. Because the District does not have separate work spaces for Substitutes, Substitutes work at the same work location as the absent incumbent. Thus, when a Substitute fills in for an absent PSEA member, he or she presumably works in a Unit member's workspace.

On some days, Substitutes fill in for positions in another bargaining unit or for confidential employees. Accordingly, the level of interaction may vary depending on the assignment and the type of positions being filled as a Substitute. This does not detract from the finding that individuals serving as Substitutes for absent Unit members have similar interactions and interchange of functions with Unit employees and with other Substitutes. Accordingly, there is sufficient evidence to conclude that Substitutes and Unit members share similarities in employee contact, integration and interaction with each other.

e. Wages, Hours, and Other Working Conditions

Unit positions are compensated on a salary schedule set forth in the CBA which contains various salary ranges for Unit members. Substitutes are compensated on an hourly basis commensurate with the hourly rate paid for Unit employees. The record shows that the Substitute Health Services Technician is compensated at Step 1 of Range 26—the first step in the salary range of the corresponding Health Services Technician. A similar compensation

pattern is applied for candidates substituting for either the Campus Security Specialist, Office Assistant II, Instructional Assistant, Library Media Assistant or Program Aide classifications.

Substitutes and Unit members have similar working hours which can vary between one to eight hours. However, the hours of the Substitutes are based on an as-needed basis by the District. Unit members have different work year schedules. For example, 9.5 month employees work 185 days per year, while 12 month employees work as many as 245 days per year. Substitutes' work years also vary depending on their assignments. For example, in less than one year, some Substitutes worked 10 or fewer days while others worked as many as 113 days. However, Substitutes do not have separate work schedules because their assignment is transitory and dependent on the District's operational need during any particular time period. The differences in wages, hours and other working conditions between the two groups of employees is not a persuasive argument for rejecting a proposed unit that includes both groups, "since for all practical purposes the hours, wages and other terms and conditions of employment are mainly within the [employer's] control" (*Oakland, supra*, PERB Decision No. 320, p. 5), and therefore "would be negotiable if the unit modification petition is granted." (*Fontana Unified School District, supra*, PERB Decision No. 1623; *Redwood City Elementary School District* (1979) PERB Decision No. 107; *El Monte Union High School District* (1982) PERB Decision No. 220.)

Unlike Substitutes, Unit employees receive a number of statutory benefits including: health and welfare, post-retirement health insurance benefits, and accrual of vacation leave. Substitutes designated as "limited-term employees" are barred from receiving similar entitlements pursuant to the District's personnel rules. Specifically, PC Rule 30.200.4(D) states that limited-term employees "shall not earn seniority credit, nor be granted benefits

regularly given to the Classified Service," unless they are appointed to fill in for employees for more than six months. Some Substitutes are entitled to earn sick leave or holiday pay provided they work continuously for more than six months. (PC Rule 30.200.4.) However, of the 124 individuals that worked as Substitutes between July 1, 2012 and February 25, 2013, none worked at least six months.

The District asserts that it is precluded under PC Rule 30.200.4 from assigning a seniority date to Substitutes, or from awarding them benefits regularly received by classified employees unless the six month exception in PC Rule 30.200.4 is met. I do not find this concern sufficiently compelling to justify the exclusion of Substitutes from the Unit. Section 3540 states that:

> This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

This supersession provision is construed in a limited fashion by the Courts and PERB. In *Sonoma County Bd. of Education v. Public Employment Relations Board* (1980) 102 Cal.App.3d 689, the Court of Appeal discussed whether a local board of education was required to negotiate over salaries to be paid to job classifications that were covered under the Education Code's merit system provisions. The court rejected the Board of Education's argument that the collective bargaining provisions of the EERA were subordinate to the existing merit system rules. The court found that "the Legislature by clear implication included the subject matter of compensation (or wages) within classification within the 'scope of representation,'" thus indicating that bargaining under the EERA was required, subject to

limitations imposed by the Education Code. (*Id.*, pp. 700-701.) Although the issue before the court involved the interaction between the Education Code and the EERA, the court also stated that the EERA was intended to "prevail over conflicting enactments and rules and regulations of the public school merit or civil service system relating to the matter of wages or compensation of its classified service." (*Id.*, p. 702.) Similarly, PERB has held that an employer's rules and regulations do not trump the EERA. (*San Francisco Unified School District* (2008) PERB Decision No. 1948 [the "Legislature intended to require parties to bargain over compensation despite the existence of related merit system rules].) The Board also noted that section 3540 should be read to allow local regulations that supplement the EERA's statutory scheme and do not conflict with the purpose of the Act, i.e., "providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relations with public school employers. . . ." (*Id.*, p. 11.) To the extent that there is any conflict between the EERA and the PC Rules prohibition on negotiable subjects, the EERA trumps, and the District's maintenance of rules that contradict the EERA, if any, does not warrant denying organizational rights to Substitutes.

As previously noted, section 3540 provides, in relevant part, that the EERA "shall not supersede other provisions of the Education Code." In *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, the California Supreme Court held that, when the Education Code "clearly evidences an intent to set an inflexible standard or insure immutable provisions," the parties may not negotiate a collective bargaining provision that would replace, set aside or annul the mandatory Education Code provision. (*Id.*, pp. 864-865, quoting *Healdsburg Union High School District and Healdsburg Union School District* (1980)

PERB Decision No. 132 (*Healdsburg*).) In other words, a subject governed by a mandatory section of the Education Code does not fall within the scope of representation under the EERA.[12] Education Code section 45103 excludes Substitutes from classified service in non-merit districts. In contrast, Education Code section 45256 contains no such exclusions for merit system districts as is the case here. Indeed, Education Code Section 45286 expressly authorizes the personnel commission of a merit system district to promulgate rules governing the employment of Substitute employees—and in fact, the District's Personnel Commission has adopted such rules, including but not limited to PC Rule 30.200.4. There does not appear to be a direct conflict between the Education Code and the EERA given that there is no express prohibition against the District from modifying such PC Rules to provide meaningful benefits to Substitutes after engaging in the collective bargaining process with the exclusive representative, subject to any limitations imposed by the Education Code. Alternatively, the District has also not established that its bargaining obligations would be excused based on any immutable provisions in the Education Code pertaining to merit districts. Accordingly, the District has not rebutted the principle enunciated in *Oakland, supra*, PERB Decision No. 320 that such benefits are outside employer's control if this petition were granted.

f. Supervision, Evaluation, Discipline and Layoff

The record provides that the District does not have a separate supervisory structure for Substitute employees. Specifically, the Substitutes who are filling in for their respective Unit members are supervised by the same supervisor as the absent Unit member. As previously discussed, the Substitutes perform the same job functions on the day their respective Unit

[12] The Board has held that there are subjects, such as layoff of classified employees, and the causes and procedures leading to disciplinary action, for which the Education Code has "fully occupied the field" such that collective negotiations on these subjects are prohibited. (*Healdsburg, supra*, PERB Decision No. 132.)

member classification is absent. Supervisors assess whether the Substitutes can perform the duties of the absent Unit member and assign them work accordingly. The District asserts an individual serving as a Substitute may report to various other supervisors depending on their assignments. However, when a Substitute fills in for the incumbent absent Unit member, the Substitutes still retain common supervision as their absent counterparts in the Unit.

Evaluations are done by designated supervisors of Unit members in accordance with the CBA which mandates that Unit employees receive a formal evaluation annually or every other year. While the Substitute employees do not receive any fixed method of evaluation, the record shows that the District does not strictly adhere to the frequency of evaluations required in the CBA. Thus, it appears that Unit employees do not consistently receive an evaluation at least every year. Section 3543.2 expressly enumerates evaluation procedures as a negotiable matter. In *Center USD, supra,* PERB Decision No. 2379, the Board did not find persuasive the argument that a community of interest does not exist between Noon Duty Aides and classified employees due to differences in evaluation standards because such topics would be subject to labor negotiations. Similarly, I find that any difference in the District's evaluation procedures (or lack thereof) does not detract from Substitutes' community of interest with Unit members.

The District has adopted disciplinary procedures that require that there be "cause" for taking disciplinary action against Unit members. (AP 4.313.1.) The District also adheres to a system of progressive discipline. (AP 4.313.) It is unclear from the record whether such disciplinary procedures are applicable to Substitutes; however, it should be noted the District may terminate a Substitute's employment by simply electing not to contact the individual for future assignments. Additionally, Unit members must be laid off in accordance with the CBA which provides members with rights regarding notice, bumping and reemployment. No such

rights are afforded to Substitute employees. Negotiable subjects of bargaining include disciplinary procedures not preempted by the Education Code. (*Healdsburg Union High School District and Healdsburg Union School District, supra*, PERB Decision No. 132, p. 81.) By the same token, layoff procedures are also negotiable. (*South San Francisco Unified School District* (1983) PERB Decision No. 343.) Should this petition be granted, the District would be obligated to negotiate over such procedures and terms and conditions of employment. Further, if the procedures set forth in the District's personnel rules do not apply to Substitutes, as discussed above, the Education Code does not preclude modifications to the District's personnel rules to incorporate different terms and conditions of employment resulting from labor negotiations to the extent permitted by the Education Code.

In sum, the differences in evaluations, disciplinary procedures, and layoff procedures between the Substitutes and Unit members is not a factor that weighs heavily in favor of finding no community of interest between the two groups since, to the extent that such procedures are not addressed by Education Code, they would be subject to negotiation. (See e.g., *Center USD, supra*, PERB Decision No. 2379.)

g. Expectation of Continued Employment

The District maintains a list of available Substitute employees. Those individuals on the list can expect to have a reasonable expectation of future employment as a Substitute (absent any concerns from the District concerning performance or their prior conduct). However, it is within the District's discretion to select an individual from the list for a Substitute assignment and it does not appear that selections are based on the seniority of the Substitute candidate. Some Substitutes are hired into Unit positions; however, there is no absolute expectation that Substitutes will be hired to fill such positions upon employment as a

Substitute. The turnover of Substitutes is higher than for employees in the Unit. There are a number of Substitutes who have worked for the District in such capacity for several years.

There is evidence in the record to show that some Substitute employees work as many as 113 days during an eight month period, while others work fewer than 10 days in the same time period. The Board has not established a cutoff date for the number of days that an employee must work before being considered a "casual" employee,[13] and therefore, excluded from a bargaining unit. Further, this Board has refused to adopt a standard for finding that teachers have an expectation of reemployment based on the on the number of days they work as distinguished from other employees who work more days. (*Palo Alto USD*, *supra*, PERB Decision No. 84, adopting ALJ's decision, p. 12.) Here, the parties have offered no arguments to show that the Substitutes are "casual" employees and I cannot infer that Substitutes maintain such status. However, there is sufficient evidence to conclude that Substitutes have a continued expectation of employment. Extrapolating from the evidence, it appears the District utilized at least 1184 Substitute workdays from July 1, 2012 through February 25, 2013. As such, Substitutes appear to be an integral part of the District's operations; without them, it is doubtful that the District could manage its school operations effectively.

For the above reasons, it is found that the above group of Substitute classifications shares a cohesive community of interest with the existing Unit.

[13] Casual employees are those who, due to their sporadic or intermittent relationship with the employer, lack a sufficient community of interest with regular employees to be included in the regular unit. (*Unit Determination for Employees of the California State University and Colleges* (1981) PERB Decision No. 173-H, citing *Mission Pak Co.* (1960) 127 NLRB 1097.)

B. Efficiency of Operation

The adverse impact of accreting classifications to an existing unit is typically an argument promulgated by an employer concerned about its resources. PERB must consider the effect of a proposed unit on an employer's ability to operate efficiently. (§ 3545, subd. (a); *San Francisco Community College District* (1994) PERB Decision No. 1068.) PERB balances any impact on efficiency with the "employees' right to effective representation in appropriate units." (*San Diego Unified School District* (1977) EERB Decision No. 8.) Although the impact of a unit determination or modification decision on the efficiency of a school district's operations is one of the statutory criteria which PERB is required to consider when weighing the various factors, PERB precedent points to the community of interest as a weightier factor than the efficiency of the employer's operations as determining the effectiveness of the representative. (*Sweetwater, supra*, EERB Decision No. 4; *Fontana, supra*, PERB Decision No. 1623.) Indeed, in situations in which employees perform functions for more than one unit, PERB has held that they are entitled to representation in *both* units if necessary to effectuate their statutory rights to bargain collectively through a representative of their own choosing. (*Oakland, supra*, PERB Decision No. 320, p. 11 and private-sector authority cited therein.)

The District's argument that additional negotiations concerning Substitutes will affect the efficiency of the District's operation is unavailing. The District acknowledges that the disputed classifications have a "theoretical right to representation" under the EERA; however, the District advances numerous arguments for why the proposed addition to the Unit would be unworkable. The District asserts that the addition of Substitutes to the existing Unit would cause disruptions to the District's operation that outweigh any gains that could be achieved through collective bargaining because Substitutes are not eligible for benefits, cannot acquire

seniority, and a majority of them perform work on an infrequent basis. Further, argues the District, PSEA and the District have negotiated a CBA that is set to expire on June 30, 2016, with limited reopeners, and the District will be burdened by additional negotiations regarding Substitutes during the life of the contract.

In *Center USD, supra,* PERB Decision No. 2379, the employer similarly accepted that Noon-Duty Aides are entitled to collective bargaining rights, but made an inefficiency argument against their inclusion in the classified unit because Noon-Duty Aides do not share a community of interest and this would require the employer to conduct two separate bargaining sessions at one table. (*Id.*, p. 12.) The Board found such argument without merit given that it was difficult to discern the burden imposed on the employer if the parties negotiated separately or at the same table with the classified unit. (*Ibid.*) The Board also acknowledged that similar efficiency arguments were rejected in *El Monte Union High School District, supra,* PERB Decision No. 142, where the employer had similar concerns about the inclusion of substitute teachers in the same unit as regular teachers reasoning that "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." (Citation omitted; *Center USD, supra,* PERB Decision No. 2379, p. 12.)

As discussed above, pursuant to *Oakland, supra,* PERB Decision No. 320 and *Fontana, supra,* PERB Decision No. 1623, differences in terms and conditions of employment could be negotiated. Additionally, there are no immutable provisions under the Education Code that prevent the District from incorporating into an agreement terms and conditions of employment that are of mutual benefit to Substitutes and unit members provided such terms do not conflict with the Education Code—to which the District has not argued any conflict exists. (*Berkeley*

Unified School District (2012) PERB Decision No. 2268, p. 9.) To the extent the District argues a conflict exists with the PC Rules, this does not forestall the parties from engaging in the collective bargaining process to negotiate terms which replace, set aside, or nullify any purported inflexible provisions of the external law referenced in the PC Rules established under the Education Code. (*San Mateo City School Dist. v. Public Employment Relations Bd.*, *supra*, 33 Cal.3d 850, 864). As previously discussed, there is no evidence that there exists "immutable provisions" or an "inflexible standard" against adopting rules that provide benefits and seniority rights to Substitute employees.

The District's assertion that it will be presented with additional burdens of negotiating an agreement prior to the June 30, 2016 expiration of the current CBA does not seem plausible. The parties are always free to mutually agree to engage in the collective bargaining process absent any reopener provisions. (*Inglewood Unified School District* (2012) PERB Decision No. 2290 [each party is not obligated to engage in collective bargaining pursuant to a zipper clause unless there is mutual agreement to do so or a reopener clause permits bargaining during the life of the agreement].) To the extent that this may cause additional burdens on the District, this argument has been previously considered and disfavored by the Board. (See e.g., *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165 ["The fact that negotiating may impose a burden on the employer was undoubtedly considered by the Legislature but found not to outweigh the benefits of an overall scheme of collective negotiation."]; *Antelope Valley Community College District* (1981) PERB Decision No. 168 [The Legislature found that "the potential loss of time spent in negotiations does not outweigh the benefits of an overall scheme of collective bargaining"].)

The District asserts that Substitutes filling in for Unit employees could "potentially" fill in as Substitutes for confidential classified employees at a later appointment period. The District asserts this is not administratively feasible because sporadically employing unit members as confidential employees could compromise the District's private information maintained by confidential employees.

Section 3540.1, subdivision (c) defines a confidential employee as:

> an employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.

PERB and its predecessor, the EERB, have long recognized that a public school employer is:

> allowed a small nucleus of individuals who would assist the employer in the development of the employer's position for the purposes of employer-employee relations . . . [who] would be required to keep confidential those matters that if made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture.

(Sierra Sands Unified School District (1976) EERB Decision No. 2, at p. 2. [*Sierra Sands*].)

In *Fremont Unified School District* (1976) EERB Decision No. 6, the Board held that employer-employee relations includes "at the least, employer-employee negotiations and the process of employee grievances." Not all involvement in such areas, however, has been deemed substantial enough to warrant a confidential designation. (See, e.g., *Franklin-McKinley School District* (1979) PERB Decision No. 108, where a business office supervisor was found not to be confidential despite having costed out negotiations proposals.) In addition, confidential status does not turn on whether the individual's functions may be transferred to others; instead, the Board must look to what the work *actually* entails.

(*San Rafael City High School District* (1977) EERB Decision No. 32, p. 4.) No evidence was presented here to show that any Substitutes who fill in for absent confidential employees actually perform confidential duties, such as preparing management proposals for labor negotiations or processing employee grievances. As such, there is insufficient evidence to conclude that Substitutes *actually* performed or will perform the confidential duties of their absent counterparts. Additionally, the District's efficiency argument must also fail since the parties have stipulated that if the unit modification petition is granted, Substitutes in the Unit must not also include those substituting in confidential positions.[14]

The District contends that pursuant to section 3546, an employer must deduct a "fair share service fee" from employees in the Unit, but if Substitutes are added, this would affect the District's efficiency for the following reasons: (1) the District is uncertain whether it will be required to deduct some fraction of dues from Substitute paychecks each time the Substitute is appointed to a Unit position; and (2) requiring fair shares fees of the petitioned-for Substitutes but not of other substitute employees, would make it difficult for the District to fill those positions requiring dues payment.

Under the EERA, the permissible organizational security arrangements are "maintenance of membership" and "agency fee." (§ 3540.1, subd. (i)(1)(2).) Under the "maintenance of membership" arrangement, a public school employee may decide whether to join an employee organization, but if the employee does join, he or she must, as a condition of continued employment, maintain his or her membership in good standing for the duration of

[14] The District has not presented convincing arguments (or supporting legal authority) that would show, for example, that the District is constrained from establishing a screening process for appointing individuals who would actually perform confidential duties to avoid potential conflicts and to ensure that the District maintains the "small nucleus" envisioned in *Sierra Sands*, *supra*, EERB Decision No. 2.

the labor agreement. (§ 3540.1. subd. (i)(1).) The employee may, however, terminate his or her obligation to the employee organization within 30 days following the expiration of the labor agreement. (*Ibid.*) Under the "agency fee" arrangement, the employee, as a condition of continued employment must either (1) join the recognized or certified employee organization, or (2) pay a service fee to the organization that may not exceed the standard initiation fee, periodic dues, and general assessments of the organization for either (a) the duration of the labor agreement, or (b) a period of three years from the effective date of the agreement, whichever comes first. (§ 3540.1(i)(2).)

Organizational security is expressly within the scope of representation under section 3543.2, subdivision (a), and thus may be subject to negotiations. The amount of the fee is governed under section 3546, subdivision (a), which provides that, upon notice to the employer by the exclusive representative, the amount of the fee shall be deducted by the employer from the wages or salary of the employees and paid to the employee organization. Accordingly, the amount of the fee charged by the employee organization is not negotiable because the amount of the fee is nowhere listed as a negotiable subject and there is "no relationship of agency fees to an enumerated subject of negotiation." (*Fresno Unified School District* (1982) PERB Decision No. 208.) PERB stated in one case that the employer's interest in negotiating an agency fee is "limited to its willingness to impose on its nonunion employees an agency fee requirement and, if so, whether an authorization election is desirable," and limited to seeking some provisions that provide the employer protection against liability in the event of a dispute over the appropriateness of the fees withheld. (*Ibid.*)

The District's concern that its operational efficiency will be affected by not knowing the service fee deduction amount for Substitutes does not support denying the instant petition.

Any logistical aspects concerning organizational security arrangements are proper for bargaining per section 3543.2, subdivision (a)[15]; while the specific fee to be deducted from the wages or salaries of Substitute employees may be ascertained at PSEA's request pursuant to section 3546, subdivision (a). However, there is no requirement that all Unit members and Substitutes be charged the same fees. (See e.g., *Los Rios College Federation of Teachers, AFT/CIO (Barth)* (1991) PERB Decision No. 882 [holding that under the standards set forth in *Chicago Teachers Union v. Hudson* (1968) 475 U.S. 292 (*Hudson*) for the collection of agency fees, there is no requirement that all nonunion members must be charged the same agency fee].) As such, fees may also be deducted based on the percentage of the Substitute's salary or wages. (*Los Rios College Federation of Teachers, AFT/CIO (Barth), supra*, PERB Decision No. 882.) Because the District has not yet received PSEA's request for the amount of service fee to be deducted, I find that the District's efficiency argument unconvincing.

The District also has concerns that requiring Substitutes for Unit positions to pay fair shares fees while not requiring fair share fees for non-Unit employees would make it difficult for the District to fill those positions requiring fair share fee payment. However, I discern no evidence in the record that would support the assertion that individuals would be discouraged from filling Substitute positions in the Unit.

Under section 3546, subdivision (f), the District is required to provide the home addresses of Unit employees to PSEA so that PSEA could comply with the notification requirements in *Hudson, supra,* 475 U.S. 292. The District questions whether the District would need to provide PSEA with the names and addresses for Substitutes who work

[15] Any District operational burdens associated with negotiations concerning organizational security is not sufficient justification for finding the proposed unit inappropriate. (*Livermore Valley Joint Unified School District, supra*, PERB Decision No. 165.)

temporarily for the District in such classification. The District also asserts it will be unable to provide the home addresses in advance until the Substitute accepts an assignment in a petitioned-for position. Under section 3546, subdivision (f), the District is required to provide the names and addresses of each member of the Unit, including those who have accepted a temporary Substitute assignment. There is no evidence that this places any burden on the District sufficient to outweigh the representational rights of Substitutes.[16]

The District argues that the addition of the Substitutes to the Unit presents a number of administrative impracticalities and implicates legal dilemmas affecting PSEA. In particular, the District questions whether PSEA will be required to send notices under section 3546, subdivision (f), to each individual who Substitutes in a petitioned-for position, even if he or she only Substitutes for one work day and never returns to District employment. These concerns are not relevant for determining whether the proposed unit is appropriate. In *San Ramon Valley Unified School District* (1989) PERB Decision No. 751, the Board held that the District is not liable for the exclusive representative's alleged failure to comply with the dictates of the United States Supreme Court's decision in *Hudson*, *supra*, 475 U.S. 292. Thus, there is no affirmative duty upon the District to police PSEA's compliance with the notice requirements set forth in *Hudson*. (*San Ramon Valley Unified School District, supra,* PERB Decision No. 751, p. 2.)

[16] There is nothing precluding the parties from mutually agreeing to update their records to reflect which employees or individuals actually belong in the PSEA unit. This can be negotiated into language as part of the organizational security provision. Additionally, it is not unusual for the organizational security provision to include language requiring the exclusive representative to indemnify the employer from any lawsuits or claims arising out of the organizational security provision. (*Sweetwater Union High School District* (2001) PERB Decision No. 1417; section 3546, subd. (e).)

Similarly, the District questions whether PSEA could comply with its legal obligations to its members under Section 3546.5 which requires unions to make available financial records to its members. For example, the District questions whether any Substitute can petition to view PSEA's financial records after the conclusion of their Substitute assignment to a PSEA position. Section 3546.5 specifically provides: "In the event of failure of compliance with this section, any *employee* within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion." (Emphasis added.) Viewed in this context, there is no independent affirmative duty upon the employer (here, public school employer) to ensure the exclusive representative complies with its legal obligations to disclose financial reports to employees under section 3546.5. Rather, it is the Board that must first determine if a union's actions are violative of the EERA. Further, only affected employees have standing to motion this Board for alleged noncompliance with section 3546.5. Accordingly, there is no evidence to discern that the District would be burdened by potential liability to ensure the adequacy of PSEA's procedures.

The District asserts that if the instant petition is granted, it would be unclear how PSEA would have its Substitute members vote on contract terms that do not affect them and given that the identity of the Substitute positions change on a day-to-day basis. The District also points out that it remains "unspecified how Substitutes filling in for absent PSEA unit members will be permitted to exercise their right to vote on PSEA matters." This argument, again, is not relevant for making a unit determination in that it has no impact on the District's operating efficiency. PERB's role in this proceeding is not to evaluate whether PSEA will be able to negotiate favorable terms and conditions of employment on behalf of its members who may potentially have different interests. (*Santa Ana Unified School District* (2010) PERB

Order No. Ad-383.) Thus, PERB need not review voting procedures or practices for making unit determinations. Any internal union affairs and procedures having "a substantial impact on the relationships of unit members to their employers" that violate an exclusive representative's duty to fair representation under section 3544.9 are subject to unfair labor charges subject to PERB's review. (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106; section 3543.6, subd. (b).) Thus, an employer must not intervene to address the lawfulness of a union's internal procedures affecting voting or to police the union's actions, lest it be held liable for interfering with the administration of the union.[17] In sum, the concerns addressed by the District pertain mostly to internal union affairs and are not factors that impact the efficient operation of the District or the community of interest factors above. For these reasons, the District's assertion that the accretion of Substitutes to the Unit would impede the school's ability to operate efficiently is rejected.

CONCLUSION

PERB cannot make a unit determination concerning the Crossing Guard classification despite the parties' stipulation in favor of its proposed addition to the Unit. Further, the Petition seeks to include all classified Substitutes filling in for absent Unit members; however, PERB cannot make unit determinations when there is no evidence establishing that all petitioned-for Substitutes have actually filled vacant positions.[18]

[17] This is exemplified in section 3543.5, subdivision (d) which states that it is unlawful for a public school employer to: "Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another."

[18] However, the parties may agree to further modify the Unit to add unrepresented classifications or positions not included in the Order *infra*.

At the time the unit modification petition was filed, there were incumbents in the following Substitute classifications: Office Assistant II, Library Media Technician; LAN Administrator; Campus Security Specialist; Health Services Technician; Program Aide ESS/ASES; Lead Middle School ASES Assistant; Athletic Trainer; and Instructional Assistants. Comparing the community of interest factors with the above Substitute classifications and those in the Unit, I find that both groups share mutual interests in numerous areas, including: job duties, interaction and interchange with other employees, qualifications, discipline, training, supervision, wages, and work hours.

Additionally, the District has not evidenced meritable concerns that the proposed accretion of Substitutes to the Unit would impede the efficiency of its operations. Finally, no evidence was offered regarding established practices at the District in the context of negotiating with these employees, and thus, this factor plays no part in this Proposed Decision.

PROPOSED ORDER

Based on the findings of fact, conclusions of law and the entire record herein, PSEA's unit modification petition is **GRANTED**, in part. It is hereby **ORDERED** that the following Substitute classifications be placed in the Office/Technical and Paraprofessional Unit: Office Assistant II, Library Media Technician; LAN Administrator; Campus Security Specialist; Health Services Technician; Program Aide ESS/ASES; Lead Middle School ASES Assistant; Athletic Trainer; and Instructional Assistant.

RIGHT OF APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)